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1908, SESSION CASES.

CASES

DECIDED IN

THE COURT OF SESSION,

AND ALSO IN THE

COURT OF JUSTICIARY

AND

HOUSE OF LORDS,

FROM JULY 25, 1907, TO JULY 18, 1908.

REPORTED BY

**H. J. E. FRASER, JOHN HARVEY, J. S. LEADBETTER, AND
J. HOSSELL HENDERSON, ESQUIRES, ADVOCATES.**

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DURING THE PERIOD OF THESE REPORTS.

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The Lord KINNEAR.

Lord PEARSON.

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JAMES OF HEREFORD, ROBERTSON, ATKINSON,
and COLLINS.

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ERRATA.

P. 116, line 18 from foot, *for* Chorlton *read* Charlton.

P. 161, note 3, *for* L. R. 1900, 1 Q. B. 413, *read* L. R. [1899], 1 Q. B. 413.

P. 295, line 22 from foot, *for* 1897 *read* 1894.

P. 431, note 1, *for* 224 *read* 244.

P. 637, note 1, *for* 10 S. L. R. 763, *read* 10 S. L. T. 763.

CASES

DECIDED IN

THE HOUSE OF LORDS.

1907-1908.

SIR JAMES LAING & SONS, LIMITED (Respondents), Appellants.— No. 1.
Clyde, K.C.—F. E. Smith—John Macgregor.
BARCLAY, CURLE, & COMPANY, LIMITED (Petitioners), Respondents.— Nov. 25, 1907.
Dickson, K.C.—D. P. Fleming.

Sale—Transference of property—Ship—Property in ship in course of construction—Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71).—A ship-builder contracted to build a ship for an Italian firm of shipowners. The purchase price was to be paid by instalments at certain stages of the construction. The contract bore that the vessel should not be considered as delivered and finally accepted by the firm until it had passed a certain trial trip. When the ship was completed, and the greater part of the purchase price had been paid, but before the trial trip, the ship was arrested in the hands of the shipbuilder for a debt alleged to be due by the Italian firm to the arresters.

In a petition by the shipbuilder the First Division recalled the arrestments, on the ground that the property in the ship had not passed to the Italian firm.

In an appeal, *held (aff. the judgment)* that, under the Sale of Goods Act, 1893, the passing of the property depended on the intention of the parties as expressed in the contract, and, on a construction of the contract, that it was not the intention of the parties here that the property in the ship should pass until it was finally handed over to the shipowners, and appeal *dismissed*.

(In the Court of Session Nov. 7, 1907, 1908 S. C., p. 82.)

Sir James Laing & Sons, Limited, respondents, appealed.

After hearing counsel for the appellants,—

Ld. Chancellor
(Loreburn).
Earl of
Halsbury.
Lord Mac-
naghten.
Lord James of
Hereford.
Ld. Robertson.
Ld. Atkinson.

LORD CHANCELLOR.—It is not necessary to trouble the learned counsel for the respondents in this case, because the question is whether the property passed, and whether the parties intended by the contract that it should pass. I do not know that any conclusive use can be made of a comparison with other contracts and the language that is used in regard to them in judgments. Speaking for myself, I always have some misgiving when presumptions in regard to the interpretation that is to be put upon particular words in a contract apart from their natural significance are put forward. It may be a very useful guide to look at other decisions, but, after all, the question is what the parties said and intended. The facts referred to by Mr Clyde and Mr Smith, namely, that the ship was to be paid for by instalments, and that there was a power of inspection on the part of the purchasers, may be

Nov. 25, 1907.

Sir James
 Laing & Sons,
 Limited, v.
 Barclay,
 Curle, & Co.,
 Limited.

marks pointing to the property passing, but they are not conclusive, and the question still remains as to what the contract really means.

I think the contract was for a completed ship, and the risk lay upon the builders until delivery, and there was no intention to make delivery or to part with the property until the vessel was completed. Under those circumstances, I think the appeal ought to be dismissed.

EARL OF HALSBURY.—I am of the same opinion. There is no doubt that a contract might be so framed as to give the purchaser power to claim the property in those parts which, when they are put together, make the complete ship; but in each case the question must be whether or not the contract has been such, and I think this has not been so made.

I confess I follow the judgment of the learned Lord President in Scotland with one little exception. I think the phrase that he has used about the presumption being in favour of the builders perhaps was not sufficiently considered by him. Perhaps he did not think it necessary; but if he had used a different phrase—if as a matter of proof the wood, the iron, the nails, and so forth, which constituted the ship ultimately, are once the builders' and are proved to be the builders', it does become necessary to shew that there is some contract transferring that property under the circumstances to the purchaser; and if instead of saying there was a presumption that it belonged to the builders, and proceeding upon the presumption, he had said that the proof was that it was the builders' property, and it became necessary to shew that the builder had divested himself of the property, and to shew that by the words of the contract it had become the property of somebody else—if he had said that, I should have entirely agreed. From the reasoning of the rest of the judgment I really do think that that is what the learned Judge meant. It was not a considered judgment, I understand, and the phrase that there was a presumption that it belonged to the builder was one used in the course of the argument, and in the sense in which I have explained it I should concur with it, otherwise I should not say that there was any presumption one way or the other. The question is, what is the contract, and by that contract to whom does the property belong?

LORD MACNAGHTEN.—I am of the same opinion.

LORD JAMES OF HEREFORD.—I concur.

LORD ROBERTSON.—The question in the present appeal seems to me to be governed by the Sale of Goods Act, and, by that statute, to be determinable by the intention of the instrument under which the ship is built. In aid and supplement of construction, the statute supplies certain rules; but these may or may not come in operation, according as the contract requires it. In the present case I find the contract to require no aid or supplement from the statutory rules, for it seems to me to provide from beginning to completion of this ship for the building of it by the shipbuilders with their materials, and transfers it to the purchasers only as a finished ship and at a stage not in fact yet reached. This is a simple view of the matter; but, in my judgment, it is the sound one. It treats the Sale of Goods Act as superseding the previous law; and if in some instance it may be found necessary

to revive and reconstruct the old common law for purposes of illustration, I Nov. 25, 1907. can only say that that occasion has not yet come.

I therefore concur in the conclusion of the Court of Session, which rests on the contract. It seems right, however, to say that this does not imply my concurrence in all that is said, by way of statement of doctrine, in the judgments of the learned Lords. Some of them seem open to exception or at least criticism, but the judgments of the learned Judges do not seem to have been at least minutely considered. Among matters of omission I think the fifth head of the 18th section of the Act is so directly applicable that it required perhaps more attention than it has received. But I do not require to enter on those disputable matters, as the ground of judgment which your Lordships adopt is common to us and to their Lordships of the First Division.

Sir James
Laing & Sons,
Limited, v.
Barclay,
Curle, & Co.,
Limited.

Ld. Robertson.

LORD ATKINSON.—I concur.

ORDERED that the interlocutor appealed from be affirmed, and that the appeal be dismissed, with costs.

PRITCHARD, ENGLEFIELD, & CO.—STEEDMAN, RAMAGE, & CO., W.S.—BURCHELLS—
H. B. & F. J. DEWAR, W.S.

ALEXANDER MURDOCH WEIR AND OTHERS (Murdoch's Next of Kin) No. 2.
(Claimants), Appellants.—*Upjohn, K.C.—C. D. Murray.*
ALEXANDER CRUM BROWN AND OTHERS (John Murdoch's Trustees) Feb. 6, 1908.
(Pursuers, Real Raisers, and Claimants), Respondents.—*Clyde, K.C.* Weir v. Crum
—*Cullen, K.C.—Gillon.* Brown.

Charitable and Educational Bequests and Trusts—Constitution—Construction—Uncertainty—Succession.—A testator by his trust-disposition and settlement directed his trustees to employ the residue of his estate "in instituting and carrying on a scheme for the relief of indigent bachelors and widowers, of whatever religious denomination or belief they may be, who have shewn practical sympathy, either as amateurs or professionals, in the pursuits of science in any of its branches, whose lives have been characterised by sobriety, morality, and industry, and who are not less than fifty-five years of age, or of aiding any scheme which now exists or may be instituted by others for that purpose."

Held (aff. judgment of Second Division) (1) that the bequest was "charitable," and therefore entitled to a benignant construction; and (2) that so construed it was not void from uncertainty.

(In the Court of Session, Dec. 4, 1906, 1907 S. C. 185.)

Alexander Murdoch Weir and others, Murdoch's next of kin, appealed.

The case was heard on 16th January 1908.

The House took time for consideration.

Ld. Chancellor
(Loreburn).
Lord Mac-
naghten.
Ld. Robertson.
Ld. Atkinson.

LORD CHANCELLOR.—The question in this case is whether a charitable bequest is to be treated as void for uncertainty. The bequest was of an unusual kind. Its object, according to the will, was to benefit persons who had shewn practical sympathy in the pursuits of science. A number of conditions were prescribed. The recipients of this bounty were, among other things, to be widowers or bachelors of fifty-five years of age or upwards, whose lives had been characterised by sobriety and other specified virtues.

Feb. 6, 1908.

Weir v. Crum
Brown.

Lord
Chancellor.

They were to be indigent, a provision which stamps the bequest as charitable. These conditions were not really canvassed in argument and need not be further considered, for no one of them is such as to impart to the bequest an uncertainty which will vitiate it in law.

The only point seriously made against this clause in the will is that the recipients of this charity were to be persons who had "shewed practical sympathy in the pursuits of science." These words have been subjected to a rigorous criticism. What is science, it was asked, and how are we to know its bounds? What is sympathy in the pursuits of science, and when and how does it become practical? What are pursuits of science in the plural as distinguished from pursuit in the singular? The thought underlying this current of observation seems to be that, if a bequest is to a class of persons, the class must be capable of being defined, and be defined so precisely that there can rarely be a doubt who does or who does not fall within it.

Now, there is no better rule than that a benignant construction will be placed upon charitable bequests. It is difficult to imagine a construction less benignant than that suggested by criticisms such as those to which I have alluded. Few indeed are the charitable bequests that could survive such an ordeal. The fact is that whenever any one wishes to describe a class of people otherwise than by referring to their age, sex, birthplace, or similar facts capable of precise ascertainment, the language used must of necessity be general, and there must always be numerous cases on the border line. Deserving literary men who have not been successful, poor members of a particular trade, reduced gentlewomen, are examples of classes of persons who may certainly be benefited; but in each case exactly the same reasoning might be used as was used in the present case to destroy the validity of the will. There is no law requiring that kind and degree of certainty. All that can be required is that the description of the class to be benefited shall be sufficiently certain to enable men of common sense to carry out the expressed wishes of the testator. I have no doubt that this can be done here. Persons who have shewn practical sympathy in an object obviously are persons who have given time or money or made some sort of sacrifice to further it. I am satisfied that the trustees or, failing them, the Court, would find no difficulty in giving effect to the bequest. Accordingly I think that this appeal ought to be dismissed. The parties have agreed that the appellants are to have their judicial expenses of appeal out of the trust funds, the expenses as awarded in the Court of Session to remain unaltered. I think your Lordships may properly act upon this agreement.

LORD MACNAGHTEN.—To my mind the difficulty in this appeal—and it is, I think, a real difficulty—is to discover any substance in the appellants' case.

The gift is a gift in perpetuity, to be administered by trustees, for the benefit of bachelors and widowers, poor and aged, whose lives have been characterised by sobriety, morality, and industry, "and who have shewn practical sympathy in the pursuits of science in any of its branches." This gift, it is said, is void for uncertainty. Why? The relief of those who suffer from the ills of poverty and the weight of advancing years is, by

common consent, the peculiar province of charity in its popular as well as Feb. 6, 1908.
in its legal sense. Unhappily it is only too easy to recognise the aged and Weir v. Crum
the poor, who are always with us. Then, I suppose, it has happened to Brown.
most men to have formed an opinion satisfactory at least to themselves as Lord Mac-
to the moral and the general character of some applicant for some employ- naghten.
ment or other. Notwithstanding the ingenious argument of the learned
counsel who spoke second, I cannot think that the task is really beyond
the capacity of any ordinary individual.

There remains one other qualification to be considered. What is science?
and what is "practical sympathy in the pursuits of science?"

Science, it was said, is so vague and comprehensive a term as to be
unmeaning. In the view of the Lord Ordinary, "'Science' is a term of no
definite or 'particular' meaning." That is certainly not the view of the
Legislature. There are, for instance, many enactments in favour of institu-
tions formed for the advancement of "science." The generality of the
word has never prevented the Court from applying to the particular case
before it the provisions of the Act under its consideration. But what is
"practical sympathy"? "An altogether nebulous phrase," says the Lord
Ordinary. It is not, perhaps, a happy expression. But if you follow the
directions of the testator with a willing mind it is, I think, perfectly
intelligible. The wish of the testator was to help those who are in need of
help, and who may have done something, much or little, in the way of pro-
moting some branch of science. Within the realms of science the field of
choice is wide. But the testator has taken pains to provide competent
judges. It is for the trustees to consider and determine the value of the
service on which a candidate may rest his claim to participate in the
testator's bounty.

I think that the case is much too clear for argument, and that the appeal
must be dismissed.

LORD ROBERTSON.—I must own that I think this a perfectly clear case.
If it is said of any one that he has shewn practical sympathy in the pur-
suits of science, this is merely a roundabout way of saying that he has
helped the pursuits of science; just as to shew practical sympathy with A B
means to help A B. Again, the word "science" embraces a wide but
perfectly ascertainable range of subjects. Accordingly I consider the mean-
ing of this testator to be plain and intelligible.

LORD ATKINSON.—I concur.

ORDERED that the appeal be dismissed, and that the appellants
have their judicial expenses of appeal out of the trust funds,
the expenses as awarded in the Court of Session to remain
unaltered.

COLLYER-BRISTOW & Co.—MURRAY LAWSON & DARLING, S.S.C.—
JOHN KENNEDY, W.S.—J. & J. TURNBULL, W.S.

No. 3. MONTGOMERIE & COMPANY, LIMITED (Pursuers), Appellants.—

Clyde, K.C.—R. S. Horne.

Feb. 21, 1908.

THE PROVOST, MAGISTRATES, AND COUNCILLORS OF HADDINGTON
(Defenders), Respondents.—*D.-F. Campbell—Malcolm.*

Montgomerie
& Co.,
Limited, v.
Haddington
Corporation.

Police—Drainage—Sewers—Formation—Procedure—Statute—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), secs. 217, 220, 221—Public Health (Scotland) Act, 1897 (60 and 61 Vict. cap. 38), sec. 103—Burgh Sewerage, Drainage, and Water Supply (Scotland) Act, 1901 (1 Edw. VII. cap. 24), secs. 1-5 and 7.—Held (off. judgment of Second Division) that notwithstanding the provisions of the Burgh Sewerage, Drainage, and Water Supply Act, 1901, it is competent for the town-council of a burgh, as sewerage authority in the burgh, (1) to carry out drainage operations in the burgh under the powers conferred by the 103d section of the Public Health Act, 1897, and (2) to do so without following the procedure or being subject to the conditions imposed by the Burgh Police Act, 1892.

Ld. Chancellor
(Loreburn).
Ld. Robertson.
Lord Collins.

(IN the Court of Session, Nov. 12, 1907, 1908 S. C. 127.)
The pursuers, Montgomerie & Company, Limited, appealed.
The case was heard upon 21st February 1908.
The respondents' counsel were not called upon.

LORD CHANCELLOR.—I agree with the conclusion of the Second Division for one short reason. The pursuers' contention is that the works executed by the defenders could not lawfully be executed without their consent as required by section 217 of the Burgh Police (Scotland) Act, 1892. Now, in my opinion that section does not touch this case at all. The Act of 1892 furnished burghs with one method of carrying out sewerage works. Another Act, the Public Health (Scotland) Act, 1897, furnished burghs with another method of carrying out sewerage works; and each of those methods was complete in itself. In 1901 an Act was passed which put an end to some of the differences between those two methods, and also contained section 5, which to my mind is the only section of that Act which really concerns us to-day. By that section a burgh obtained or retained all the powers created by the Acts of 1892 and 1897, save as altered by the Act of 1901; and the Act of 1897 was incorporated with the Act of 1892 so far as was necessary to give effect to that enactment.

In my opinion the defenders, as the result, possess the right either to proceed under the Act of 1892—in which case the pursuers' consent was, I assume, needed—or to proceed under the Act of 1897, in which case the consent was not needed. They elected to take the latter course. The appellants cannot dispute that if consent was not needed their appeal must fail. But they say that the effect of incorporating the later with the earlier Act was to qualify the powers of the later Act by the restrictions contained in the earlier, and that as consent is required by the Act of 1892 so it is now required, when the powers of the Act of 1897 are exercised, because of incorporation.

I can see no foundation for this view. Section 217 of the Act of 1892, which requires the consent, is expressed to be a restriction only as to what is contained in that Act. If the appellants' contention prevails, the mere

incorporation of a later Act would make it a restriction as to what is not so contained. Feb. 21, 1908.

I think that this is really a plain case, and that the appeal ought to be dismissed.

Montgomerie
& Co.,
Limited, v.
Haddington
Corporation.

LORD ROBERTSON.—I concur, and for the reasons which have been given by my noble and learned friend on the woolsack. In reaching this conclusion I do not suppose that your Lordships applaud the legislation as it stands, and it is doubtful whether it is either symmetrical or even entirely coherent; but I am afraid as regards some modern legislation the maxim applies, which primarily relates to an earlier system: *Non omnium quæ a majoribus nostris constitutæ sunt ratio reddi potest.*

LORD COLLINS.—I am of the same opinion.

ORDERED that the appeal be dismissed with costs.

JOHN KENNEDY, W.S.—T. S. PATERSON, W.S.—GRAHAMES, CURREY, & SPENS—
JOHN C. BRODIE & SONS, W.S.

MRS ANN CAMERON AND OTHERS (Pursuers), Appellants.—
C. D. Murray.

No. 4.

JAMES YOUNG AND ALEXANDER YOUNG (Defenders), Respondents.—
Macmillan—H. W. Beveridge.

Feb. 27, 1908.

Cameron v.
Young.

Lease—Contract—Breach of Contract—Insanitary House—Title to Sue—Wife and Children of Tenant.—Held (aff. judgment of First Division) that the wife and children of the tenant of a dwelling-house had no title to sue the landlord for damages for loss and injury caused to them by illness due to the insanitary condition of the house.

(In the Court of Session, Jan. 26, 1907 S. C. 475.)

Robert Cameron, tenant of a house in Crieff, Mrs Ann Cameron, his wife, and William, James, and Neil Cameron, his three sons, brought an action in the Sheriff Court at Stirling against James Young and Alexander Young, bakers, Stirling, the proprietors of the house, for damages for injury to their health arising from defective drains. Ld.Chancellor (Loreburn). Lord Macnaghten. Ld.Robertson. Ld. Atkinson. Lord Collins.

The pursuers pleaded, *inter alia*;—(1) It being an implied condition of the let by the defenders' factor to the pursuer Robert Cameron that defenders would keep the premises so let in a habitable and tenantable condition, and the pursuers having suffered in health in consequence of their failure to do so, they are entitled to reparation therefor from the defenders. (2) The several pursuers having sustained loss, injury, and damage through the fault or culpable negligence of the defenders, and the several sums claimed by the pursuers respectively being fair and reasonable compensation, decree should be granted as craved.

The defenders pleaded, *inter alia*;—(1) No title to sue. (2) The pursuers' averments are irrelevant, and insufficient in law to support the conclusions of the action. (7) If it be the fact, as condescended on by the pursuers, that they continued to live in said house after they considered it unfit for their habitation, they are barred from suing for damages on account of injury to their health.

On 21st June 1906 the Sheriff-substitute (Dean Leslie) repelled

Feb. 27, 1908. the defenders' first plea in law, sustained the defenders' second and seventh pleas in law, and dismissed the action.

Cameron v.
Young.

On appeal the Sheriff (Lees), on 1st August 1906, recalled the interlocutor of the Sheriff-substitute, sustained the defenders' first plea in law in so far as regards the pursuers other than Robert Cameron, and found that these pursuers had no title to sue; assoilzied the defenders from the conclusions of the action so far as at the instance of these pursuers; and allowed to the pursuer Robert Cameron and to the defenders a proof before further answer of their averments.

The pursuer Robert Cameron appealed to the Court of Session for jury trial, and the other pursuers appealed against the interlocutor of the Sheriff.

The First Division, on 26th January 1907, allowed the pursuer Robert Cameron issues, and found that the other pursuers had no title to sue.

Subsequently Robert Cameron's claim was compromised, and the other pursuers, his wife and children, appealed.

In the appeal the appellants contended that they were entitled to damages for the injury they had sustained through the landlord's negligence in allowing the house to fall into a state of disrepair dangerous to persons having a lawful occasion to be on the premises.

The appeal was heard on 20th January 1908.

The House took time for consideration.

LORD CHANCELLOR.—I have had the advantage of reading the opinion about to be delivered by my noble and learned friend Lord Robertson. I agree with it, and have nothing to add.

LORD MACNAGHTEN.—I have had the same advantage, and I also concur, and have nothing to add.

LORD ROBERTSON.—The facts giving rise to the important question now before the House are of the simplest. The respondents let to one Robert Cameron, the husband and father of the appellants, a dwelling-house at Crieff. The house was allowed to get out of repair in the matter of drains; disease was generated owing to this neglect, and Cameron and his family, the appellants, suffered accordingly. Cameron's own claim for damages was sued by him in this action; but he has been settled with, and is out of the case. The question is whether the appellants, who are not parties to the contract of lease, have a good ground of action against the landlord.

It seems to me perfectly clear that they have not; and I rest my opinion, not alone on the authority of *Cavalier v. Pope*,¹ but on principle common to the laws of Scotland and of England, which *Cavalier v. Pope*¹ applied.

These respondents were perfectly entitled to let this house or not to let it, and in either case they were entitled to allow the house to fall to pieces and the drains with it, so long as they did not injure any neighbour (by which I, of course, mean any neighbour in vicinage, whether the title of that neighbour was of property or of passage) or violate any existing law of nuisance, the only restraint on their action being obligations of contract with their tenant. Now it happens that in the present instance they were

¹ [1906] A. C. 428.

under such obligation to their tenant, by virtue of a condition which the Feb. 27, 1908.
 Scottish law implies in leases of urban houses, that the landlord shall not ^{Cameron v.}
 only give the tenant a habitable house, but maintain it in that state. It ^{Young.}
 ought to be, but apparently is not, superfluous to say that if the law implies ^{Ld. Robertson.}
 this condition it is because this is the customary arrangement in Scottish
 towns, and therefore, when nothing is said to the contrary, parties are taken
 to have agreed to it. That an obligation to maintain a house habitable is
 not an essential term or obligation of the tenure of real property in Scot-
 land, but a matter of agreement, is indeed most strikingly proved by the
 fact that, in the case of farmhouses, the contrary is the presumption of
 liability; for there it is the tenant, and not the landlord, on whom this
 duty of maintenance falls. It thus appears that the landlord's liability is
 conventional and contractual, and not the less so where it is implied by law
 and not written in the contract.

The argument for the appellants has indeed rested on invoking principles
 of the law of neighbours which have nothing to do with the rights of
 inhabitants of the house. Those principles are embodied in a distinct
 chapter of Scottish law, and are concerned with what may be called the
 external or foreign relations of the owner of a house. There he is liable,
 because the maxim *sic utere tuo ut alienum non lœdas* necessarily imposes
 on the proprietor the duty of exercising that measure of care which will
 avoid injury accruing to his neighbour from his house. He must not
 allow his house to get into such disrepair that it falls down on his neigh-
 bour's house, or injures the passer-by in the street. In all those cases the
 person injured and claiming damages stands on his own rights; and his
 relation to the offending or negligent proprietor is not constituted or
 measured by any voluntary contract.

These principles have no application at all to persons who are within the
 house, for they have and can have no right to be there except by the
 licence of the owner, given by the owner, on certain terms, to the person
 with whom he chooses to contract. Nor can it be omitted from notice that
 if the appellants' contention were sound, the liability of the landlord may
 be indefinitely increased or diminished according to the domestic or social
 relations or tastes of the tenant over which the landlord has no control.

I have examined all the cases prior to *Cavalier v. Pope*,¹ which were
 cited at the bar; and with one apparent, but not real, exception, and one
 real exception, there is none which conflicts with that decision. All fall
 within the category of external relations which I have discussed.

The apparent exception is the case of *Shields v. Dalziel*,² in the First
 Division. There it is quite true that the claim which the Court allowed
 was that of the wife of the tenant, and not of the tenant. I must, how-
 ever, point out that neither in the written pleadings nor in the oral argu-
 ment did the landlord question or object to the title or instance of the wife,
 the defence being rested on totally different grounds. The pleadings were
 written and the argument was conducted by very able counsel, and presum-
 ably they deliberately abstained from stating this plea. Suffice it to say
 that the present question was not before the Court, and the decision in

¹ [1906] A. C. 428.

² 24 R. 849.

Feb. 27, 1908. *Shields v. Dalziel*¹ is not a judgment adverse to the doctrine of *Cavalier v. Pope*.²

Cameron v.
Young.

Ld. Robertson.

The other case, which I have called an exception, is *Hall v. Hubner*,³ decided by the Second Division. There the landlord argued that "the pursuer being the tenant's wife was . . . a stranger to the landlord, and must seek her remedy not against him but the tenant." The learned Judges, in their reported opinions, take no notice of this argument; but their judgment allowing issues to be lodged amounted to its rejection. This decision, I therefore think, cannot be supported; but this is the only and the slender support of the appellants' case to be found in the Scottish cases prior to *Cavalier v. Pope*.²

I am of opinion that the appeal ought to be dismissed.

LORD ATKINSON and LORD COLLINS concurred.

ORDERED that the appeal be dismissed.

WALTER H. GUTHRIE—MURRAY LAWSON & DARLING, S.S.C.—
A. & W. BEVERIDGE—MATHIE, MACLUCKIE, & LUPTON, Stirling—
MORTON, SMART, MACDONALD, & PROSSER, W.S.

No. 5. JAMES COLQUHOUN AND OTHERS (Pursuers), Appellants.—*Macmillan—Maitland*.

Mar. 17, 1908.

Colquhoun v.
Society of
Contributors
to Widows'
Fund of
Faculty of
Procurators in
Glasgow.

THE SOCIETY OF CONTRIBUTORS TO THE WIDOWS' FUND OF THE FACULTY OF PROCURATORS IN GLASGOW AND OTHERS (Defenders), Respondents.—*Sir R. Finlay, K.C.—Hunter, K.C.—Hon. W. Watson.*

Insurance—Widows' Fund of Corporation—Contributor expelled from the Corporation—Right to remain a contributor—Glasgow Faculty of Procurators Widows' Fund Act, 1833 (3 Will. IV. c. lxiv.)—Glasgow Faculty of Procurators Act, 1875 (38 Vict. cap. vi.), sec. 3.—By the Act 3 Will. IV. c. lxiv., 1833, the contributors to the Glasgow Procurators' Widows' Fund were incorporated into a Society, and every person under fifty years of age becoming a member of the Faculty of Procurators of Glasgow was required to become a contributor and to continue to subscribe "so long as he lives." Only members of the Faculty were entitled to become contributors. The purpose of the fund was declared to be the payment of certain provisions "to the widows and children of the members of said Faculty who now are or may hereafter become entitled to the benefit of the fund under the provisions of this Act."

By the Act 38 Vict. c. vi., sec. 3, it was enacted that after the passing of the Act [April 1875], "No person shall be obliged or be entitled to become a member of the Society or a contributor to the fund."

In 1901 C., a Glasgow procurator, who had become a contributor to the Widows' Fund in 1870, was struck off the roll of the Faculty in respect of his having been convicted of a crime, and subsequently the Widows' Fund Society declined to receive his contributions.

In an action of declarator brought by C. and his wife and children against the Widows' Fund Society, the First Division, Lord M'Laren dissenting, held that as C. was no longer a member of the Faculty of Procurators he was not entitled to contribute to the Widows' Fund, and that at his death his widow and children would have no right to the benefit of the fund.

In an appeal, *held* (rev. the judgment *diss.* the Earl of Halsbury, Lord Robertson, and Lord Collins) that while it was a condition of a person being

¹ 24 R. 849.

² [1906] A. C. 428.

³ 24 R. 875.

admitted as a member of the Widows' Fund that he should be a member of Mar. 17, 1908. the Faculty of Procurators, it was not a condition of the contract of insurance that he should continue to be a member of that Faculty during his life, and that C. was still a contributor.

Colquhoun v. Society of Contributors to Widows' Fund of Faculty of Procurators in Glasgow.

Ld. Chancellor (Loreburn).

Earl of Halsbury.

Lord Macnaghten.

Lord James of Hereford.

Ld. Robertson.

Ld. Atkinson.

Lord Collins.

(In the Court of Session Dec. 22, 1904, 7 F. 345.)

On 22d January 1904 James Colquhoun, his wife, and children, raised an action against the Society of Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow, and David Murray, LL.D., writer, Glasgow, and others, the trustees of the Society, concluding (1) for reduction of a minute or resolution of the Society dated 4th February 1901, whereby it was resolved that James Colquhoun had ceased to be a contributor to the Widows' Fund, or to have any interest therein; and whereby it was also resolved to strike his name off the list of contributors; and (2) for declarator that, notwithstanding the passing of said minute or resolution, James Colquhoun was, at the date thereof, and still is, a contributor to the Widows' Fund, and entitled to all the rights, privileges, and benefits of a contributor, and that his wife and children were, notwithstanding the said resolution, still entitled to all the rights, privileges, and benefits of the widow and children of a contributor to said Widows' Fund.

On 22d December 1904 the First Division by a majority (Lord President Kinross, Lord Adam, and Lord Kinnear, *diss.* Lord M'Laren) dismissed the action.

The pursuers appealed.

The appeal was heard on 10th and 11th June 1907 before the Lord Chancellor (Lord Loreburn), Lord James of Hereford, Lord Robertson, and Lord Collins, and afterwards on 6th February 1908 before their Lordships along with the Earl of Halsbury, Lord Macnaghten, and Lord Atkinson.

The House took time for consideration.

On 17th March 1908,—

LORD CHANCELLOR.—This case has been twice argued.

James Colquhoun, the appellant in this appeal, became a member of the Faculty of Procurators of Glasgow in 1870. Under an Act of Parliament then in force he was obliged to join, and did join, the Society of Contributors, which was a mutual insurance society for members of the Faculty, regulated by that Act. He paid a considerable entrance fee and an annual subscription down to the year 1899. Subsequently he was expelled from the Faculty for misconduct, and the Society claim that they also were entitled to expel him and to deprive him of all the benefits derived from his membership and past subscriptions. The question for your Lordships is whether this Society was so entitled; and that question must be solved by reference to the Act itself, which is 3 Will. IV. c. lxiv.

To begin with, this much is clear, Mr Colquhoun cannot be deprived of these benefits as a punishment for his misconduct. There is not a word in the Act which upon any construction can authorise the Society to deprive on the ground of delinquency where they could not otherwise deprive. If Mr Colquhoun is to lose the fruit of his insurance it must be on the ground that he is no longer a member of the Faculty, a ground which would apply whatsoever may have been the cause of his ceasing to be a member. And so it comes to this: Ought we to construe this Act of Parliament as meaning that whenever a member of the Faculty ceases to be a member he

Mar. 17, 1908. must necessarily also cease to be a member of and contributor to the insurance society?

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Faculty of
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Glasgow.

Lord
Chancellor.

It is a question of contract. What were the terms on which Mr Colquhoun became a contributor to this Society? I think this is to be settled by the Act alone, and that no help can be gained by referring to anything beyond it.

Under the scheme of the Act any procurator who joins the Faculty is compelled to join the insurance society also, and thenceforward to subscribe to it as long as he lives, not, be it observed, for so long as he remains a member of the Faculty. He is allowed to renounce the benefits in due form, and will thereupon cease to have any interest in the fund. Also he may forfeit them by specified acts or omissions, all of which relate to some default relative to the fund itself. There is no provision that ceasing to be a member of the Faculty shall entail consequences so serious, and I cannot see any sufficient reason for implying such a provision.

It would operate very harshly upon those who had compounded for or, to use the language of section 27, "redeemed" their annual contributions; also upon any member of the Faculty who, having for many years paid to this fund, desired to quit the Faculty for another profession.

Between two equally admissible interpretations the more reasonable should be preferred. And if an Act will read equally well whether or not an unexpressed condition be implied, a Court ought surely not to imply a condition that works hardship. In my view this Act set up a statutory contract of insurance. Even if I thought the Act admitted of it, I would not imply a condition most onerous to the assured unless the Act also required it. But in the present case I do not think there is an ambiguity.

I am of opinion that, according to the letter of the Act, any member of the Faculty who once becomes a contributor to the fund is entitled to continue a contributor, and is entitled to the benefits offered in exchange, even though he ceases to be a member of the Faculty.

Under section 16, on payment of his entry-money, a member of the Faculty becomes a contributor to the fund "and entitled to the benefit thereof, under the provisions of this Act." Under section 18 such person is bound to pay the Society an annual contribution "during his life." And under section 9 one of the purposes of the fund is "payment to the widows and children of the members of said Faculty who now are or may hereafter become entitled to the benefit of the fund under the provisions of this Act, as hereinafter specified." All that is required is that the person entering the Society should be a member of the Faculty when he enters it. In my opinion the position of any member of the Faculty who has paid his entry-money is as follows:—He may renounce, he may redeem, he may forfeit the benefits for some cause specified in the Act. But if none of these things happen he is required to keep up his annual contributions whether he remains a member of the Faculty or not, and is entitled in return to the benefits like any other contributor.

Accordingly, with the utmost respect, I am unable to agree with the judgment of the First Division.

EARL OF HALSBURY.—I think it is a very relevant consideration that the

corporate body we are now dealing with has from its earliest institution Mar. 17, 1908. been confined to a separate professional class, and that from the year 1796 till 1833 and 1875 it has continued to be so confined and to the present day is undoubtedly so confined that no one can demand to be admitted within it unless he is a member of the class in question.

Colquhoun v. Society of Contributors to Widows' Fund of Faculty of Procurators in Glasgow.

It is not denied that for entry into the Corporation and its ancillary charitable provisions a person must be a member of the Faculty of Procurators. If he is, he may take a part in its government and, among other things, has his chance of being entrusted with the management and distribution of its funds.

Earl of Halsbury.

By section 2 of the Act of 1833, which is described as an Act for the better establishing and securing a fund for providing annuities to the widows and children of the members of the Faculty of Procurators of Glasgow, a scheme for the election of its officers is enacted which is described to be for the proper administration of the funds of the Society and management of the affairs thereof, and it provides that any member of the Society may be re-elected, or any other member may be elected also by section 11; former regulations as to the fund are cancelled by the statute, and it is enacted that in future the fund shall be administered in pursuance of the new enactment.

Up to the passing of the Act a person to be admitted was required to serve a regular apprenticeship for five years with one of the members of the Faculty, but by section 15 of the Act the Faculty was authorised to receive and admit any person who should be found duly qualified "in terms of the original charter, and upon such terms as to payments as the said Faculty and the said Society hereby constituted shall from time to time appoint."

I presume doubt had been raised as to the lawfulness of some of the appropriations of a portion of the funds, since by section 8 the appropriation of certain portions of "the funds of the said Faculty of Procurators" was declared to be lawful, and by section 9 the declaration of the object of the trust, after providing for the necessary charges, goes on to declare what is relevant to the present questions before your Lordships for provision and payment of an annuity to the widows severally and children of deceased members of the said Faculty.

The concluding words of that section seem to me most important: "And in the last place for provision and payment of an annuity to the widows severally and children of deceased members of the said Faculty, contributors to the fund and Society hereby established, and for payment to the widows and children of the members of said Faculty who now are or may hereafter become entitled to the benefit of the fund under the provisions of this Act as hereinafter specified. And it shall not be lawful to apply the said fund to any other use or purpose whatsoever."

Now, it will be observed that this is the section which defines the object of the trust and which prohibits any other disposition of its funds. That part of it which is relevant to the discussion defines the object as widows of members of the Faculty who were contributors, and must have been both members and contributors—in the latter part of the section it says "members of the said Faculty contributors to the fund and Society hereby established."

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It seems to me impossible to construe the words here used as if they permitted the qualification for an annuity to cover the case of a widow who did not fill the character of a widow who became a widow by the death of her husband while he was a member of the Faculty and besides being a member of the Faculty had also been a contributor to the fund.

I do not think the question of forfeiture or loss of money comes into the question of construction. It is a question of what this definition of the object of the trust means, and, with all respect for those who think differently, I cannot doubt what the true construction is, much as I respect the views of those who differ. It may, of course, present a case calculated to raise a feeling that some injustice is being done when a man who has paid this contribution for twenty-nine years is refused permission to continue his contributions and thus lose for his wife and children a provision intended for them; but upon the question of construction it is immaterial whether it was twenty-nine years or twenty-nine days. If the contributor died within the first year and was a detected thief the day after his entry the construction must be the same. For my own part, I cannot understand why a member of such a Society, which means to confine the right to enter it to those possessing a particular professional qualification, is not supposed to possess throughout the qualification without which he could not have entered the Society.

Neither am I much impressed by the absence of a distinct provision that such a qualification is taken away by the person being detected as a thief. And, as I understand the argument, it is not now denied that, quite apart from the express power by later legislation, it was quite within the powers of the governing body to deprive the appellant of his character of procurator. Yet because of his having contributed to the society, which is simply ancillary to it, it is argued he is still entitled to remain a contributor.

I think that I misunderstood Lord M'Laren's observations¹ as to the power which every corporation possesses both of disfranchisement and amotion for heinous crimes, such as embezzlement undoubtedly is—see Lord Mansfield's judgment in *Rex v. Mayor of Liverpool*²; and though the loss of pecuniary profit may follow as a consequence, it seems to me fallacious to treat as itself a penalty what is the consequence of a loss of qualification, and the whole question seems to me to depend upon whether being a Glasgow procurator is or is not a qualification for joining in the society for providing funds for the widows and children of Glasgow procurators.

I have hitherto referred to the section which declares the object of the trust, but there is nothing in the rest of the Act which seems to me to militate against the construction I put upon that section. On the contrary, the title and preamble of the Act of 1833 seem to me to disclose with some distinctness the purpose of the Act, and certainly I should not suppose from the language used it was contemplated to erect two different societies, since the objects sought to be obtained are to be "the objects of the said incorporation." The charter granted, and the Act referred to, or said to be the Act, is said to be for the better and more convenient distribution of the funds thereof; still, be it observed, it is assumed to be the

¹ 7 F. 352.

² (1759) 2 Burr. 723, 731.

same corporation, and the Act is for the better and more convenient distribution of the funds thereof. Mar. 17, 1908.

The preamble proceeds to recite that the said Faculty appropriated certain sums of money from the said funds and other contributions from the then present members and future members of the said Faculty, for establishing a fund or scheme for members and widows and children of the said Faculty contributors—observe it is still members who are within this description, but they must also be contributors. It goes on to mention that at a meeting of the members on 5th February 1827, amended regulations were made and approved of by the said Faculty at the time. Colquhoun v. Society of Contributors to Widows' Fund of Faculty of Procurators in Glasgow.
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It then recites several alterations and amendments in the said scheme, that members of the said Faculty made certain alterations for the better management and distribution of the said fund. It then recites the great increase of the said fund by the contribution of the members of the said Faculty. It declares that it is expedient, without prejudice to what has been done, that the said Faculty should be enabled more effectually to manage the said fund and to extend the usefulness thereof by making provision for more ample annuities to the widows and children of the members of the said Faculty who may be willing to contribute for that purpose, and to adopt certain regulations for the more sure establishment and better administration of the said fund, and for the continuance of the benefits thereof, but which objects cannot be carried into effect without the authority of Parliament.

It then proceeds to enact that all and each of the members of the Faculty of Procurators in Glasgow and every other person who shall hereafter become members of and contributors to the said fund in manner after mentioned shall be and are hereby declared to be members of and contributors to such fund established under the provisions of this Act, and shall be called the Society of Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow.

It is an old observation that in construing an Act of this character it is not the language of the Legislature itself, but the language which the promoters have used and to which the Legislature has assented.

I say this because the words I have quoted are in some respects slipshod and inaccurate. I do not know, speaking accurately, what is the meaning of the words "members of a fund," but it is impossible not to see what the draftsman intended. He has throughout referred to the Faculty and its members in respect of the greatly increased contributions by the Faculty, the enabling of the said Faculty effectively to manage and to extend its usefulness, and for giving more ample annuities to widows and children of "the members of the said Faculty who may be willing to contribute for that purpose."

From first to last I can find no trace of any intention to establish a fund independent of and not for the benefit of the profession of the Faculty of Procurators. That some words were necessary when the rule of compulsory contribution was abolished is plain enough, and that they only should be entitled who contributed is one thing, but that people who were not members of the Faculty should be entitled to contribute is another and a very different thing.

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I do not think it is very relevant to the matter now in hand to consider the cases where by voluntary retirement the contributions should cease; they are provided for.

The very last words of the 1st section quoted by some of your Lordships describe the Widows' Fund of the Faculty of Procurators in Glasgow.

It is in view of the preamble and the enacting part of the 1st section that I think the 29th and 30th sections so important. It does not appear to me that there was ever any intention to alter the constitution of the Society, but the abolition of the compulsory contribution rendered appropriate an alteration of the phraseology, which, however, has not throughout been observed with strict accuracy, but the language appears to me to be sufficiently plain that while only the contributing members of the Society should receive the benefit, it is assumed all through that they must be members of the Faculty.

I am afraid I do not follow the argument derived from the statement that the relation between the corporation and its members is that of contract. There is no other contract than that of becoming a member of the corporation, and as such liable to all the incidents which belong to an individual corporator.

Lord Mansfield said the causes of the amotion of a corporator are,¹ first, offences against the duties of his office as a corporator; secondly, crimes in their own nature heinous and against the offender's general duty as a subject; yet not particularly relating to his corporate office or duty. It can hardly be doubted that the offence of embezzlement comes within Lord Mansfield's second category and requires no express contract that he should be removable for such a cause.

It would be intolerable that because a man was once a corporator the non-criminal corporators should be compelled to associate with and take part in the business of the corporation with a person who had been convicted of theft and suffered the punishment of penal servitude.

It is by the act of the person thus guilty that what is called his loss is incurred, and, indeed, it is not quite accurate to describe it as if his investment was entirely lost. During the twenty-nine years he had the security of his investment for his wife and children if at any time he had died during the period; and if in the end the pension has been lost, it is because he had committed a crime which involved the loss of his qualification when he was found out.

For these reasons I am of opinion that the judgment below was right and ought to be affirmed.

LORD MACNAGHTEN.—In 1870 the appellant, James Colquhoun, became a member of the Faculty of Procurators in Glasgow, a corporation established in 1796 by Royal Charter. At the same time he became a member of a mutual insurance society styled "The Society of the Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow." This Society was constituted by Act of Parliament in 1833. The Act provides in section 16 that no person shall be admitted a member of the Faculty of Pro-

¹ Rex v. Mayor of Liverpool, 2 Burr. 733.

curators without first paying entry-money to the Widows' Fund, and that after such payment the person admitted as a member of the Faculty of Procurators shall be "held and deemed a contributor to or member of the fund, and entitled to the benefits thereof under the provisions of this Act."

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Contributors
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Faculty of
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In March 1900 James Colquhoun having been convicted of embezzlement, was struck off the roll of the Faculty. The trustees of the insurance society then removed his name from the list of the Society. It is not suggested that their action was justified by the crime which James Colquhoun had committed. Misconduct has nothing whatever to do with the position taken up by the respondents. Their attitude apparently would have been just the same if James Colquhoun had left the Faculty with an unblemished character and of his own free will. Their contention is that if a person becomes a member of the Society, and so by statute entitled to the benefits of its fund, and afterwards, from any cause or for any reason, ceases to be a member of the Faculty of Procurators, his statutory rights as member of the insurance society are at once extinguished and all his contributions confiscated for the benefit of the Society. Is that contention sound?

Lord Mac-
naghten.

The question, as it seems to me, depends on the meaning and effect of the Act of 1833, and on nothing else. Except so far as may be gathered from the recitals in the Act, the charter of 1796, and the regulations in force under it are, in my opinion, irrelevant. Equally irrelevant, I think, is any reference to a subsequent Act passed in 1875 for winding up the affairs of the Society. The question is simply a question of contract, and the contract is to be found within the four corners of the Act of 1833.

The Widows' Fund had its origin in certain provisions made by the Faculty of Procurators for the benefit of widows and children of members. Before the Act of 1833 everything was in the hands of the Faculty. The allocation and distribution of its fund was a matter of domestic arrangement and regulation. By the Act of 1833 the condition of things was altered. The old Widows' Fund with its existing liabilities was handed over to the insurance society, which was to have no claim on the Faculty fund in respect of new members. The Society from its inception was a body separate and distinct from the Faculty. Even the members were not identical, for no one who became a member of the Faculty after reaching a certain age could enter the Society, and members of the Society might leave that body and still continue members of the Faculty. The Society had its own treasurer and was under the control of its own officers. It had no disciplinary powers. It had no function but that of an insurance society. It was purely a business association of a common type intended to be conducted on sound actuarial principles, subject to periodical investigation in accordance with the most approved tables of mortality, "taken in connection," as the Act itself declares, "with . . . the experience of this and similar schemes." It is quite true that entrance to the Society could only be gained through admission to the Faculty of Procurators. Membership of the Faculty was the only passport to the Society. So far, but no further, the Faculty and the Society were linked together. When once the entrance gate was passed and a person became "a contributor to the Widows' Fund and entitled to the benefits thereof" his only statutory obligation to the Society besides

Mar. 17, 1908. payment of a marriage tax, if exigible, was to contribute during the whole of his life unless and until he purchased exemption by compounding or by contributing for a period fixed by the Act, or unless and until he renounced in due form for himself and for his widow and children all interest in the Society and its funds.

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Lord Mac-
naghten.

The argument of the respondents, if I understood it aright, was founded partly on the language of the declaration of trust contained in the Act of 1833 and partly on inferences derived from the circumstances and position of the Widows' Fund before the Act.

The latter branch of the argument, which, at first sight, seems the more formidable, and on which much stress was laid, is, I think, displaced and excluded by the Act itself. In section 11 it was enacted that the regulations in force before the passing of the Act should be annulled, and that the fund as vested in the officers of the insurance society, with the whole increase thereof, should be administered under the provisions of the Act of 1833.

The declaration of trust on which the respondents rely is to be found in section 9. That section declares that the uses and purposes of the Society and of the funds vested and to become vested in it or in the trustees thereof shall, after satisfying certain prior charges, be "for provision and payment of an annuity to the widows severally and children of deceased members of the Faculty contributors to the fund and Society hereby established." Then follow these words dealing with present and future contributors—"and for payment to the widows and children of the members of the said Faculty who now are or may hereafter become entitled to the benefit of the fund under the provisions of this Act as hereinafter specified." What is the meaning of these latter words? In construing them you must, I think, bear in mind two things. In the first place, a person could only enter the Society as a member of the Faculty. The Society was formed for the purpose of insuring members of the Faculty and no others. In the next place, a member of the Society, in the view of the framers of the Act, became "entitled" to the benefits of the Society's fund immediately on his admission. That is plain enough from the language of this section. It is plainer still from the language of section 16, which has been referred to already. Now, the learned counsel for the respondents in construing the clause under consideration seemed to omit, or leave out of sight, the most important part of it. They read the clause as if the declared purpose of the fund was "for payment to the widows and children of the members of the said Faculty" without anything further in the way of defining the class of persons intended to be benefited. I venture to think that is not quite right. If I might paraphrase the sentence I should say the true meaning is "for payment to the widows and children of persons who, being members of the Faculty, are, or may hereafter be, admitted to the Society, and by virtue of their admission become entitled to the benefit of the fund." This construction is consistent with what is found in subsequent sections, where the phraseology is varied and the persons entitled to the benefits of the fund are described sometimes as "contributors" simply and sometimes as "members of the fund" without any reference to membership of the Faculty. What is more important is that it is consistent with the fundamental constitution

of the Society as declared in section 1. The constituents of the Society Mar. 17, 1903. besides the then members of the Widows' Fund are to be "all and every other person or persons who shall hereafter become members of and contributors to said fund in manner after mentioned." The only conditions of membership of the Society are entrance in the prescribed manner and contribution, not contribution plus continued membership of the Faculty of Procurators.

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The construction for which the respondents contend would certainly lead to strange and harsh results. A person might be a member of the Faculty of Procurators and also a member of the Insurance Society; he might have compounded for all future contributions to the Widows' Fund, and thus have purchased for his wife and children the benefit of the annuity by payment in full. Suppose he were then struck off the roll of Procurators in order to enable him to join the Bar or some other profession, membership of which might be incompatible with membership of the Faculty, it would be a strange thing that he, or rather his wife and children, should lose the benefit of his purchase—it would be a strange thing too, unheard of, I should think, in the practice of insurance companies, that this Insurance Society without making any refund should appropriate a windfall which the actuarial calculations of an insurance society would not, I suppose, take into account. But, however that may be, I rest my judgment simply and solely on the Act of 1833. It seems to me that when a person is declared by Act of Parliament to have become a member of a statutory body, and to be entitled to the benefit of a certain fund, his status and rights are not to be destroyed or taken away without plain language. An implied power of expulsion seems to me something of a novelty. Forfeitures, as a great Judge has said, "are not favoured in the law."

Lord Mac-
naghten.

I think the order appealed from ought to be reversed.

LORD JAMES OF HEREFORD.—The question raised in this case can easily be stated.

The Faculty of Procurators in Glasgow are a Corporation existing under a charter. In 1833 an Act of Parliament was passed for the better establishing and securing a fund for providing annuities to the widows and children of the members of the Faculty. The general effect of the statute is that persons becoming in the future members of the Faculty had to contribute to the Widows' Fund, and, upon making certain payments, would be entitled to certain benefits. By the concluding words of the first section of the Act the position of such contributors is thus defined,—“shall be called the Society of Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow.”

The pursuer, James Colquhoun, being a member of the Faculty, became in 1870 a contributor to the Widows' Fund, making payment by way of entrance and subscription amounting to £179. He was always ready and offered to continue to pay the subscriptions due from him.

In 1899 James Colquhoun pleaded guilty to a charge of embezzlement, and the Faculty, acting within their powers, expelled him. The question before your Lordships is, What are the effects of that expulsion? Does it carry with it any forfeiture or loss of the benefits under the Widows' Fund

Mar. 17, 1908. to which he was entitled by virtue of his contributions? I think that it does not.

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The argument of the respondents is that inasmuch as no one could become a contributor to the fund unless he were a member of the Faculty, in like manner he lost his rights under his contributorship if he ceased to be such member of the Faculty.

Lord James of
Hereford.

But such argument cannot be supported by anything expressed in the statute; it is by force of inference only that such contention can prevail.

Where, as in this case, it is sought to effect a loss of moneys paid, surely there ought to be clear and distinct grounds for drawing such inference. I cannot find them. On the contrary, I think the provisions of the statute shew that it was intended to protect the interests of the contributor. He is entitled to renounce or to redeem under sections 27 and 28, and is liable to forfeiture only for non-payment of contributions under section 26 of the Act.

It is true that in the first instance a contributor to the fund must be a member of the Faculty, but obligations are imposed upon him by the statute to make certain payments not only whilst he is a member of the Faculty, "but during the period that each of such contributors respectively shall live and be a member of such Society."

Now a member of the Faculty may desire to resign such position—as, for instance, if he sought to become a member of the Bar of England or Scotland—and the respondent's argument must go to the extent of saying that in such a case all right to the benefits resulting from the contribution would be lost. No reliance is placed upon the fact that in this case misconduct has occurred. It is the absence of Mr Colquhoun's name from the roll that is relied upon. If this were sufficient to cause the forfeiture the statute may well have said so; but it has not, and in the absence of any express declaration that only members of the Faculty can be allowed to remain members of the contribution fund, I come to the conclusion that the appellant's contention is correct and ought to prevail.

LORD ROBERTSON.—The judgment which I am now about to read was written after the first hearing, and I have nothing to add.

I am of opinion, and as there is a difference of opinion it is right to say clearly of opinion, that the judgment appealed against is right.

The claim of the appellant is that, albeit he is not a member of the Faculty of Procurators, he is entitled to contribute to their Widows' Fund and to receive the benefits of that institution. It seems to me that from the beginning, and of its essence, this fund has been one purely domestic to the Faculty, and that none of the modifications of the institution have impaired this essential characteristic and condition. Nor do I find in the successive charters and statutes anything affording the smallest countenance to the idea that the fact that a man, while a member of the Faculty, has been a contributor to the fund gives him any right to contribute to the fund when he has ceased to be a member. The nature of all such insurance exposes it to the risk that the contributions of years may be lost if a man has not the money, or has not the qualification, to contribute in later years. But I hope that I need not remind your Lordships that hardship will not supply

a ground of decision which the contract does not supply, and that it would be at least as irrelevant to deplore James Colquhoun's loss as to reflect on his fraud. Mar. 17, 1908.
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Glasgow.

Now, I do not intend to rehearse the developments of this fund ; for this has been done very adequately. But I take the several stages.

I should have thought it past all doubt that the claim of the appellant would have been impossible if the Act of 1833 had stood alone. The preamble and the enacting section (section 1) make membership of the Faculty the qualification of contributing to the new fund ; and, when we come to section 9 the Act declares the purpose of the trust to be the payment of annuities to the widows and children of members of the Faculty, "and it shall not be lawful to apply the said fund to any other use or purpose whatever." Ld. Robertson.

Now I turn to the Act of 1875, which, as has been said with substantial accuracy, provides for the winding-up of the fund. I must own that, this being so, it would be a singular occasion for increasing the number of contributors by bringing in persons who *ex hypothesi* were hitherto outsiders, or by abolishing a condition which on the same hypothesis had hitherto attached to existing contributors. In truth, however, the negative words of sec. 3 do not contain any such implication.

In what I have said, I assume the right of the Faculty to remove from their membership persons disqualified from membership, and such is a person convicted of the crime of embezzlement. I do not suppose that this was a new power conferred by the supplementary charter ; but it is there in black and white. The truth is that membership of any such body is precarious to this extent, that it is not the fact of a man having been honest at the time of his admission that will retain his position if in the sequel he is found dishonest. The same kind and degree of precariousness attend the corresponding investment of money by contributing to a professional widows' fund ; that and nothing more.

On these grounds I am for affirming the judgment of the First Division.

LORD ATKINSON.—Whatever may have been the true relation between the Faculty of Procurators in Glasgow and the contributors to the Widows' Fund before 1833, the statute of that year, in my opinion, entirely altered their relative positions, and gave to those contributors a corporate existence, distinct from, and to a certain extent independent of, the older Corporation. It was by section 1 of that Act provided that those persons who were at the passing of the Act members or contributors to the Widows' Fund, together with all other persons who should thereafter become members or contributors to the fund, "in manner thereafter provided," should form the Corporation. From that time forward the new Corporation stood to the old very much, I think, in the position of an insurance company. Every member under fifty years of age admitted to the Faculty was bound to become a contributor to this fund, whereby, in consideration of the payment of a lump sum, varying from £25 upwards in an ascending scale according to his age, plus an annual contribution or premium during his life of £3, 10s., or such larger sum as the Society should have theretofore fixed, together with interest and penalties as in the statute

Mar. 17, 1908. provided, certain annuities were, after his death, to be paid to his widow or children. Every member of the Society could redeem, *i.e.*, compound for, his annual contribution, and thus, if he were so minded, pay a lump sum at once. And none but members of the Faculty could become contributors.

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Ld. Atkinson.

It was not disputed, as I understood, that the relation between the contributors and the new Corporation became from 1833 a contractual relation. And the point for your Lordships' decision is, in my view, this, whether it is an implied term of this statutory contract—it is certainly not an express one—that the insurer must continue to be a member of the Faculty until his death, so that if for any reason he, during his life, should cease to be a member of the Faculty, he should *ipso facto* forfeit everything he had paid and the Society be relieved from every obligation to pay anything whatever to his widow or children.

This contingency, as appears from the actuarial tables used, was not taken into account in fixing the amount of the contribution. The latter is uniform, and the lump sum varies with the age of the insurer, and with that alone.

Section 13 provides for the restoration of members of the Faculty whose interest in the fund shall have been forfeited, and section 14 enacts that on being restored they shall become members of the Society, and each pay to the treasurer £1, 10s. *during his natural life*. Section 21 enacts that the customary payments of £1 in respect of every contributor who was admitted to the benefit of the fund before 7th February 1814, and of £1, 10s. in respect of every contributor admitted after that date, shall continue to be paid by the Faculty “during the period *that each of the said* contributors respectively shall live and continue to be a member of the Society,” not, be it observed, continue to be a member of the Faculty.

Section 18 provides that every person who should thereafter be admitted to the Faculty should be bound to pay to the treasurer of the Society for its benefit annually “*during his life*” the sum of £3, 10s., or such larger sum as the Society shall have theretofore fixed and appointed.

All these sections apparently contemplate that the annual payment should continue to be made *during* the life of the contributor, and that this is their true meaning is, I think, enforced by the fact that special provision is made for the cessation of this payment in three particular instances, and those alone, namely—(1) where the contributor has paid for forty years (section 27); (2) where he has renounced all benefits of the fund (section 28); and (3) where his interest in the fund has been forfeited by reason of his having been guilty of one of the several acts or defaults specified in the various sections, each of which is in its nature injurious to the interests of the fund. No provision whatever is made for the cessation of the contributions expressly made payable *for life*, on the happening of such a probable event as the contributor's ceasing, for any reason, to be a member of the Faculty. *Prima facie* it must, I think, strike one as strange that such a contingency was not expressly provided for, if it was the intention of the Legislature that forfeiture should follow upon its occurrence. It has been urged on behalf of the respondents that the omission is accounted for by the history of the fund, and by the special wording of several sections of the Act, notably the 9th, 29th, and 30th, which shew that the *widows* or children who are to

receive annuities are the widows and children of persons who, at the time of their decease, were members of the Faculty, and that anything in the nature of a forfeiture clause, such as is above suggested, is therefore unnecessary.

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The past history of the fund cannot, in my opinion, furnish any key to the meaning of the language of a statute which so fundamentally altered the previous position of things as did the Act of 1833, while the words used in the several sections relied upon do not, I think, when examined lead to the conclusion contended for. The words which occur in section 9 have been already quoted. Those used in section 29 are, "there shall be paid out of the funds of the said Society to each of the widows of the deceased members of the said Faculty whose names are specified in Schedule A"; and those in section 30 the following—"there shall be paid out of the funds of the said Society to the widow of every member of the said Faculty who shall have contributed to the said fund." It is to be observed, however, that in both sections 29 and 30, where the payment of annuities to children is dealt with, the words used are "deceased contributors" and "in case any member of the said Society shall die" and "widow of a contributor," while in section 31 the event, of the proof of which the trustees are empowered to call for evidence, is described as the "death of contributors." Again, in section 33 the phrase used is "widow of more than one contributor in succession." And in section 34 the word "contributor" is used throughout the section, the words "member of the Faculty" never, while the phrase "widow or children of such contributor" frequently occurs. It is clear, therefore, that under all the sections the essential fact which must be proved in order to entitle a widow, or a child, to an annuity is, that the husband of the widow, or father of the child, must have been a contributor at the date of his death, unless he had already redeemed, or had paid his contribution for forty years. These are the only exceptions. In the face of the clear provisions of sections 9 and 16, which have already been quoted, I think the words "widows of deceased members of the Faculty," or words of the like kind, may, when used in the three sections above mentioned, well be held to mean the widows of men who were members of the Faculty, and who consequently became contributors, but subsequently ceased to be members of that Faculty yet continued to be contributors; so that one is not constrained to adopt a construction which, at all events in the case of men who have paid their contributions for forty years, or who redeemed them, and thus purchased the benefits provided for their widows and children, if not in the case of others, would work the most gross injustice. Neither will this construction prejudice the interest of the Faculty or of the Society, while, in my view, it reconciles the several sections of the Statute of 1833 with one another and makes them consistent. If it be the correct construction, as it appears to me to be, then I think James Colquhoun has not forfeited his interest in the fund, and the respondents were not justified in the course they took; that the decision of the First Division was wrong and should be reversed, and this appeal allowed with costs.

Ld. Atkinson.

LORD COLLINS.—At the close of the first hearing I arrived at the conclusion that the decision of the Court below was right. Afterwards I had the

Mar. 17, 1908. opportunity of reading in print the opinion of Lord Robertson. I did not attempt the superfluous task of trying to modify or improve upon that opinion, for I frankly felt I could not. Since then the case has been re-argued, and I am bound to say that the re-argument tended to confirm my original opinion. Since then again that opinion has been reinforced by that of my noble and learned friend Lord Halsbury, with the result that, with all deference to those who hold the opposite view, I am compelled to give my opinion that the judgment of the Court below is right, and that this appeal ought to be dismissed.

Colquhoun v. Society of Contributors to Widows' Fund of Faculty of Procurators in Glasgow.
Lord Collins.

LORD CHANCELLOR.—As the majority of your Lordships are in favour of allowing this appeal, I shall propose the following order:—"That the minute or resolution of 4th February 1901 be reduced, and that it be found and declared as concluded for." I apprehend if any question arises in the drawing up of this order the parties will settle it themselves. Failing that, it will be possible to submit it for your Lordships' consideration.

ORDERED that the order appealed from be reversed; that the minute or resolution of 4th February 1901 be reduced, and that it be found and declared as concluded for; and that the respondents do pay to the appellants their costs here and below.

A. & W. BEVERIDGE—GORDON MASON, S.S.C.—GRAHAMES, CURREY, & SPENS—WEBSTER, WILL, & Co., S.S.C.

No. 6. GENERAL ACCIDENT ASSURANCE CORPORATION, LIMITED, Appellants.—
Danckwerts, K.C.—Constable—Beyfus.
April 8, 1908. JAMES M'GOWAN (Surveyor of Taxes), Respondent.—
Att.-Gen. Sir W. S. Robson—Sol.-Gen. Ure—Munro.

General Accident Assurance Corporation, Limited, v. M'Gowan.

Revenue—Income-Tax—Fire and Accident Insurance—Balance of Profit—Deductions—Unexpired Risks.—In an appeal by an accident assurance corporation against an assessment for income-tax on profits, the First Division held, following *Scottish Union and National Insurance Co. v. Inland Revenue*, Feb. 8, 1889, 16 R. 461 and 474, and *Imperial Fire Insurance Co. v. Wilson*, 1876, 35 L. T. R. 271, that in ascertaining for income-tax purposes the annual profits of a company carrying on the business of fire, sickness, accident, and guarantee insurance, no deduction fell to be made in respect of estimated losses on risks unexpired at the end of the year.

The Assurance Corporation having appealed to the House of Lords, *held* (in *aff.* the judgment) that the appellants had failed to shew that the rule adopted in these cases had operated inequitably in their case, and appeal *dismissed*.

Ld. Chancellor (Loreburn). Lord Ashbourne. Lord Macnaghten. Lord James of Hereford. (IN the Court of Session, June 4, 1907, S. C. 1004.)
The General Accident Assurance Corporation, Limited, appealed.
The appeal was heard on 19th and 20th March 1908.
The House took time for consideration.

Ld. Robertson. Ld. Atkinson. Lord Collins. LORD CHANCELLOR.—In this case the appellants, a fire and accident insurance company, appeal against an assessment for income-tax. The Commissioners arrived at the assessable profits by calculating income as the balance of receipts from premiums and other unquestioned sources over payments made in respect of losses and other unquestioned deductions. This balance they treat as the Company's income for each of the three pre-

ceding years, and thence derive the average for which they assess the appeal- April 8, 1908.
 tant Company in respect of the year 1905-6.

On the other hand, the Company claim that an allowance should be made for unexpired risks in the way following. They say that $33\frac{1}{3}$ per cent of the premiums received in any one year, say 1903, represents that part of the risk covered by such premium which runs on into the following year. Accordingly they seek to deduct from the gross income of, say, 1903 $33\frac{1}{3}$ per cent of the premiums received in that year because it really represents the money they earn for taking risks which run on into 1904. But at the same time they add to the gross income of 1903 $33\frac{1}{3}$ per cent of the premiums received in 1902, upon the ground that 1903 has in fact borne that proportion of the risks paid for in 1902.

General
 Accident
 Assurance
 Corporation,
 Limited, v.
 M'Gowan.
 Lord
 Chancellor.

Now, in my opinion, there is one sufficient reason for rejecting this contention. It is not found as a fact that $33\frac{1}{3}$ per cent does represent the real value of the risks that run on into 1904 in respect of premiums received in 1903. I am not prepared to assume that it is so, because of the statement of the Commissioners that it is the practice of insurance companies to estimate $33\frac{1}{3}$ per cent as the proper figure to represent that value. We are not told either for what purpose such an estimate is made, or that it corresponds with the reality. If I am to conjecture, I should incline to the view that this percentage is very far from the proper figure. For if this estimate be accepted, then in the three years 1902, 1903, and 1904, taken together, the total profit of this Company, making certain deductions, was £15,338, whereas we know that for its own purposes the total profit, after the same deductions, was treated by the Company as £62,850, and dividends were paid and moneys carried to reserve on that footing.

During thirty-two years, since the decision of *Imperial Fire Insurance Company v. Wilson*,¹ the method of assessing fire and accident companies has been that adopted by the Commissioners in the present case. It is not scientifically unassailable, for it obviously proceeds upon the supposition that the unexpired risks at the beginning and at the end of the year are in substance the same, or that, if an average of three years is taken, they are upon an average the same. But no method is scientifically unassailable that does not enter into an analysis of the contracts made and contracts current in each year so minute that it is in a business sense impracticable. I think the particular correction sought by the appellants in this case is indefensible upon the materials before us, and, further, that the method adopted by the Commissioners is a good working rule in the present instance and generally. If in any particular case an insurance company can shew it works hardship, no doubt the rule ought to be modified so that the real gains and profits may be ascertained as near as may be. I am for dismissing this appeal with costs.

LORD ASHBOURNE.—I concur with the Lord Chancellor.

LORD MACNAGHTEN.—Your Lordships would probably agree with Mr Danckwerts in thinking that the present mode of assessing the profits of a

¹ 35 L. T. 271.

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naghten.

fire insurance company for the purpose of the income-tax is neither accurate nor scientific. But it has been established for a very long time. It is simple, and it does not appear that in the long run it is productive of injustice. The alternative mode first proposed by the learned counsel for the appellants is certainly not more accurate. The inquiry afterwards suggested would, I think, be interminable. It is impossible to obtain anything approaching complete accuracy by any conceivable method. In a somewhat similar case—it was a rating case—Blackburn, J., delivering the judgment of the Queen's Bench, after stating that the Court had endeavoured to lay down a rule more satisfactory than the one then in force, makes the following observations: "We have not, however, succeeded in laying down a rule which would be consistent with the existing legislation and decisions on this subject, and would at the same time be capable of being satisfactorily worked, and we are strongly impressed with the importance of not unsettling the law as established by past decisions where we cannot lay down a rule that is not open to exception"—*Sheffield United Gas-Light Company v. Overseers of Sheffield*.¹

I think there is much good sense in that observation, and I think it is apposite to the present case.

I think the appeal must be dismissed.

LORD JAMES OF HEREFORD.—I concur.

LORD ROBERTSON.—I concur.

LORD ATKINSON.—I agree.

LORD COLLINS.—This is, in effect, an appeal after thirty-two years from the decision of the Court of Exchequer in 1876 in the case of *Imperial Fire Insurance Company v. Wilson*.² In my opinion the proposed method of taking the accounts of the Insurance Company is open to the same objections that prevailed in that case, which has been acted upon in the interval. I am far from satisfied that it arrives at a result at all more approximately accurate than the less complex method suggested by the Legislature itself, and adopted by the Commissioners. I am of opinion, therefore, that the appeal should be dismissed.

ORDERED that the appeal be dismissed with costs.

SMILES & Co.—BONAR, HUNTER, & JOHNSTONE, W.S.—SIR FRANCIS C. GORE,
Inland Revenue, England—PHILIP J. H. GRIERSON, Inland Revenue, Scotland.

No. 7.

May 25, 1908.

Train v.
Clapperton.

MISS ISABELLA TRAIN (Pursuer), Appellant.—*Munro*—*A. A. Fraser*.
ALAN ERNEST CLAPPERTON (Buchanan's Trustee) (Defender),
Respondent.—*Younger, K.C.*—*C. H. Brown*.

Trust—*Gift of whole or portion of annual income according to trustees' discretion*—*Assignment*—*Tantum et tale*.—A testator directed his trustees to invest in their own names, as trustees, a sum of £5000, and to pay to A B during his lifetime "either the whole or only a portion of the annual revenue thereof, and that subject to such conditions and restrictions, all as my trustees in their sole and absolute discretion think fit," and, on the

¹ (1863) 4 B. & S. 135-146.

² 35 L. T. 271.

decease of A B, to pay "said sum of £5000, with any revenue accrued thereon that has not been paid to" A B, to A B's children, declaring that in the event of A B dying without children, "said sum of £5000 and accumulations of revenue, if any," should form part of the residue of his estate. The testator died in June 1899. A B was the testator's sole next of kin, and in 1903 he assigned to X, in security of a debt of £650, his interest in the deceased's estate as next of kin and as a legatee.

Train v.
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In August 1904 an action was raised by X as assignee of A B against the trustees concluding (1) for payment of the income of the £5000. The pursuer maintained that the defenders—who had since the testator's death paid only certain trifling sums to A B from time to time—were bound to have exercised their discretion annually as to the amount of the income of the £5000 to be paid to A B, and in respect that they had failed to do so, were bound to make payment of the whole income thereof that had accrued since the date of the testator's death, under deduction of the sums paid to A B.

The First Division held that the payments to be made to A B were left by the testator entirely in the discretion of the trustees, and that in the circumstances the trustees had done nothing to entitle the Court to interfere with their discretion, and assoilzied the defender.

In an appeal the House *affirmed* the judgment.

(In the Court of Session, Feb. 5, 1907, 1907 S. C. p. 517.)

The pursuer appealed.

After hearing counsel for the appellant,—

Ld. Chancellor
(Loreburn).
Lord
Ashbourne.
Ld. Robertson.
Lord Collins.

LORD CHANCELLOR.—I will not occupy your Lordships' time with this appeal, because it rests upon the statement of the appellant that the trustees who had the misfortune to be saddled with this duty have not exercised a discretion, or at anyrate have not exercised a reasonable and sound discretion. I think your Lordships are satisfied that they have exercised a discretion; whether it was reasonable or sound I cannot possibly judge, because the facts are not before us, but it looks to me very like a most sound and reasonable discretion.

LORDS ASHBOURNE, ROBERTSON, and COLLINS concurred.

Younger, K.C., applied that as this was an appeal *in forma pauperis*, the respondent, who was a trustee, should be allowed his costs out of the estate.

LORD CHANCELLOR.—Let that be so.

ORDERED that the appeal be dismissed.

HERBERT G. DAVIS—A. W. GORDON, Solicitor—ROBBINS, BILLING, & Co.—
F. J. MARTIN, W.S.

JAMES DICK AND OTHERS (Claimants), Appellants.—*Cripps, K.C.*— No. 8.
Orr, K.C.—*J. D. Millar*—*Munro*.

JOHN EDWARD AUDSLEY AND OTHERS (Trustees under James Dick's Settlement dated in 1902) (Pursuers and Real Raisers and Claimants), Respondents.—*Clyde, K.C.*—*Cullen, K.C.*—*R. Scott Brown*. May 26, 1908.
Dick v. Audsley.

JOHN WATT AND OTHERS (Trustees under James Dick's Settlements dated in 1891, 1899, and 1901) (Claimants), Respondents.—*Lees, K.C.*—*W. E. Vernon*—*Ingram*.

Charitable and Educational Bequests and Trusts—Uncertainty—Local or Scottish charitable institutions constituted or to be constituted.—A testator

May 26, 1908. **Dick v. Audsley.** disposed his whole estate to certain trustees, and directed them to realise the whole residue of his estate at such time as they might think proper, and "at any time or times, or from time to time, as and when the said residue or any part thereof becomes available, as they may deem proper, to pay over or divide the said residue, or any part or parts thereof, to or amongst such local or Scottish charitable institutions and schemes already constituted, or which may hereafter be constituted, . . . as they may select, or any one or more of such institutions and schemes, and that at such time, in such manner, or in such proportions, all as they in their absolute discretion may deem proper." The testator further provided that his trustees should have "the fullest powers of and in regard to realisation, investment, administration, management, and division, as if they were beneficial owners"; that "the time, manner, and propriety of selling and disposing" of his estate, heritable and moveable, should be entirely at the discretion of his trustees; and that his trustees might, should they in their discretion see fit, retain the investments of which the estate consisted at the time of his death, "and that for such time or times as they might think fit or indefinitely."

The next of kin of the testator maintained that the directions of the trust-disposition with regard to the disposition of the residue were void from uncertainty, in respect that (1) the class of objects of the testator's bounty was not sufficiently definite; and (2) power was given to the trustees to postpone realisation indefinitely.

Held (aff. judgment of First Division) that the bequest of residue was not void from uncertainty.

Ld. Chancellor (Loreburn). Earl of Halsbury. Lord Ashbourne. Ld. Robertson. Lord Collins. (IN the First Division of the Court of Session, 29th May 1907, 1907 S. C. 953.)

James Dick and other next of kin of James Dick, the testator, appealed.

LORD CHANCELLOR.—I do not think it is necessary to invoke in this case the rule that charitable bequests are an object of peculiar favour, because I do not think the points put by Mr Cripps had any real substance.

With regard to the first question, whether the trustees have an option to apply any part of this fund otherwise than to the charitable purposes designated by the will, I do not think that is the true construction of the clause. I think the words which are used, "any part or parts thereof," have relation to the time or times when the distribution may become practicable by reason of the fund becoming available.

With reference to the second point made by Mr Cripps, whether the bequest is bad because there was an option to retain indefinitely and so frustrate the trust or so render uncertain its objects, I do not think that is the meaning of the clause. The word "indefinitely" appears to me really to be redundant, meaning the same in substance as the words "for such time or times as they may think fit." Of course, the administration of a trust is always subject to the control of the Court if there is maladministration. Even if the word "indefinitely" meant something much more than that, I am by no means satisfied that the will could be set aside on that ground, but the point does not arise.

EARL OF HALSBURY.—So far as I am concerned, I think the Lord Ordinary's judgment perfectly satisfies everything that ought to be said upon the subject.

LORD ASHBOURNE, LORD ROBERTSON, and LORD COLLINS concurred.

May 26, 1908.

INTERLOCUTORS appealed from affirmed: The appellants to pay the respondents, other than the trustees of the settlement of 4th March 1902, the costs of this appeal: The said trustees to have their costs out of the estate.

JOHN KENNEDY, W.S.—INGLIS, ORR, & BRUCE, W.S.—CROWDERS, VIZARD, OLDHAM, & CO.—HENRY ROBERTSON, S.S.C.—NEISH, HOWELL, & HALDANE—
W. & F. HALDANE, W.S.

JOHN TOAL (Pursuer), Appellant.—*Munro—J. A. Christie.*
THE NORTH BRITISH RAILWAY COMPANY (Defenders), Respondents.—
Sol.-Gen. Ure—Forbes Lancaster, K.C.

No. 9.

May 26, 1908.

Reparation—Negligence—Railway—Failure of railway servants to close carriage doors before setting train in motion.—In an action of damages for personal injuries brought against a railway company by a passenger who, after alighting from a train, had been knocked down by an open carriage door as the train was leaving the station, the pursuer averred that “the said accident to the pursuer was due to the fault and negligence of defenders’ servants, for whom defenders are responsible. When said train was stopped at said platform there were no porters or officials on the platform to see that the doors of the carriages were closed before the train was restarted. It is the duty of defenders, and is the invariable practice of railway companies, to close the doors of compartments before a train is allowed to leave the station, but this the defenders and their servants culpably and negligently failed to do on the occasion of this accident to pursuer. The defenders and their said servants were also negligent in respect that they set said train in motion without closing said door.” He also averred that the defenders’ servants were negligent in failing to have the lamps at the station lighted, and that the station was so dark that the pursuer could not see whether the doors were closed or not.

Toal v. North
British Rail-
way Co.

The First Division dismissed the action on the ground that there was no relevant averment of negligence on the part of the Railway Company.

In an appeal the House *reversed* the judgment on the ground that the pursuer had averred facts from which a jury might infer negligence.

(In the Court of Session, Oct. 31, 1907, 1908 S. C. 48.)

The pursuer appealed.

Ld. Chancellor
(Loreburn).
Earl of
Halsbury.
Lord
Ashbourne.
Ld. Robertson.
Lord Collins.

LORD CHANCELLOR.—The question here is whether the pursuer avers, and offers to prove, facts from which a jury might legitimately infer that this accident was caused by the neglect of the Railway Company; and I do not suppose that your Lordships will conjecture whether or not that is the right conclusion, for it is really the province of the jury not only to ascertain the facts, but to draw their own inferences from the facts that are ascertained. I find in this case the pursuer says that the duty of the defenders was to close the door of the carriage before it started; that it was their duty to do so on the occasion of this accident; that they did not close the door, and so swept the pursuer from the platform on to the rails; and, further, that the station was so dark that the pursuer could not see whether the doors were closed or not.

What was the duty of the Railway Company in this matter, and what they did or omitted to do, is for a jury to determine. Accordingly, with the most sincere respect for the opinion of the Court of Session, I am constrained to the view that in this case there is material from which the

May 26, 1908. proper tribunal might conclude that the accident was due to the neglect of the defenders.

Toal v. North
British Rail-
way Co.

I will not express any opinion of my own upon the subject, because I think it is not my province to deal with matters of fact, but the province of the constitutional tribunal.

EARL OF HALSBURY.—I am entirely of the same opinion. I abstain from expressing any opinion of my own on the point, which is simply a question that the jury will have to determine. It is enough for me to say that in my view there was a case to be properly submitted to a jury, and it was for them to determine it.

LORD ASHBOURNE.—I agree.

LORD ROBERTSON.—My opinion is that this appeal must be allowed. I differ with the greatest reluctance from a tribunal so able and experienced in administering this particular jurisdiction, but I think in this instance they have gone too fast.

I must not, however, be supposed in the least degree to hold that because the parties are not agreed as to the facts therefore a case must go to trial. That is a much cruder view than has ever been accepted by the Scottish Courts or by your Lordships in Scottish appeals. Much time and money have been saved by a more critical view of the case presented by the claimant. When a case comes, as this one did, from the Sheriff Court for trial by jury the duty of the Court of Session is to see, before a jury is summoned, that there is a case to try. This means an ascertainment of the gist or gravamen of the action. The mere fact that in what is probably an unnecessarily detailed averment of circumstances there is a dispute about facts is in no way decisive of the right to go to trial. If the defender can demonstrate that, assuming all the pursuer says, he has no case, then the Court has habitually, and most rightly, ended the litigation. This, however, is a delicate jurisdiction, because it depends in dubious cases on the language, very often obscure, applied to facts very often equivocal.

As I think this case must go to trial, I do not enter into any analysis of the points in the case, for that would merely prejudice the trial. My interposition at all is merely because, in my humble judgment, it has got to be remembered that the Scottish system obliges the pursuer to shew his hand and state his case before he is allowed to go to trial, and thus compels the Court, when invited, to ascertain the value of the case thus stated. In the present instance I think the Court have criticised the statements too severely and nicely.

LORD COLLINS.—I am of the same opinion.

ORDERED that the order appealed from be reversed, and that the respondents do pay to the appellant his costs in the Court of Session so far as the same relate to the question of relevancy and also the costs incurred by him in respect of this appeal to this House, such last-mentioned costs to be taxed in the manner usual when the appellant sues *in forma pauperis*.

WARLOW & PATEY—ST CLAIR SWANSON & MANSON, W.S.—JOHN KENNEDY, W.S.—
JAMES WATSON, S.S.C.

G. W. WHITEHOUSE (Pursuer), Appellant.—*Danckwerts, K.C.*—*J. R. Christie.*

No. 10.

R. & W. PICKETT (Defenders), Respondents.—*Watt, K.C.*—*Munro.*

June 26, 1908.

Innkeeper—Limitation of Liability to guests—Negligence—Onus pro-
bandi—Deposit expressly for safe custody—Innkeepers Liability Act, 1863
(26 and 27 Vict. cap. 41).—The Innkeepers Liability Act, enacts, sec. 1,
that no innkeeper shall be liable to make good to any guest of such inn-
keeper any loss of property brought to his inn to a greater amount than
£30, except (1) where such property shall have been stolen or lost through
the wilful act, default, or neglect of such innkeeper or any servant in his
employ; or (2) where such property shall have been deposited “expressly
for safe custody” with such innkeeper.

Whitehouse v.
Pickett.

A hotel in Edinburgh exhibited on the wall of a corridor a printed notice
that the proprietors “will not be responsible for any valuables left in bed-
rooms, but will take charge of same in office. See extract from Act of
Parliament, chap. 41, Vict. 26 and 27, in entrance hall.” The extract in
the entrance hall contained section 1 of the Act.

A commercial traveller for a manufacturing jeweller on arriving at that
hotel on a Saturday afternoon handed to the hotel porter a bag, containing
jewels to the value of £1800, to be placed in the office. The traveller made
no statement as to its value, but he was in use to visit the hotel, and the
hotelkeepers knew that he was in the habit of carrying jewellery with him.
At 11.30 P.M., when he asked for the bag with the view of taking it to his
bedroom, it was discovered that his bag had been stolen. Another bag
of the same size and appearance had been left at the office by one of three
guests in the hotel who disappeared the same evening without paying their
bill, but leaving behind them certain burglar's tools.

In an action by the jeweller against the hotelkeepers for the value of the bag,
the defenders pleaded, *inter alia*, the statutory limitation of liability to £30.

The pursuer pleaded, *inter alia*;—(1) that the goods having been deposited
with the defenders for safe custody he was entitled to indemnity; and (2)
that the goods having been stolen through the default or neglect of the
defenders or of their servants, they were liable in damages.

A proof was led, in which the facts above narrated were established.

The Lord Ordinary (Salvesen) held that the bag had been lost through the
negligence of the defenders or of their servants, and gave decree for damages.

The Extra Division held (1) that the bag had not been deposited “expressly”
for safe custody within the meaning of sec. 1, subsec. (2), of the Act; (2)
that the *onus* of proving that it had been lost through “default or neglect”
on the part of the defenders or of their servants lay upon the pursuer, and
that that *onus* had not been discharged; and therefore (3) that the defen-
ders were entitled to the benefit of the statutory limitation of liability.

In an appeal the House *affirmed* the judgment (*diss.* Lord Collins, who held
that although there had not been an express deposit for safe custody the
defenders, as bailees for reward, were bound to give a high degree of care, and
that from the facts proved the Lord Ordinary was entitled to infer negli-
gence, and that his judgment should be restored).

(In the Extra Division of the Court of Session, Nov. 16, 1907, reported in the present volume, p. 219.)

The pursuer appealed.*

Ld. Chancellor
(Loreburn).
Lord
Ashbourne.
Lord James of
Hereford.
Ld. Robertson.
Lord Collins.

* *The Appellant cited*—M'Pherson v. Christie, 1841, 3 D. 930; Meda-
war v. Grand Hotel Co., L. R., [1891] 2 Q. B. 11; O'Connor v. Grand
International Hotel Co., L. R., [1898] 2 Q. B., (Ir.) 92.

The Respondents cited—Moes, Moliere, & Tromp v. Leith and Amster-
dam Shipping Co., 1867, 5 Macph. 988; Moss v. Russell, 1884, 1 T. L. R.
13; Stevens v. Great Western Railway Co., 1885, 52 L. T. 324.

June 26, 1908. The House took time for consideration.

Whitehouse v.
Pickett.

LORD CHANCELLOR.—I shall move your Lordships to dismiss this appeal. The contentions of the appellant were twofold. In the first place, he maintained that there had been a deposit expressly for safe custody; in the second place, that his property had been lost through the neglect of the innkeepers. It is unnecessary to recapitulate the facts, which have been fully stated in more than one of the opinions already expressed.

I cannot think that the pursuer should succeed on his first contention. Under the statute innkeepers are liable beyond £30 if property has been deposited with them expressly for safe custody.

The word “expressly” is not used without a purpose. It means that an intention by the bailor is not enough. That intention must be brought to the mind of the bailee or his agent in some reasonable and intelligible manner, so that he may, if so minded, insist on the precautions specified in the Act. The pursuer’s traveller caused to be placed in the office, without a word spoken, a bag of undeclared contents, which was laid in a corner of the room; and there is nothing more of substance proved in this case on this point, except that he had been in the habit of depositing similar property in that or an adjoining room for some years, also without word spoken. The Act meant to secure for the innkeeper, by warning, an opportunity of safeguarding himself when a heavy risk is placed on him. There is no ground for saying he had such a warning here.

As to the second point I see no sufficient evidence. Obviously it was for the pursuer to prove it if he could. He proved that his own traveller and other travellers also were somewhat careless as to the place where bags and parcels were deposited, and perhaps that the innkeeper or his servants were sometimes careless in fastening the doors of the office and the parlour, or in keeping someone constantly there. But no evidence was given to prove how in fact the pursuer’s bag was lost, or that it must have been lost through neglect either in leaving doors unlocked or in leaving rooms unwatched. The facts are equally consistent with loss by methods which implied no disregard of reasonable care, and the place chosen for deposit was chosen by the pursuer’s own traveller. If it were enough to shew that this property may have been stolen through the innkeeper’s neglect, an innkeeper might be liable in every case of unexplained loss. Nor is it enough to prove, if it were proved, that the innkeeper was neglectful in general. He is not liable unless the loss was due to his neglect, which is quite a different thing.

LORD ASHBOURNE.—There is practically little dispute as to the facts, although there is a difference of opinion as to the law applicable to the circumstances proved in evidence. This involves a consideration of the Innkeepers Liability Act of 1863, which altered the common law by limiting their liability for the property of their guests to £30 except in two cases—(1) where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ; (2) where such goods or property have been deposited expressly for safe custody with such innkeeper.

Taking the second case in the first place, I cannot think that the evidence June 26, 1908. establishes any such deposit within the meaning of the Act. I do not think ^{Whitehouse v.} that any form of words was needed, but something should be said or done ^{Pickett.} by the guest that would clearly convey to the innkeeper that goods were ^{Lord} being deposited with him for safe keeping. Here the guest did not say a ^{Ashbourne.} word to draw attention to the fact that he was making any deposit whatever. The innkeeper probably never saw the bag at all. The course of dealing would not warrant the effort to spell out any liability. The bag, in my opinion, was left in the office to afford ready access to Mr Buckley whenever he wanted his bag for his trade purposes, he thinking it as safe and convenient a place as he could find. His removal of it to his bedroom each night demonstrates that he did not think he had fixed the innkeeper with any special liability by leaving it during the day in the office. The respondents cannot eke out a special undertaking by the notice that the proprietors would not be responsible for any valuables left in bedrooms, but would "take charge of same in office," and adding a reference to the statute. This, in my opinion, only invited guests to make deposits for safe custody as contemplated by the Act. Once it is decided that there was no deposit for safe keeping, it is manifest that the duty or obligation was entirely altered. The decision on this point colours the whole case, although, of course, the question of negligence has to be separately considered.

This latter question is somewhat more difficult, and needs close examination, but after the best consideration that I can give the case I am unable to arrive at the conclusion that on the actual evidence the respondents are liable. Most probably the loss was due to the theft of three daring confederates who had been shadowing Buckley, and according to the poster notice of the police had been following him from town to town—London, Manchester, Liverpool, Lancaster, Carlisle, and Glasgow. If Buckley had made an express deposit for safe custody the respondents would be liable, but as he did not do so, and only left his bag in the office in the way described, to be taken such good care of as the course of business in the hotel permitted, and as was extended to their own property, I cannot see any proof of negligence that would render the respondents liable.

It was urged by the appellant that the door from the private sitting-room into the passage was not always locked, and that the door next the bar-room was not always "snibbed" when the bar or sitting-room had, for the moment, no one in attendance. But there can be no doubt, I think, that the usual practice was to have a close attendance and also to keep the door secure. An occasional departure from a settled practice owing to the exigencies of the hotel business would not justify a speculation or guess that this might have led to the loss. The probability that has found most favour on all sides for the theft is that it occurred while the bar was attended by one of the family, whose attention was called away by one of the confederates whilst the others stole the bag. I would not on this speculation hold that the respondents were to be held liable for "wilful act, default, or neglect." There is no affirmative evidence bringing home to the respondents direct negligence from which the loss resulted.

I think that the appellant's argument seeking to hold the respondents liable by the imputation of neglect for the theft from the office is coloured

June 26, 1908.

Whitehouse v.
Pickett.

Lord James of
Hereford.

I wish to observe that if the trial had been before a jury and it had been found by them that the defenders had been guilty of negligence, a grave question would arise whether such a verdict should be set aside, for it may be that some evidence of negligence might be discovered; but this is an appeal against the judgment of the Lord Ordinary upon the whole case, and your Lordships have to review his findings upon the facts as well as the law of the case. With sincere respect for the authority of that learned Judge, I cannot avoid differing from him and agreeing with the Judges of the Extra Division.

So it appears to me that on this second ground also the pursuer's case fails, and that therefore the judgment of the Court below is correct, and that the appeal must be dismissed.

LORD ROBERTSON was absent, but his opinion was read by the Lord Chancellor:—

I think the judgment appealed against sound.

By statute, an innkeeper is no longer liable, on the old common law ground, for goods lost in his house, except to the extent of £30. Beyond that, he can only be liable on one or other of the two grounds stated in the statute, that is if the goods have been deposited with the innkeeper expressly for safe custody, or if they have been stolen or lost through the wilful act, default, or neglect of the innkeeper or his servant.

Now, on the first of those alternatives, the appellant has no case at all. Buckley, the traveller, says, in so many words, that he cannot remember ever asking the respondents to take charge of the bag. What he did was simply to put the bag in a place which he thought at once safe and accessible during the day, while, on the other hand, at night he took it to his own bedroom, the bag being, in each case, placed and taken away without reference to the respondents. There is, therefore, no suggestion that this practice was initiated by, or based upon, any original and continuing trust, made and accepted, which should apply to the whole course of Buckley's visits. The thing was done simply on Buckley's estimate of the physical conditions of safety afforded by the place in question, and not on any guarantee of the respondents; as is shewn by his considering his own bedroom, when occupied by himself, still safer than the office. In the one case, as in the other, the respondents were not consulted. They knew, of course, that he put his bag there and that he took it away, in each case at his own hand.

In the other matter, of neglect, it is necessary to see first what duty is said to be neglected. The hypothesis of the argument is that there was no legal deposit expressly for safe custody, and the duty must therefore be one applicable to any goods not deposited for safe custody, of large value or small value. The appellant has no affirmative case on this subject, and the suggestions made are merely hints that this valuable bag ought to have had more care taken of it, which, of course, is simply giving the statute the go-by. When the proved facts are examined, it is plain enough that the bag got exactly the same protection that everything in the office got, including the respondents' own till. Unless, then, there is ground for holding in fact that the till was neglected, there is no ground for holding that this

bag was neglected. And ground there is none. It is true that no one June 26, 1908.
sat on the bag any more than on the till; but there is no scintilla of evi-
dence of any desertion of the room, which held both. Nor does the fact Whitehouse v.
of the theft itself evidence neglect, for it is now plain that three thieves Pickett.
were at work, and it is plausibly suggested that two might engage the Ld. Robertson.
occupant of the room in conversation while the third abstracted the bag.
These are among the risks which of old fell on the innkeeper, and now
do not.

I must frankly say that I think the case a clear one for the respondents.

LORD COLLINS was absent, but his opinion was read by Lord Ashbourne.
—I am of opinion that this appeal should be allowed and the judgment of
the Lord Ordinary restored.

The Innkeepers Act (of the provisions of which the Lord Ordinary finds
that sufficient notice was given) cuts down the absolute liability of the inn-
keeper to his guest for loss or injury to goods, such as those here in ques-
tion, brought to his inn, to £30, except (1) where they have been stolen,
lost, or injured through the wilful act, default, or neglect of such innkeeper
or any servant in his employ; (2) where such goods or property shall have
been deposited expressly for safe custody with such innkeeper.

It has been held that the word "wilful" in the first exception is to be
read as applying to "act" only—*Squire v. Wheeler*.¹

The Lord Ordinary, without deciding whether there was an express
deposit for safe custody within the second exception, held that the goods
in respect of which the action was brought were stolen or lost through the
negligence of the defenders or their servants, and awarded the pursuer
damages accordingly to the amount of £1790.

I agree that it is not necessary to decide here that there was an "express"
deposit for safe custody, though, on the other hand, it would not be a very
unreasonable inference to draw, from sixteen years' uniform practice, that
the innkeeper accepted an obligation with regard to the bag containing
jewellery higher than that under which he received the ordinary luggage of
his guest. But it is enough to say that, with regard to it, he was at least
in the position of a bailee for reward, and bound as such to a high degree
of care. The statute, no doubt, in such case, throws the *onus* of proving
negligence on the guest, and there was, in my opinion, evidence of negli-
gence on the part of the innkeeper or his servants which a jury, had the
case been tried by one, would have been fully justified in treating as having
caused the loss. There was evidence from which a jury might well have
inferred that one at least of the defenders was aware that the pursuer's bag
had been placed for greater security in the office, and as to one door, at all
events, giving access to it, the defenders admitted that the rule was that,
when no one was in the office, it should be kept "snibbed." There was
evidence that this precaution had not been uniformly adopted on the day
in question, and that no special precautions had been taken to make sure
that someone should be always on the spot to keep an eye on the things
left for safety in the office. The learned Judge who tried the case, and

¹ (1867) 16 L. T. 93.

June 26, 1908. **Whitehouse v. Pickett.** heard and saw the witnesses, was at least as well entitled as a jury to draw inferences of fact from evidence which, in my opinion, must have been left to a jury had there been one, and I am certainly not prepared to differ from his conclusions. The argument of the respondents seemed to me to ignore the high degree of diligence incumbent upon the defenders as bailees for reward, even though there had not been the *express* deposit for safe custody mentioned in the section. It was equally a bailment for reward whether express or implied, and the risk involved and the degree of care required were well understood, but there was a pressure of business in the hotel that night, and less than reasonable care seems to have been exhibited. The fact that they were equally negligent in the custody of the money in their own till, even if relevant in the case of a gratuitous depository—see *Doorman v. Jenkins*¹—cannot excuse a bailee for reward.

I agree with the Lord Ordinary in his conclusion and his reasons.

ORDERED that the appeal be dismissed with costs.

CHRISTOPHER & RONEY—GARDINER & MACFIE, S.S.C.—A. & W. BEVERIDGE—
CUTHERBERT & MARCHBANK, S.S.C.

¹ (1834) 2 A. & E. 256.

CASES

DECIDED IN

THE COURT OF JUSTICIARY.

1907-1908.

JAMES FAIRBAIRN AND OTHERS, Appellants.—*Orr, K.C.—Moncrieff.* No. 1.
THE LOCHRYAN OYSTER FISHERY COMPANY, LIMITED, AND ANOTHER, May 31, 1907.
Respondents.—*Dickson, K.C.—Munro.*

Summary Procedure—Complaint—Instance—Company.—A summary complaint may be presented at the instance of an incorporated company without the conjunction of an officer of the company.

JAMES FAIRBAIRN, fisherman, and others were charged in the Sheriff Court at Stranraer, on a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887, at the instance of "The Lochryan Oyster Fishery Company, Limited, incorporated under the Companies Acts, and having its registered office in Manchester, lessees of the Lochryan Oyster Fishery aftermentioned, and John Alexander Agnew Wallace, Esq., of Lochryan, Cairnryan, Wigtownshire, proprietor of the said fishery, with consent and concurrence of John Marquis Rankin, Esq., Procurator-fiscal of Court at Stranraer, for the public interest."

The complaint set forth an offence against the Oyster Fisheries (Scotland) Act, 1840 (3 and 4 Vict. cap. 74), sec. 2.

The accused stated, *inter alia*, the following objection to the complaint:—(2) "Instance defective."

On 21st November 1906 the Sheriff-substitute (Watson) repelled the objection and, after a proof, convicted the accused of the contravention charged.

The accused obtained a case, one of the questions of law being:—(2) "Is the instance defective in respect that the manager or other official of the respondents, the Lochryan Oyster Fishery Company, Limited, is not associated with the Company as complainer?"

The appellants argued;—In any complaint at the instance of an incorporated company, it was necessary to conjoin in the instance of the complaint together with the company some individual as acting for and under the authority of the company, who would be directly responsible for the proceedings and for the manner in which they were carried on.¹ This had not been done, and the instance of the Lochryan Oyster Fishery Company was accordingly defective; and, this being a joint prosecution, it could not proceed at the instance of the other prosecutor, when the instance of one was bad.

Counsel for the respondents were not called upon.

¹ Great North of Scotland Railway Co. v. Anderson, Oct. 28, 1897, 25 R. (J.) 14, *per* Lord Trayner, at p. 16, 2 Adam, 381.

May 31, 1907. **LORD JUSTICE-GENERAL.**—This is a case where a complaint is brought against certain fishermen for having contravened the provisions of an Act for the better protection of the Oyster Fisheries in Scotland, inasmuch as they did, in a part of Lochryan known as “The Field,” unlawfully and wilfully trawl with a seine net. Several objections have been stated. The first is as to the instance, the complaint being at the instance of the Lochryan Oyster Fishery Company, Limited, incorporated under the Companies Acts, and John Alexander Agnew Wallace, Esquire, of Lochryan, with consent and concurrence of the Procurator-fiscal. It is said that this is bad, because an incorporated company cannot make a good instance unless they are coupled with some officer who may appear in Court and act on their behalf. I have not been able to see that that is a good objection. The conduct of the case in Court is another matter, but I do not see how they can be said not to have a title to prosecute. In the case which was quoted to us it seems to have been said that in practice it was in use to conjoin one of the company’s officers. I do not see how that makes the instance any better, nor do I see why there should be any difference between the rules which prevail in civil cases and those which prevail in criminal matters.

Fairbairn v.
Lochryan
Oyster
Fishery Co.,
Limited.

But, apart from that, the instance of Mr Wallace in this case was perfectly good, and he could not be prevented from going on with the case if, for example, the other prosecutor did not come to take part in the proceedings.

LORD M’LAREN and LORD KINNEN concurred.

THE COURT answered the question of law in the negative.

SIMPSON & MAEWICK, W.S.—GARDEN & ROBERTSON, S.S.C.—Agents.

No. 2.

DAVID FINDLAY, Complainer.—*MacRobert.*

WILLIAM WALKER (Burgh Prosecutor, Paisley), Respondent.—*M. P. Fraser.*

July 18, 1907.

Findlay v.
Walker.

Summary Procedure—Complaint—Sentence—Common Law Offence—Notice of Penalty—Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. cap. 53), sec. 29—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 490.—A summary complaint in a burgh Police Court, charging assault at common law, was headed “Under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887,” and did not contain any reference to the Burgh Police (Scotland) Act, 1892.

Held that it was competent for the Magistrate on this complaint to pronounce a sentence within the maximum authorised by sec. 490 of the Burgh Police (Scotland) Act, 1892, although the sentence was in excess of the maximum authorised by sec. 29 of the Summary Procedure (Scotland) Act, 1864.

HIGH COURT.
Lord Justice-
Clerk.
LdStormonth-
Darling.
Lord Ardwall.

DAVID FINDLAY, potato merchant, 3 Hamilton Street, Paisley, was charged in the Police Court at Paisley on a summary complaint at the instance of the Burgh Prosecutor, headed “Under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887,” and setting forth that the accused, “on 18th March 1907, within the public-house at 38 High Street, Paisley, occupied by John Merry Forrester, spirit merchant, did assault William Keter, farmer, residing at Bogside Farm, Moorpark, Renfrew, by striking him a severe blow on the face with his fist, whereby his left lower eyelid was severely cut to the effusion of blood, and to

the hurt and injury of his person: And the said David Findlay has been previously convicted of the crime of assault." The complaint did not make any reference to the Burgh Police (Scotland) Act, 1892, and prayed the Court to adjudge the accused "to suffer the pains of law."

Findlay v.
Walker.

The accused pleaded not guilty, but after evidence had been led the Magistrate pronounced the following conviction and sentence:—
"In respect of the evidence adduced, finds the said David Findlay guilty of the crime charged, aggravated as charged, and therefore fines and amerciates him in the sum of £10, payable to the Clerk of Court, and in default of immediate payment thereof, decerns and adjudges the said David Findlay to be imprisoned for the space of thirty days, unless the said sum shall be sooner paid; further, ordains the said David Findlay to find sufficient caution acted in the Books of Court for good behaviour for the period of six months from and after the date of payment of said fine, or of the expiration of said period of imprisonment, under a penalty of £20, and in default of said caution being found, sentences and adjudges the said David Findlay to be imprisoned for the further space of thirty days from the date of the payment of said fine or the expiration of the term of imprisonment for non-payment thereof, and thereafter to be set at liberty, and for that purpose grants warrant," &c.

Findlay presented a bill of suspension, in which he stated, *inter alia*:—"4. The said complaint was brought under only the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887, and not under the Burgh Police (Scotland) Act, 1892.* Under the Summary Jurisdiction and Criminal Procedure Acts, and at common law, the said sentence was excessive and *ultra vires*. The presiding magistrate was not entitled to fine the complainer in a greater sum than £5, nor was he entitled

* The Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. cap. 53), enacts:—

Sec. 29. "Where by any Act of Parliament a power is or shall be given to any sheriff, justices or justice, or magistrate in the exercise of jurisdiction as a judge of police to take cognisance of offences punishable by fine or imprisonment, without any declaration being expressed or implied of the powers of such judge of police in relation to the punishment of such offences, it shall be lawful for such sheriff, justices or justice, or magistrate convicting for an offence of which he or they may lawfully take cognisance, to sentence the person convicted to pay a penalty not exceeding five pounds, or, in the discretion of the judge, to sentence him to be imprisoned for any period not exceeding sixty days from the date of imprisonment, and also to adjudge him to find caution to keep the peace for six months under a further penalty of ten pounds, and in default of such caution being found to be imprisoned for a further period not exceeding thirty days."

The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55), enacts:—

Sec. 490. "The magistrate may either sentence the accused on conviction for common law crimes or offences to imprisonment with or without hard labour for any period not exceeding two months, or he may impose a fine not exceeding ten pounds, and failing payment thereof award imprisonment, not exceeding the respective periods after specified; and in lieu of or in addition to either of these modes of punishment he may order the accused to find security for good behaviour for any period not exceeding six months, and, under a penalty not exceeding twenty pounds, and failing the finding of such security, he may award imprisonment or additional imprisonment not exceeding the respective periods after specified, but in no case shall the total imprisonment exceed sixty days except as hereinafter provided."

July 18, 1907. to ordain the complainer to find caution for his good behaviour as above mentioned. The said conviction and sentence is accordingly irregular, incompetent, and invalid. The complainer had no notice of, nor was he aware of, the terms of section 490 of the Burgh Police (Scotland) Act, 1892.”¹

Findlay v.
Walker.

At advising,—

LORD STORMONTH-DARLING.—This suspension is brought (1) on a ground which this Court cannot possibly entertain, viz., that the evidence was insufficient to warrant a conviction; but (2) it is brought on the ground that the sentence was not warranted by the Summary Jurisdiction Acts, on which the complaint bore to proceed. It is not denied by the accused that the sentence actually imposed—a fine of £10, followed by an order to find security for good behaviour for a period of six months—was fully warranted by section 490 of the Burgh Police Act in the case of a conviction, as this was, for a crime at common law. But it is said that the Burgh Police Act was not mentioned in the complaint, and that the only statutes which were mentioned in the heading of the complaint were the Summary Jurisdiction Acts, 1864 and 1881, and the Criminal Procedure Act, 1887. Moreover, it is said that the accused had no notice of, nor was he aware of, the terms of section 490 of the Act of 1892. I think it did not matter whether he had notice of it or not, and that he was bound to know the law as to the punishment which could be inflicted; although, of course, that could never apply to any section that creates a statutory offence, as to which distinct notice must always be given in the body of the complaint, so that an accused person may know what he is being charged with. But a mere enlargement of the magistrate’s powers with regard to sentence for a common law crime seems to me to be attended with no such consequences, and therefore I am of opinion that this suspension should be refused.

LORD ARDWALL.—I am of opinion that this suspension ought to be refused.

The principal, and, indeed, practically the only, ground on which the conviction under review is attacked is, that while the complaint on which it proceeds bears to be brought under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887, the sentence pronounced exceeds the maximum sentence of thirty days’ imprisonment or a fine of £5 which, under the 29th section of the Act of 1864, Police Judges have power to pronounce. But it is answered that by the Burgh Police (Scotland) Act, 1892, section 490, the powers of Police Judges in this matter were enlarged to the effect of enabling them to pronounce a sentence of imprisonment not exceeding two months or a fine not exceeding £10.

The matter simply stands thus, that the provisions in section 29 of the Summary Jurisdiction Act of 1864 are altered as regards Police Magistrates by section 490 of the Burgh Police Act of 1892, and of course the provisions of the later statute must prevail. Then by section 516 of the Burgh Police Act, 1892, it is provided as follows:—“If it should be found

¹ *Cited at the hearing*:—Reid v. Millar, July 13, 1899, 1 F. (J.) 89, 3 Adam, 29.

convenient in any prosecution under this Act or any special statute, any of July 18, 1907. the provisions or forms of the Summary Jurisdiction Acts, or of the provisions or forms of the Criminal Procedure (Scotland) Act, 1887, may be used." ^{Findlay v. Walker.}

I think that the fact that the prosecutor has taken advantage of this section and made use of the forms and provisions of the Summary Jurisdiction Acts in the present complaint cannot reasonably be held to reimpose upon the Police Magistrate disposing of the complaint in the Burgh Police Court the limitations in the matter of sentences which were imposed by section 29 of the Act of 1864, but removed by section 490 of the Burgh Police Act of 1892. There is, in my opinion, no obligation on a prosecutor in the case of a common law offence to libel the Act or Acts of Parliament under which the Judge is authorised to pronounce any particular sentence. ^{Lord Ardwall.}

I am therefore of opinion that the Police Magistrate in the present case was competent to pronounce the sentence he did, and that the suspension ought to be refused.

LORD JUSTICE-CLERK.—I concur.

THE COURT refused the bill.

WALTER M. MURRAY, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

DAVID GOLD, Complainer.—*A. M. Anderson.*

No. 3.

GEORGE NEILSON (Police Court Procurator-Fiscal, Glasgow),
Respondent.—*Lord-Adv. Shaw—M. P. Fraser—A. Crawford.*

Nov. 7, 1907.

Procedure—Relevancy—Locus—Latitude—Reset.—In a summary complaint for reset of forty-four different articles the crime was libelled as having been committed at four different specified places in Glasgow, "or at one or other of said places, or elsewhere in Glasgow, the particular place or places being to the complainer unknown." *Held* that, this being a case of reset, the latitude taken as regards the *locus* was legitimate.

Gold v.
Neilson.

M'Intosh, 1831, Bell's Notes to Hume, p. 213, and *Wilkinson*, 1835, Bell's Notes to Hume, p. 213, followed.

Summary Procedure—Conviction—Reset—Charge of resetting different articles at different times and places—Conviction in general terms.—A person was charged on a summary complaint with resetting forty-four different articles during a period of three weeks at four specified places in Glasgow, "or at one or other of said places, or elsewhere in Glasgow." Objections to the relevancy were repelled, and the accused on evidence was found "guilty of the crime charged." *Held* that it was not necessary in the conviction to specify the particular articles which the accused was found guilty of resetting, or the particular times and places at which the articles had been reset.

Observed (per the Lord Justice-Clerk) that a conviction of "guilty as libelled" means guilty of all that is libelled or of a substantial part thereof, and that in the ordinary case where the crime is alleged to have been committed as regards a number of different articles, and there is doubt as to the guilt of the accused as to some of the articles libelled, it is not necessary to mention this in the conviction.

Summary Procedure—Record of Proceedings—List of witnesses—Misnomer of witness—Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. cap. 53), sec. 16.—In the record of proceedings on a summary complaint the name of the first witness was entered as "Joseph Milligan" instead of "Joseph Milliken," but Milliken's designation and address were correctly stated. *Held* that the misnomer was not a sufficient ground for suspending a conviction.

Nov. 7, 1907.

Gold v.
Neilson.

HIGH COURT.
Lord Justice-
Clerk.

LdStormonth-
Darling.
Lord Low.

DAVID GOLD, 74 Parson Street, Glasgow, was charged in the Police Court at Glasgow on a complaint, under the Glasgow Police Acts, the Summary Jurisdiction (Scotland) Acts, 1864 to 1881, and the Criminal Procedure (Scotland) Act, 1887, at the instance of the Procurator-fiscal of Court, which set forth that the accused "did, during the period between 19th July and 9th August 1907, in his licensed broker's shop at 75 Glebe Street, in his house at 74 Parson Street, in his store at 64 Parson Street, and in a close at 14 Albert Street, Townhead, all in Glasgow, or at one or other of said places, or elsewhere in Glasgow, the particular place or places being to the complainer unknown, on different occasions during said period, the particular occasions being to the complainer unknown, reset in all, ten rubber cycle tubes, eight free-wheel clutches, twenty-four cycle inflator connections, one cycle hub, and one horn, the particular articles resetted on each occasion being to the complainer unknown, the said articles having been dishonestly appropriated by theft from the shop of Joseph Milliken, at 6 George Street, Glasgow, by" two persons specified.

The accused objected to the relevancy of the complaint in respect of the width of latitude taken as regarded time and place. The Magistrate repelled the objection.

The accused pleaded not guilty, but after evidence had been led the Magistrate found him "guilty of the crime charged," and sentenced him to thirty days' imprisonment.

Gold brought a bill of suspension.

The complainer averred, *inter alia* :—(Art. 8) "Further, the record bears that one Joseph Milligan was examined as a witness. There was no such witness examined. Further, one Milliken was examined as a witness and his name is omitted from the record."

The complainer pleaded, *inter alia* ;—1. The said conviction and sentence ought to be suspended *simpliciter*, and the complainer set at liberty, in respect (1) that the complaint against him is irrelevant on the grounds stated in the objections thereto and as herein founded on . . . and (3) that the complainer, owing to the absence of specification in the pretended complaint brought against him was seriously prejudiced, and had no opportunity of instructing a proper defence so as to prove his innocence. 2. *Separatim*, the said conviction and sentence ought to be suspended in respect that it does not disclose the particular acts of which the Magistrate found the accused guilty, and that the Magistrate, in convicting the complainer of the crime as charged, should have specified the particular place or places, the articles and the dates, in respect of which the said conviction passed. 3. The said conviction and sentence should be set aside in respect that the names of the witnesses examined are not noted in the record of proceedings as required by statute.*

Answers were lodged for the Procurator-fiscal, in which he stated :—(Ans. 8) "Admitted that in the record of proceedings the name of the witness Joseph Milliken is spelt as Joseph Milligan. His designation otherwise is correct."

The case was heard on 7th November 1907.

* The record of proceedings in the Police Court on the complaint bore that the following witness, *inter alios*, was examined in support of the complaint, viz. :—"1. Joseph Milligan, Wholesale Cycle Dealer, 6 George Street, City, Glasgow."

The argument for the complainer sufficiently appears from his Nov. 7, 1907.
pleas in law, *supra*. Counsel referred to the Summary Procedure Gold v.
Act, 1864 (27 and 28 Vict. cap. 53), Sched. K, 1, and sec. 16. Neilson.

Counsel for the respondent were not called upon.

LORD JUSTICE-CLERK.—I have no doubt or difficulty in holding that this bill of suspension must be refused.

To take the last objection first:—One of the witnesses in the list of witnesses is slightly misnamed. The object of having the names of the witnesses recorded is that they may be ascertained. When a witness has been slightly misnamed in the list, but his address and designation are correct, there can be no difficulty in ascertaining the person who is meant. I have therefore no difficulty in holding that the conviction cannot be set aside upon that ground. It would be absurd to hold otherwise. The total omission of the name of a witness from the list is quite a different matter. But a slight mistake in the name of a witness is not material, provided the person is sufficiently identified.

The complainer also objects to there being no finding by the Magistrate specifying the particular places, times, and articles as to which he was found guilty. It is an entirely new idea to me that where alternatives as to time and place have been stated in a complaint, and these allegations as to time and place have been held relevant to be remitted to probation, it is necessary to have special findings in the conviction and sentence as to the particular times and places at and on which the crime has been committed. But it is said here that the prosecutor took too great a latitude. The place of the crime is stated as, *inter alia*, “or elsewhere in Glasgow to the prosecutor unknown.” I should like to say that prosecutors ought always to avail themselves of the simpler forms of stating place and time authorised by the statute, which makes a great deal that is often found in complaints like this—such as this statement of “elsewhere to the prosecutor unknown”—quite superfluous. But as regards the latitude here taken, such latitude has been long ago decided to be legitimate in cases of reset. There are two cases in Bell’s Notes which clearly shew this. In the first of these cases¹ the place libelled was “within your house in King Street, Leith, or in some other part within the town or in the vicinity of Leith to the prosecutor unknown.” In the second case² the place libelled was “some place in the county of Perth to the prosecutor unknown.” Such latitude is necessary in cases of reset. It is a continuing crime. The person accused may originally have got the goods honestly, but if he afterwards finds that he got them from a thief, the moment he knows this he is guilty of reset, unless he takes steps at once by informing the police to shew that he has no guilty intention with regard to the goods.

But it is said, further, that this is a general conviction of resetting a great number of different articles, and that the complainer has been put to a disadvantage because he did not know from the conviction which articles he has been found guilty of resetting. The Magistrate was not bound to make any such finding. He pronounced a verdict of guilty as libelled. Now,

¹ M’Intosh, Jan. 4, 1831, Bell’s Notes to Hume on Crimes, p. 213.

² Wilkinson, Sept. 30, 1835, Bell’s Notes to Hume on Crimes, p. 213.

Nov. 7, 1907. **Gold v. Neilson.**
 Lord Justice-Clerk. that means guilty of resetting all the articles or part thereof. It may some times be important to distinguish as to particular articles, for example where the charge is resetting one article of great value and also other articles of comparatively small value. In such cases it might be right to limit the verdict to particular articles, and the matter should be attended to at the trial. But in the ordinary case where there is a doubt regarding the guilt of the accused as to two or three of the articles libelled, there is no need to mention that in the conviction. A general conviction of guilty means guilty of all that is charged or of a substantial and material part thereof, and that is enough. I may add that reset is in many respects peculiar. For example, it is competent in a case of reset to prove previous convictions for the purpose of shewing guilty intention.

On the whole matter I think everything in this case was done regularly and properly, and that there is no ground for setting aside the conviction.

LORD STORMONTH-DARLING and LORD LOW concurred.

THE COURT refused the bill of suspension.

BRYSON & GRANT, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 4. DANIEL STEWART, Complainer.—*D. Anderson.*
 Dec. 4, 1907. THOMAS WILLIAM TODRICK (Procurator-Fiscal of Haddingtonshire),
 Respondent.—*Sol.-Gen. Ure—Orr, K.C., A.-D.—A. M. Anderson, A.-D.*
 Stewart v. Todrick. *Road—Road Authority—Motor-car—Road in Burgh maintained by County—Title to apply for Speed Limit—Motor-Car Act, 1903 (3 Edw. VII. cap. 36), secs. 9 and 18—Roads and Bridges (Scotland) Act, 1878 (41 and 42 Vict. cap. 51), sec. 47.—*The burgh of Dunbar, under sec. 47 of the Roads and Bridges (Scotland) Act, 1878, devolved the “management and maintenance” of a road within the burgh upon the County Council of Haddington. The County Council, as being the Road Authority, thereafter applied for and obtained a Regulation made by the Secretary for Scotland, under secs. 9 and 18 of the Motor-Car Act, 1903, restricting the speed of motor-cars on this road to ten miles an hour. The driver of a motor-car having been convicted of a contravention of the Regulation, brought a suspension pleading that the Regulation was *ultra vires*, in respect that the County Council were not the Local Authority entitled to apply for the Regulation.

The Court *refused* the suspension, *per* Lord M'Laren and Lord Pearson, on the ground that the Regulation was not *ultra vires*, and, *per* Lord Kinneir, on the ground that even if the Regulation was *ultra vires* the burgh of Dunbar was alone entitled to take the objection.

Statute—Statutory Order—Competency of challenging validity of order in Summary Proceeding—Motor-Car Act, 1903 (3 Edw. VII. cap. 36), secs. 9 and 18.—Question whether it was competent in a summary proceeding, such as a suspension, to challenge the validity of a regulation made by the Secretary for Scotland under sec. 18 (3) of the Motor-Car Act, 1903.

HIGH COURT. ON 8th July 1907 Daniel Stewart, motor-car driver, was charged
 Lord M'Laren. in the Sheriff Court at Haddington on a summary complaint at the
 Lord Kinneir. instance of Thomas William Todrick, Procurator-fiscal of Court of
 Lord Pearson. the county of Haddington, setting forth that “on 3d July 1907, on the public highway leading between East Linton and Dunbar, and particularly at a part thereof in the village of West Barns, in the parish of Dunbar, in the county of Haddington, near the Public Hall, West Barns, he being the driver of a motor-car then on said public

highway, did drive said car along said highway, place aforesaid, at Dec. 4, 1907. the rate of 17 miles per hour, being a speed exceeding 10 miles per hour, contrary to the Motor-Car Act, 1903, section 9, and the Motor-Cars Regulation (County of Haddington) (No. 2) Order, 1905, dated October 31st, 1905, regulating the speed of motor-cars within certain limits or places in the county of Haddington." *

Stewart v.
Todrick.

On 12th August 1907 the Sheriff-substitute (Macleod), after a proof, convicted the accused of the contravention charged, and imposed a fine of £5.

Stewart brought a bill of suspension of this conviction.

The following facts were admitted by the parties:—The road to which the Order applied, and on which the offence was committed, lay partly in the county of Haddington and partly in the burgh of Dunbar, the *medium filum* of the road constituting the boundary. The whole of the road, however, was managed and maintained by the County Council of Haddington, on whom the burgh of Dunbar had devolved the management and maintenance under and in terms of the Roads and Bridges (Scotland) Act, 1878, section 47,† the burgh of Dunbar being situated within the county of Haddington, and having a population of less than 10,000 inhabitants. The Order was obtained solely on the application of the County Council of Haddington, but no objections thereto were lodged or stated by the burgh of Dunbar.

* The Motor-Car Act, 1903 (3 Edw. VII. cap. 36), enacts:—Sec. 9. "(1) . . . A person shall not under any circumstances drive a motor-car on a public highway at a speed exceeding twenty miles per hour, and, within any limits or place referred to in regulations made by the Local Government Board with a view to the safety of the public on the application of the Local Authority of the area in which the limits or place are situate, a person shall not drive a motor-car at a speed exceeding ten miles per hour. . . ."

Sec. 18. "In the application of this Act to Scotland—(1) a reference to the Secretary for Scotland shall be substituted for a reference to the Local Government Board; (2) a reference to the council of a royal, parliamentary, or police burgh containing within its boundaries, as ascertained, fixed, or determined for police purposes, a population according to the census for the time being last taken of or exceeding 50,000, shall be substituted for a reference to the council of a county borough, and every other burgh shall be deemed to form part of the county within which it is situate; (3) the Road Authority of any county, or of any royal, parliamentary, or police burgh, shall be the Local Authority within the meaning of the provisions of this Act which relate to the rate of speed and the erection of danger boards. . . ."

The Motor-Cars Regulation (County of Haddington) (No. 2) Order, dated 31st October 1905, provides, *inter alia*, that a person shall not drive a motor-car at a speed exceeding ten miles an hour on the main road passing through the village of West Barns.

† The Roads and Bridges (Scotland) Act, 1878 (41 and 42 Vict. cap. 51), enacts:—

Sec. 47. "The highways and bridges situated within any burgh shall be by virtue of this Act transferred to and vested in the Local Authority of such burgh, and such Local Authority shall have the entire management and control of the same, and shall possess the same rights, powers, and privileges, and be subject to the same liabilities in reference to such highways and bridges (including the construction of new roads and bridges) as the trustees under this Act possess and are liable to in reference to roads, highways, and bridges (including as aforesaid) in the landward part of the

Dec. 4, 1907.

Stewart v.
Todrick.

The complainer pleaded;—(2) The said regulation of the County Council of Haddington is invalid and *ultra vires, et separatim* is invalid and *ultra vires quoad* the portion of said roadway not under their jurisdiction.

The respondent pleaded;—(2) The said Regulation Order of 31st October 1905 is lawful and valid in all respects, and, *separatim*, the complainer has no title to challenge its validity. (3) The said roadway is under the jurisdiction of the said County Council for the purposes of said Act. (4) The said conviction is well founded in fact, and is not open to review in this process; and the bill of suspension should be refused, with expenses.

Argued for the complainer;—The Order was invalid in respect that it was obtained at the instance of a party who, not being the “Road Authority” for the highway in question, had no title to apply for a regulation affecting it. The jurisdiction of the County Council of Haddington extended only over the portion of the road lying within the boundaries of the county, and did not extend over the portion situated within the burgh of Dunbar. The fact that the “management and maintenance” of the latter portion had been devolved upon the County Council did not constitute them the “Road Authority” within the meaning of the Motor-Car Act, 1903. The terms “management and maintenance” as used in section 47 of the Roads and Bridges Act, 1878, were to be construed strictly,¹ and did not include the right to control the traffic upon the road. The Order being invalid, the conviction obtained under it should be suspended.

Argued for the respondent;—The Road Authority, and the only possible Road Authority, over the whole of the highway to which the Order applied, was the County Council of Haddington. There was nothing which a Road Authority could do to the roads under its charge which was not expressed in the words “management and maintenance.” These terms included not merely the duty of upkeep, but also the right to take such measures for the control of traffic as were proper in the interests of the public, and generally—in the words of section 47—the whole “rights, powers, privileges, and liabilities” originally possessed by the burgh. This was also in accord-

county, including the right to any assets belonging thereto, and shall also have and may exercise with reference to the construction, maintenance, and repair of the roads, highways, and bridges within their respective boundaries, such and the like powers and authorities as they possess with reference to any streets within their respective boundaries: Provided that the Local Authority of any burgh not containing more than 10,000 inhabitants according to the census last taken may, by a resolution passed at a meeting summoned for the purpose, on not less than one month's notice, by special advertisement, devolve the management and maintenance of the highways and bridges within the boundaries or forming the boundary thereof upon the trustees of the county within which such burgh or any portion thereof is situated, on payment to such trustees of such an annual sum or upon such terms as may be agreed upon,” and in default of agreement, on the summary application of either party, by the Sheriff. “Provided also, that any such resolution of the Local Authority of a burgh may be rescinded, with the consent of, and on such terms as may be agreed upon with the County Road Trustees, and thereupon the original rights, powers, privileges, and liabilities of the said Local Authority shall revive in full force and effect.”

¹ Lanarkshire Road Trustees v. Kelvinside Estate Trustees, Nov. 12, 1886, 14 R. (H. L.) 18.

ance with the policy of the Motor-Car Act, 1903, which was¹ to treat small burghs as part of the county. But apart from the question of the extent of the County Council's authority, it was not competent—^{Stewart v. Todrick.} at anyrate in a summary proceeding such as the present—to challenge the validity of an Order made by a Department of Government under statutory authority, and *ex facie* valid.² Even assuming the competency of the objection, it was not one which could be taken by the complainer, for the only parties who could be heard to say that the Order had been applied for by the wrong persons were the parties who themselves might have had a title to apply, namely, the burgh of Dunbar, and they had taken no objection.

LORD M'LAREN.—We have had a very full and interesting argument upon the questions raised in this case, and especially concerning the validity of the Regulation Order made by the Secretary for Scotland under the authority of the Motor-Car Act, 1903. By section 9 of that Act it is provided that “within any limits or place referred to in regulations made by the Local Government Board with a view to the safety of the public on the application of the Local Authority of the area in which the limits or place are situate, a person shall not drive a motor-car at a speed exceeding ten miles per hour.” By section 18 it is provided that in the application of the Act to Scotland, “Secretary for Scotland” shall be substituted for “Local Government Board,” and that “the Road Authority of any county, or of any royal, parliamentary, or police burgh, shall be the Local Authority within the meaning of the provisions of this Act which relate to the rate of speed and the erection of danger boards.” Now, section 9 is a provision relating to rate of speed, and accordingly when, under that section, power is given to make regulations, the only authority entitled to apply to the Secretary for Scotland for such regulation is the Local Authority, that is, the Road Authority in the county or burgh as the case may be. But we are informed of a fact which does not appear in the bill of suspension but is disclosed in the answers, that, acting under the authority of the Roads and Bridges Act, 1878, and particularly under section 47, the burgh of Dunbar has, in the words of the statute, “devolved” upon the County Council of Haddington the “management and maintenance” of the road in question “forming the boundary” of the burgh. I assume for the purposes of this case that all the requirements of procedure as to devolution were carried out. There is a general presumption that all public acts have been carried out in conformity with law, and I assume that it is so in this case. This devolution having taken place, can it be doubted that, so long as it continued, the whole administration of this road passed to the County Council of Haddington? It is quite certain that the burgh of Dunbar no longer possesses the power of administration, and cannot in any reasonable sense be considered the Road Authority. Unless the County Council is the Road Authority, we are shut up to this paradoxical result, that there is no Road Authority

¹ Cf. secs. 9 (4), (b), and (c).

² Crichton v. Forfar County Road Trustees, July 20, 1886, 13 R. (J.) 99, per Lord M'Laren, at p. 101, 1 White, 213; Institute of Patent Agents v. Lockwood, June 11, 1894, 21 R. (H. L.) 61.

Dec. 4, 1907. **Stewart v. Todrick.**
 Lord M'Laren. having control of the road in question. I think there can be no doubt that the effect of the devolution was to make the County Council the Road Authority, not only for the purposes of the Roads and Bridges Act, but also for the purposes of the Motor-Car Act. I am confirmed in this opinion by the terms of the proviso to section 47 of the Roads and Bridges Act, which enacts that "any such resolution of the Local Authority of a burgh may be rescinded, with the consent of, and on such terms as may be agreed upon with the County Road Trustees, and thereupon the original rights, powers, privileges, and liabilities of the said Local Authority shall revive in full force and effect." It would be difficult in any view to say what would be left, after the "management and maintenance" had been devolved, except a naked right of property, but I read the proviso as putting a wide interpretation upon the terms "management and maintenance," and as making it clear that under these words are included all the "rights, powers, privileges, and liabilities" originally possessed by the burgh.

If such be the construction of the two Acts with which we are concerned, then the Order made by the Secretary for Scotland is in conformity with the statute, and must be obeyed. But I reserve my opinion on the question whether an Order made by a Department of Government in the exercise of authority conferred by Parliament, can be challenged as being *ultra vires* in a summary proceeding for the recovery of penalties. It is not to be supposed that an Order going beyond the powers conferred by Parliament has authority in an absolute sense, but it may well be that it is to be treated as a good Order until it is disaffirmed by a Court having jurisdiction to determine its validity. I see great inconvenience in admitting that, whenever a defender is brought before a Court of summary jurisdiction, he is entitled to raise the question of the validity of the Order which he is said to have transgressed. In this case the Judge having jurisdiction is the Sheriff, but offences against Orders such as the one in question are not infrequently tried in a Court where the Judge is not a trained lawyer, and I should not like to commit myself to the proposition that such a Judge has authority to absolve the accused on the ground that the Order is *ultra vires*. For the present I only say that I am not satisfied that this Court of Appeal would have power to determine a legal question which could not be raised in the Court of first instance.

I am of opinion that the bill of suspension should be refused and the conviction sustained.

LORD KINNEAR.—I agree in desiring to express no view upon the question last mentioned by your Lordship, but I am clearly of opinion that the suspension should be refused.

On 31st October 1905 the Secretary for Scotland pronounced an Order upon the application of the County Council of Haddington forbidding any person to drive a motor-car at a speed exceeding 10 miles per hour within certain specified limits, and on 12th August 1907 the complainer was convicted of an infringement of this Order. It is admitted that the complainer had no right to challenge this conviction upon the merits, since there is no appeal upon the question of fact. But he objects to it upon the ground that the Order which he transgressed was *ultra vires*, because the statute allows the Secretary for Scotland to make such an Order on the application

only of the Local Authority of the county or burgh where the road is situated. It appears that for a certain not very considerable distance the road to which the Order applies is situated upon the boundary between the county of Haddington and the burgh of Dunbar, the true boundary being the *medium filum* of the road, and it is said that the Secretary for Scotland had no power, on the application of the county of Haddington, to issue an Order affecting the portion of the road lying within the boundaries of the burgh of Dunbar, seeing that the County Council had no authority over this portion of the road. I do not think it necessary to consider whether, even if they had no other authority than that which extended to the *medium filum*, that would not have been enough to support the application on a sound construction of the Act of 1903, and to enable them to consider the question of the speed at which motor-cars could be driven on their own half of the road. I do not think that question arises. It is quite obvious that the management of such a road as this would be impossible if the two Local Authorities had not the good sense to provide by agreement for a uniform administration of the whole, and accordingly, in terms of the 47th section of the Roads and Bridges Act, 1878, these two Local Authorities had come to an arrangement by which the burgh of Dunbar "devolved" upon the County Council of Haddington the "management and maintenance" of the road. It is argued that all that was handed over was the "management and maintenance," the burgh retaining certain other rights and privileges comprehended under the term "control." I do not consider it necessary to decide what were the exact powers which were devolved upon the County Council, for I think it enough to say that when they took over the "management and maintenance" they became for certain purposes the Road Authority—and the only Road Authority—not only over their own half of the road, but also over the half which lies within the boundaries of the burgh, and by sec. 18 of the Act of 1903 the Road Authority is declared to be the Local Authority within the meaning of sec. 9. If the burgh of Dunbar had any right to maintain that the title to apply for an Order regulating the speed of motor-cars was one of the rights retained by them—and I express no opinion as to that—I am clearly of opinion that no one else has the right to maintain it. The whole procedure had the assent of the burgh, at least they stated no objections to it, and I do not think that the accused has a title to raise such a technical objection as this, when all the persons who could claim to be the Road Authorities are agreed on what has been done.

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I accordingly agree that the suspension should be refused.

LORD PEARSON.—I am of the same opinion. I have nothing to add as to the circumstances in which, and the pleas upon which, a statutory Order such as this can be challenged. On the merits we must bear in mind the peculiar circumstances found here, viz., a road forming the boundary between the burgh of Dunbar and the county, where the duty of management and control fell on each authority respectively up to the *medium filum* of the road. That was a case calling for some regulation by agreement between the two parties, and accordingly the burgh here has devolved the management of the road in question on the County Council. In consequence of

Dec. 4, 1907. this agreement the County Council became the Road Authority as regards the management of the road, and as such was the proper party to apply for the Order in question.

Stewart v Todrick.

THE COURT refused the bill, and sustained the conviction.

A. C. D. VERT, S.S.C.—CROWN AGENT—Agents.

No. 5.

ANDREW PATERSON GREIG, Appellant.—*Munro—Welsh*.

JOHN MACLEOD, Respondent.—*R. S. Horne*.

Dec. 4, 1907.

Greig v. Macleod.

Public-House — Public-House Offences — Sale of Exciseable Liquors to children—Responsibility of Publican for assistant—Licensing (Scotland) Act, 1903 (3 Edw. VII. cap. 25), sec. 59.—Under section 59 of the Licensing (Scotland) Act, 1903, every holder of a certificate who knowingly sells or delivers, or allows any person to sell or deliver, exciseable liquors to any person under fourteen years of age, except in corked or sealed vessels in quantities not less than one pint, is guilty of an offence.

Exciseable liquors in quantities less than one pint were sold in open vessels to a girl of eleven years of age by a publican's assistant, who had means of knowing the age of the child. The sale took place outwith the publican's presence and actual personal knowledge, but no sufficient instructions had been given by him to his assistant not to supply children under fourteen years of age with exciseable liquors except as provided by the statute.

Held that the publican had been rightly convicted of a contravention of the Act.

HIGH COURT.
Lord M'Laren.
Lord Kinnear.
Lord Pearson.

ON 10th July 1907 Andrew Paterson Greig, residing in Moat Place, Edinburgh, and holding a certificate for a public-house at Nos. 23 and 24 Bridge Street, Leith, was charged in the Leith Police Court, at the instance of John Macleod, Burgh Prosecutor, with contravening section 59 of the Licensing (Scotland) Act, 1903. The charge was that "on the 29th June last, within the licensed premises occupied by him at 23 and 24 Bridge Street, Leith, he did knowingly allow David Inglis, an assistant in said premises, to sell and deliver exciseable liquor, namely, a half-pint of ale and a half-pint of porter, to Beatrice Nicholson, an orphan, residing with John Furlong, a labourer, residing in Carpenter's Land, Coburg Street, Leith, who was then eleven years and two months, and under fourteen years of age, for consumption off the said premises, such exciseable liquor not being sold and delivered to the said Beatrice Nicholson in corked and sealed vessels in quantities not less than one reputed pint for consumption off said premises only." *

The accused pleaded not guilty, but was convicted after a proof, and fined 20s.

He obtained a case in which the Magistrate set forth:—"The following facts were held by me to be proved, viz.—On the evening of Saturday, 29th June, between 9 and 10 o'clock, the said Beatrice Nicholson entered the appellant's licensed premises mentioned in the

* The Licensing (Scotland) Act, 1903 (3 Edw. VII. cap. 25), enacts:—Sec. 59 (1). "Every holder of a certificate who knowingly sells or delivers, or allows any person to sell or deliver, save at the residence or working place of the purchaser, any description of exciseable liquor to any person under the age of fourteen years, for consumption by any person on or off the premises, excepting such exciseable liquors as are sold or delivered in corked and sealed vessels in quantities not less than one reputed pint for consumption off the premises only, shall be liable to a penalty . . ."

complaint by the jug bar. The jug bar is entered from the street by a separate door from that by which the public bar is entered. The public bar and the jug bar are divided outside the bar by a screen which is carried the breadth of the counter, and both are supplied from behind the counter. Beatrice Nicholson ordered half a pint of ale and half a pint of porter from David Inglis, an assistant in the appellant's shop. The said David Inglis has been in the appellant's employment as assistant since he purchased the business seven years ago. The said David Inglis supplied the said Beatrice Nicholson with the liquor ordered, as libelled. The appellant was not at the time either in the public or jug bar, but was engaged in a room in another part of the shop, and Beatrice Nicholson was supplied by the said David Inglis outwith the appellant's presence and actual personal knowledge. The said Beatrice Nicholson had left the appellant's shop without his having seen her, and he only saw her when she was brought back to the shop by the police, who noticed her leaving the shop with the beer and porter in open pitchers, and immediately took her back to the shop to ascertain whether she had been supplied there, and by whom she had been served.

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"The said Beatrice Nicholson was eleven years and two months of age, and her appearance in the witness-box shewed that she was diminutive and youthful looking even for a girl of that age. She had previously frequented the shop with her mother. Her family was well known to the said David Inglis, who had a conversation with the mother about the girl's age, the mother stating that the girl was a twin and diminutive for her age. Inglis must or ought to have known that the girl was under fourteen years of age.

"No notice was displayed in the appellant's shop warning assistants to be careful to observe the provisions of the said section of the Act alleged to be contravened, and it was clear to me that sufficient instructions, verbal or written, had not been given to the said David Inglis not to supply children under fourteen years of age with excisable liquor, except as provided in said section.

"On the facts proved I found the appellant guilty as charged, fined him in the sum of 20s., and in default of immediate payment sentenced him to seven days' imprisonment."

The question of law for the opinion of the Court was—"Do the facts proved warrant a conviction?"

Argued for the appellant;—No offence was committed unless the sale took place with the knowledge of the holder of the certificate. Knowledge meant either actual personal knowledge or connivance, and in this case it was expressly found that the sale took place outwith the knowledge or presence of the appellant. Failure to give instructions could not be considered "knowledge," and even if it were, there was sufficient evidence that the appellant had done all that was required of him. Section 59 of the Licensing Act, 1903, was in the same terms as section 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, under which it had been held that a licence-holder, whose assistant sold liquors to children contrary to the Act, outwith the personal knowledge of the licence-holder, was not guilty of an offence.¹

¹ Emary v. Nolloth, L. R., [1903] 2 K. B. 264; Conlon v. Muldowney, I. R., [1904] 2 K. B. 498; M'Kenna v. Harding, March 24, 1905, 69 J. P. Cases, 354.

Dec. 4, 1907.

Counsel for the respondent was not called upon.

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LORD M'LAREN.—In this case the question is, what constitutes an offence against the Licensing (Scotland) Act, 1903, section 59. That section imposes a penalty on "every holder of a certificate who knowingly sells or delivers, or allows any person to sell or deliver, save at the residence or working place of the purchaser, any description of exciseable liquor to any person under the age of fourteen years, for consumption by any person on or off the premises, excepting such exciseable liquors as are sold or delivered in corked and sealed vessels."

In the present case the facts as found proved by the Magistrate make it clear that such liquor was supplied, in an open vessel, to a girl of eleven years of age, whose appearance was suggestive that she was even younger, and that no notice or instructions had been given to the assistant, David Inglis, not to supply children under fourteen years of age in such a manner. The question is therefore, the liquor having been sold in these circumstances, by an assistant, has an offence been committed? In the case of *Emery v. Nolloth*,¹ we have the authority of Lord Alverstone for this construction of the provisions of the section, that if a person in the position of the appellant delegates the conduct of his business to another, he is responsible for the acts of the person to whom he has given the institorial power as if he had made the sale himself. Now, I think it is not an illegitimate extension of the rule thus laid down if I say that every licensee who delegates the conduct of a part of his business is at least responsible to the extent that he must give instructions to his assistant as to compliance with Acts of Parliament which regulate the spirit trade.

The Magistrate here has given the facts very clearly, and we must take his findings as conclusive on the facts. He says—"It was clear to me that sufficient instructions, verbal or written, had not been given to David Inglis not to supply children under fourteen years of age with exciseable liquor, except as provided in the section." In the absence of any such instructions I think it is consistent with a sound construction of the statute to hold that if the appellant does not instruct his assistant to give obedience to the requirements of the statute, he must be taken as assenting to what is done under his authority, and that in this case he has contravened section 59 of the Act. I am therefore of opinion that the argument for the appellant fails, and that this appeal falls to be dismissed.

LORD KINNEAR.—I agree with your Lordship. I only desire to add that the question which the case purports to raise is one of fact, and I see no ground in law for disturbing the Magistrate's finding on the facts.

LORD PEARSON.—I am of the same opinion.

THE COURT answered the question in the case in the affirmative, and dismissed the appeal.

GARDEN & ROBERTSON, S.S.C.—R. H. MILLER, S.S.C.—Agents.

¹ L. R., [1903] 2 K. B. 264.

ROBERTSON BARCLAY GORDON (Procurator-Fiscal of Elginshire),
Appellant.—*Sol.-Gen. Ure—A. M. Anderson, A.-D.—John Harvey.*
JOHN SHAW, Respondent.—*Macmillan.*

No. 6.

Jan. 17, 1908.

Statutory Offence—Fishing—Sea Fishing—Trawling within Prohibited Area—Seaman—Offence committed by member of crew acting under orders—Proof—Onus—Duty of Prosecutor to prove guilty knowledge—Herring Fishery (Scotland) Act, 1889 (52 and 53 Vict. cap. 23), sec. 7 (1)—Sea Fisheries Regulation (Scotland) Act, 1895 (58 and 59 Vict. cap. 42), sec. 10 (4), (5)—Bye-laws Nos. 10 and 14 of Fishery Board for Scotland.—Bye-law No. 10 of the Fishery Board for Scotland enacts that within a certain area “no person” shall use an otter-trawl for taking sea fish. Gordon v. Shaw.

In a complaint against a seaman charging a contravention of this bye-law, it was proved that the vessel on which the accused was employed had been engaged in trawling within the prohibited area; that the accused occupied a subordinate position on the vessel, and acted under the orders of his superior officers. It was not proved by the prosecutor that the accused knew, or must have known, that the vessel was within prohibited waters on the occasion libelled, and no evidence was led for the defence.

The Sheriff-substitute found the charge not proven.

In an appeal by stated case *held* (1) that it was no defence to the charge that the accused occupied a subordinate position on the vessel and acted under the orders of his superior officers; (2) that the prosecutor, having established the facts specified in the statute as constituting the offence, was not bound to prove further that the accused knew the position of the vessel when the offence was committed; and appeal *sustained*.

Question whether it would have been a sufficient defence for the accused to prove that he did not know that the trawling was within the prohibited area.

Question whether in the case of statutory offences, if the word “knowingly” is not used, ignorance can ever be a defence.

The King v. Marsh, 1824, 2 B. & C. 717, *commented on*.

JOHN SHAW, residing at 122 Orwell Street, Grimsby, was charged in the Sheriff Court at Elgin on a summary complaint, dated 22d May 1907, at the instance of Robertson Barclay Gordon, Procurator-fiscal of the Court. The complaint set forth that the accused “has been guilty of a contravention of the Sea Fisheries Acts and the Herring Fishery (Scotland) Acts,* in so far as on 23d March 1907, at

HIGH COURT.
Lord M'Laren.
Lord Kinneir.
Lord Pearson.

* The Herring Fishery (Scotland) Act, 1889 (52 and 53 Vict. cap. 23), sec. 7 (1), enacts:—

“The Fishery Board may, by bye-law or bye-laws, direct that the methods of fishing known as beam-trawling and otter-trawling shall not be used within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire, in any area or areas to be defined in such bye-law, and may from time to time make, alter, and revoke bye-laws for the purposes of this section, but no such bye-law shall be of any validity until it has been confirmed by the Secretary for Scotland.”

Bye-law No. 10, dated 27th September 1892, made by the Fishery Board for Scotland, under the powers conferred on the Board by the Sea Fisheries (Scotland) Amendment Act, 1885, the Herring Fishery (Scotland) Act, 1889, and the Herring Fishery (Scotland) Act Amendment Act, 1890, provides:—

“II. Whereas by the Act 52 and 53 Vict. cap. 23, being the aforesaid Herring Fishery (Scotland) Act, 1889, it is enacted that the Fishery Board for Scotland may by bye-law or bye-laws direct that the method of fishing known as beam-trawling or otter-trawling shall not be used within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeen-

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a part of the Moray Firth thirteen and one-third miles or thereby south-east by south a half south from Port Gower, Sutherlandshire and within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire, he being at the time a deck hand on board of the steam-trawler 'Zenobia,' S.R. 11, of Stavanger, Norway, and not in the service or possessing the written authority of the Fishery Board for Scotland, did use or assist in using an otter-trawl for taking sea fish, contrary to bye-law number ten, made by the Fishery Board for Scotland, under the powers conferred on the said Board by the Sea Fisheries (Scotland) Amendment Act, 1885, the Herring Fishery (Scotland) Act, 1889 (particularly section 7 (1) thereof), and the Herring Fishery (Scotland) Act Amendment Act, 1890, dated said bye-law at Edinburgh on 27th September 1892, confirmed by Her late Majesty's Secretary for Scotland on 22d November 1892, and published in the *Edinburgh Gazette* on 25th November 1892, as amended by bye-law number fourteen, made by the said Fishery Board for Scotland, under the powers conferred on the said Board by the Herring Fishery (Scotland) Act, 1889, section 7 (1), dated said bye-law at Edinburgh on 17th April 1896, confirmed by Her late Majesty's Secretary for Scotland on 6th August 1896, and published in the *Edinburgh Gazette* on 18th August 1896, a copy of which bye-laws certified by the Secretary of the said Fishery Board for Scotland is produced herewith: whereby the said John Shaw is on conviction liable, in terms of the Sea Fisheries Regulation (Scotland) Act, 1895, section 10 (particularly subsections 4 and 5), to a fine not exceeding One hundred pounds, and failing immediate payment of the fine, to imprisonment for a period not exceeding sixty days."

shire, in any area or areas to be defined 'in such bye-law,' it is hereby declared that the foregoing provision shall apply to the whole of the area above specified.

"III. Within the aforesaid area, as above defined, no person, unless in the service or possessing the written authority of the said Fishery Board for Scotland, under the hand of the Secretary thereof, shall at any time from the date when this bye-law shall come into force use any beam-trawl or otter-trawl for taking sea fish. . . ."

This bye-law was confirmed by the Secretary for Scotland on 22d November 1892, and was amended as to the penalties therein provided by Bye-law No. 14, dated 17th April 1896, made by the Fishery Board.

The Sea Fisheries Regulation (Scotland) Act, 1895 (58 and 59 Vict. cap. 42), sec. 10, enacts:—

"(4) Any person who uses any such method of fishing in contravention of any such bye-law shall be liable on conviction, under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding one hundred pounds, and failing immediate payment of the fine, to imprisonment for a period not exceeding sixty days, without prejudice to diligence by poinding or arrestment, if no imprisonment has followed on the conviction; and every net set, or attempted to be set, in contravention of any such bye-law, may be seized and destroyed or otherwise disposed of by any superintendent of the herring fishery or other officers employed in the execution of the Herring Fishery (Scotland) Acts. Provided always that, if no conviction shall follow, any net so seized shall be forthwith returned, and due compensation made for any loss or damage occasioned thereto by such seizure.

"(5) Subsection two of section seven of the Herring Fishery (Scotland) Act, 1889, is hereby repealed, and the provisions of the foregoing subsection shall be and are hereby substituted therefor."

The accused did not appear. Evidence was led for the prosecutor. Jan. 17, 1908.

The Sheriff-substitute (Webster) found the charge not proven, and
assoilzied the accused. Gordon v.
Shaw.

The prosecutor obtained a case for appeal.

The stated case, after narrating the complaint, set forth as follows :
—“It was proved that the said steam-trawler ‘Zenobia’ was on the date libelled engaged in trawling with an otter-trawl for taking sea fish at the place mentioned in the complaint. It was further proved that the respondent was on that occasion not in a position of authority for the purpose of directing the navigation, management, or fishing operations of the ‘Zenobia.’ It was also proved that he did not direct, nor did he assist in directing, such navigation, management, or fishing operations. It was further proved that he occupied a subordinate position as a member of the crew of the ‘Zenobia,’ and as such member of the crew, acting under orders of his superior officers, he assisted in the trawling operation proved. It was not proved that he knew or must of necessity have known of the position of the said vessel on the occasion specified. The charge against the respondent was found not proven.”

The question of law for the opinion of the Court was :—“Whether, on finding the facts stated proved, the Sheriff-substitute was justified in finding the charge against the respondent not proven ?”

Argued for the appellant ;—The complaint was admittedly relevant, and the prosecutor had proved all the facts constituting the offence libelled ; this being so, the Sheriff had no option but to convict, and had erred in finding the charge not proven. He had done so on apparently two grounds—(1) because the accused was in a subordinate position ; and (2) because it had not been proved that the accused knew the position of the vessel. As to the first point, the plea of subjection was no defence, unless it could be shewn that the accused had acted under compulsion, and the facts as stated fell far short of this. This was the common law rule both in Scotland¹ and in England.² It was also in accordance with the terms of the Sea Fisheries Acts, for although under the earlier statutes and bye-laws made by the Fishery Board the penalty was confined to the master,³ the later enactments, including those under which the present complaint was brought, provided that *any person* could be convicted and punished for the offence.⁴ A similar distinction between offences for which the master alone could be punished and for which any

¹ H. M. Advocate v. Boyd, Jan. 7, 1842, 1 Broun, 7; H. M. Advocate v. Henderson, June 13, 1842, 1 Broun, 360; H. M. Advocate v. Woods, Feb. 25, 1839, 2 Swin. 323; Hume on Crimes (3d ed.), i. 47, 50, 53; Bell's Notes to Hume, pp. 7, 8; Alison's Criminal Law, i. 672; Fraser, Master and Servant (3d ed.), p. 305.

² Russell on Crimes (6th ed.), i. 146.

³ Sea Fisheries Act, 1868 (31 and 32 Vict. cap. 45), sec. 63; Sea Fisheries Act, 1883 (46 and 47 Vict. cap. 22), sec. 20 (1); Bye-law No. 1, dated 1st Feb. 1886; Bye-law No. 2, dated 18th April 1887; Bye-law No. 3, dated 25th April 1887.

⁴ Sea Fisheries (Scotland) Amendment Act, 1885 (48 and 49 Vict. cap. 70), sec. 4; Herring Fishery (Scotland) Act, 1889 (52 and 53 Vict. cap. 23), sec. 6, 7; Herring Fishery (Scotland) Act Amendment Act, 1890 (53 and 54 Vict. cap. 10), sec. 3; Sea Fisheries Regulation (Scotland) Act, 1895 (58 and 59 Vict. cap. 42), sec. 10 (4), (5); Bye-law No. 8, dated 19th July 1890; Bye-law No. 10, dated 27th Sept. 1892.

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person was liable was taken in the analogous offence of smuggling.¹ As to the plea that there was no proof that the accused knew the position of the vessel, two answers could be given. In the first place ignorance was no defence to the charge,² though it might be a good plea in mitigation of the penalty. Ignorance could only be a defence when the statute provided that the offence must be committed "knowingly," which was not the case in the present instance. In the second place, even if ignorance were a good defence, it was for the accused to prove it, and this he had failed to do. The *onus* was not on the prosecutor to prove guilty knowledge. He had established the facts which constituted the offence as defined by statute, and it was for the accused to displace the presumption of guilt which thereupon arose³ by proving excusable ignorance. Bye-law No. 10 had already been before the Court in *Wilson v. Rust*⁴ and *Mortensen v. Peters*.⁵

Argued for the respondent ;—The Sheriff had found that the accused was acting under orders, and this was tantamount to saying that he acted under compulsion. The position of a seaman on board a vessel was very different from that of an ordinary servant.⁶ On the question of knowledge, the Sheriff was entitled to take into consideration all the circumstances—such as the distance of the vessel from land, and the improbability of an ordinary seaman being able to know the position of the vessel at any moment—and from these to infer that the accused was excusably ignorant that an offence was being committed. The English cases relied on by the appellant in support of the proposition that ignorance was no defence were not applicable. In *The King v. Marsh*,⁷ the judgments shewed that ignorance would have been considered a good defence if it had been proved. *The Queen v. Prince*⁸ was a case of *malum in se*, not *malum prohibitum*. *The Queen v. Bishop*⁹ dealt with an offence against the Lunacy Acts, and was decided on the view that none could have been ignorant that the persons concerned were lunatics. The offence here libelled was "using or assisting to use," and there was no proof of unity of purpose between the accused and the master, who was the person primarily responsible. It was for the appellant to shew that on the facts found the Sheriff was bound to convict, and was not entitled to infer innocence, and this the appellant had failed to establish.

At advising on January 17, 1908,—

LORD M'LAREN.—This is an appeal on a stated case from a judgment of the Sheriff-substitute at Elgin in a complaint under the Fisheries Acts, charging the defender with a contravention of a bye-law of the Fishery

¹ Customs Consolidation Act, 1876 (39 and 40 Vict. cap. 36), secs. 172, 179; Customs and Inland Revenue Act, 1881 (44 and 45 Vict. cap. 12), sec. 12.

² *The King v. Marsh*, 1824, 2 B. & C. 717; *The Queen v. Prince*, 1875, L. R., 2 C. C. R. 154; *The Queen v. Bishop*, 1880, L. R., 5 Q. B. D. 259.

³ Macdonald on Crimes, p. 1.

⁴ Feb. 29, 1896, 23 R. (J.) 56, 2 Adam, 114.

⁵ July 19, 1906, 8 F. (J.) 93, 5 Adam, 121.

⁶ *Rothwell v. Hutchison*, Jan. 21, 1886, 13 R. 463, *per* Lord President Inglis, at p. 464.

⁷ 2 B. & C. 717.

⁸ 2 C. C. R. 154.

⁹ 5 Q. B. D. 259.

Board for Scotland duly made and confirmed, whereby the defender is on Jan. 17, 1908. conviction liable, in terms of the Sea Fisheries Regulation (Scotland) Act, Gordon v. 1895, sec. 10, to a fine not exceeding one hundred pounds, or imprisonment Shaw. for a period not exceeding sixty days.

Lord M'Laren.

The Sheriff-substitute found the case against the defender not proven, and the Procurator-fiscal has appealed from this sentence to the Court.

The facts are very clearly and succinctly stated in the case, and all the facts found being essential, it is only necessary that I should read the paragraph in which these are set out—"It was proved that the said steam-trawler 'Zenobia' was on the date libelled engaged in trawling with an otter-trawl for taking sea fish at the place mentioned in the complaint. It was further proved that the respondent was on that occasion not in a position of authority for the purpose of directing the navigation, management, or fishing operations of the 'Zenobia.' It was also proved that he did not direct, nor did he assist in directing, such navigation, management, or fishing operations. It was further proved that he occupied a subordinate position as a member of the crew of the 'Zenobia,' and as such member of the crew, acting under orders of his superior officers, he assisted in the trawling operation proved. It was not proved that he knew or must of necessity have known of the position of the said vessel on the occasion specified."

It was not seriously disputed that a seaman, or fisherman serving as a seaman on board a fishing vessel, would be liable to conviction if he were proved to have assisted in the operation of trawling within a prohibited area, knowing that the vessel was within the locality in which trawling was illegal.

But on behalf of the defender and respondent it was contended that such knowledge could not be imputed to an ordinary seaman, who has not the means of determining the ship's position at sea, and who would not in the ordinary conduct of the business of navigating the ship be informed by the master as to the ship's position. As a matter of impression I think it is very likely that an ordinary seaman, when out of sight of land, would not know the exact position of the ship, and in this case it is found not proved that he knew, or must of necessity have known, what was the ship's position.

On the other hand, the respondent, although entitled to be a witness in his own case, did not come forward to excuse himself by professing ignorance of the ship's position.

While, in the case of a charge of crime under the common law, guilty knowledge or guilty intention is of the essence of the crime, yet there are many cases where such knowledge or intent is presumed from the facts in the absence of a special defence.

In the case of a breach of a statutory regulation, it is not a universal rule that intention to contravene the statute must be established. That may depend on the policy of the statute, and also on the language of the statute. If the enactment is in form an absolute prohibition against doing a certain thing, it seems to me that in general the prosecutor may be held to have established his case if he proves the commission of the prohibited act by the person accused, unless the accused is able to satisfy the Court that in the special circumstances of the case he is excusable.

In this case there are four statutes dealing with contravention of trawling

Jan. 17, 1908. regulations ; but it is only necessary to refer particularly to the latest of these, the Sea Fisheries Regulation Act, 1895, sec. 10, subsec. (4), being the Act which prescribes the penalties for infringement of these regulations. Now, the enactment begins with the words, "Any person who uses any such method of fishing in contravention of any such bye-law shall be liable on conviction" to the fine or period of imprisonment there prescribed. This is in the nature of a universal prohibition, and there is not a suggestion in the words of the statute that knowledge of the locality is necessary to constitute the offence. If it were necessary to a conviction that the prosecutor should prove knowledge on the part of the contravener that he was fishing in prohibited waters, it would be very difficult to get a conviction against anyone, and I cannot see that there is any hardship in the case, because it is the duty of those who engage in the fishing industry to inform themselves, and to take care that they do not fish where they are not entitled to fish. In the case of the master of a trawling vessel this is clear enough, and it may be that the ends of justice would be satisfied if the penalty were only enforceable against the master.

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Shaw.

Lord M'Laren.

But evidently that was not the opinion of the Legislature, because the penalty for contravention is directed against all persons who shall use such method of fishing in contravention of a bye-law of the Fishery Board. I am accordingly of opinion that the respondent was not entitled to a judgment of not proven on the facts stated. I need hardly add that where a person in the position of the respondent comes forward, and is able to satisfy the Sheriff that he was excusably ignorant of the position of the fishing vessel, or that he acted under compulsion, and after protest, his case will always receive indulgent consideration ; but if he says nothing, and fishing within the prohibited area is proved against him, I think that the Judge or magistrate has no discretion, and that a conviction must necessarily follow.

LORD KINNEAR.—I come to the same conclusion. The question put to us in this special case is not very happily stated, because it appears on the face of it to be a question of fact, but when it is read in connection with the statement of facts given by the learned Sheriff, there is no real difficulty in ascertaining what is the point of law which it is intended to submit for our decision. I do not read over again the statement of facts which Lord M'Laren has already read, but I observe upon it that it is clear that the Sheriff held it to be proved that the respondent had done the very thing which is described by the words of the statute as constituting an offence to be punished. He used an otter-trawl for taking sea fish within the prohibited area. But the learned Sheriff follows his recital of what was proved by saying that it was not proved that the respondent knew or must of necessity have known of the position of the said vessel on the occasion specified, and then he asks as matter of law whether, on finding the facts stated to be proved, the Sheriff-substitute was justified in finding the charge not proven. Now, if on the evidence adduced before him the learned Sheriff had said that he had found as matter of fact that the charge was not proved, this Court could not have reviewed his judgment. But I think he makes it quite clear that the judgment he pronounced was not a mere verdict on matter of fact—because he considered this question to be a

question of law—and that he proceeded upon a rule of law which he supposed to be binding on him, and in respect of that rule of law he held that the offence was not proved. The question is, what is disclosed in the case as the rule of law which the learned Sheriff accepted? In the statement of the facts there are no considerations tending to establish any defence except the finding that the respondent was not in a position of authority for the purpose of directing navigation or the management of the fishing operations of the ship, and that it was proved that he did not in fact direct or assist in directing the said navigation or management of fishing operations. It is not, I think, suggested, and I do not think the learned Sheriff intended to decide, that the mere fact of the respondent being a deck hand, and not a master mariner, exempted him from the operation of the clause, and that could hardly have been maintained, because, as Lord M'Laren has pointed out, the statute or bye-law which has statutory effect provides that every person, without any exception whatever, who is found doing a certain act shall be guilty of an offence. But when you take these findings in combination with what the Sheriff said was not proved, viz., that the man knew or must of necessity have known the position of the vessel, I think the question of law which is meant to be raised becomes clear enough. The direction which I think the learned Sheriff must have given to himself is that as matter of law it is not enough for the prosecutor to prove the acts which constitute the offence unless he goes on in the absence of evidence for the alleged offender to prove by affirmative evidence that the accused knew in fact that he was doing the thing prohibited, that is, that he knew in fact that he was within the protected area.

The appellant's counsel maintained that this was wrong upon two distinct grounds. In the first place, it was maintained by the learned Solicitor-General that, inasmuch as the enactment prohibits a certain thing being done without using the word "knowingly" or any equivalent word, it is not necessary that knowledge should be proved, because the offence is committed when the act is done, however ignorant the alleged offender may be of the act which constitutes the offence, or however innocent of any unlawful intention; and that is based upon what is said to be a general rule that, in the construction of statutes and statutory offences, if the word "knowingly" is not used, evidence of ignorance affords no defence. I do not think it necessary for the purpose of this decision to express any definite opinion upon that question, and therefore I shall only say that, as at present advised, I cannot myself assent to it. It was supported by no authority from our own books. The English cases upon which the learned Solicitor-General relied, with the exception of one, namely, *The King v. Marsh*,¹ to which I shall afterwards refer, appear to me altogether inapplicable, because they were constructions of particular statutes passed for a different purpose, and expressed in very different terms from that which we are considering.

But I do not think it necessary to say more as to the existence in our law of any general absolute rule of the kind stated by the Solicitor-General, because I think the second point taken by the appellant is

¹ 1824, 2 Barn. and Crea. 717.

Jan. 17, 1908. well founded. The prosecutor having proved a thing was done which the statute in express terms prohibited, and done by the accused on a particular occasion, the respondent chose to leave the case just where the prosecutor had left it, and it is now maintained on his behalf that he was rightly acquitted, because the prosecutor failed to prove that he knew in fact what the position of the vessel was at the time. I assume for the purpose of considering that question that it may be a good defence that the accused was ignorant of the position of the ship—excusably ignorant of the position of the ship. But it does not follow that the prosecutor can be required to do more than prove the existence of the facts which the statute describes as constituting the offence. The prosecutor has done all that could be required of him when he has proved the facts, and it lies upon the respondent to rebut the inference of guilt which arises upon these facts, if he can, by a proof of innocent ignorance, or of any other lawful excuse. The contention on the other side really puts it on the prosecutor to prove a negative, because the position of the case when the prosecutor has closed his proof is really this, that the facts constituting the offence, as defined in the statute, having been proved or admitted, the accused can still maintain his plea of not guilty on the ground that what he did—which, after all, was *malum prohibitum* and not *malum in se*—was done with lawful excuse. I am assuming for the purpose of the argument that innocent ignorance is a lawful excuse. But then it lies on him to prove that, not upon the prosecutor to disprove it by anticipation, which I apprehend in most cases it would be impossible for him to do. On the case as stated, it appears that the question whether, in fact, the accused had a lawful excuse, was not decided by the Sheriff, and it cannot be decided by us, because no such question is stated in the case. The Sheriff finds certain facts which may possibly be regarded as items of evidence tending to shew that the respondent was not really aware of the position of the ship. But although they tend in that direction they do not go very far, because it may well be that a sailor, knowing his ground, may have perfectly good reasons for knowing that he is still within the Moray Firth, although he is not directing the navigation of the vessel and is not capable of taking observations for the purpose of defining its position. He may know where he sailed from. He may know how long a time has elapsed since he left the land, or he may even be in sight of land. The question whether or not he knew where his ship was must always be a question of fact, and the circumstances may vary so indefinitely that it is quite impossible to lay down, as I think the learned Sheriff did, that the particular circumstances of this case are of themselves sufficient to prove or disprove that question. It may be again that although a man may not have known exactly where his ship was, he may have had good reason to believe that its master had set out upon an expedition for trawling within the prohibited area, and if so, a man who takes his chance of being found within the imaginary line that divides the prohibited area from the open area of the ocean, might be precluded from maintaining innocent ignorance. But then I think that all that relates to a question of fact which is not before us, although I have referred to the difficulty of proving the facts. I do not desire to express any real opinion as upon fact

at all. I think the learned Sheriff has not done so. What he has done Jan. 17, 1908. is to say as matter of law, that the prosecutor has failed to prove what it is ^{Gordon v.} incumbent upon him to prove, viz., the absence of a particular defence ^{Shaw.} which might have been brought forward by a man who was acting in inno- ^{Lord Kinnear.} cent ignorance of the facts. I think that is an unsound view of the law. I think the prosecutor has done all that was required of him when he has proved his facts, and that it then lies upon the offender, if he has a defence, to bring it forward.

I referred in passing to the case of *The King v. Marsh*.¹ I return to it only for the purpose of saying that while I think the decisions of the English Criminal Courts must always be used in this Court with very considerable diffidence, I have read the whole series of decisions cited to us by the Solicitor-General as carefully as I can, and I think it satisfactory to find that the decision proposed by your Lordship, in which I agree, is entirely in accordance with the law stated by the learned Judges in the case of *The King v. Marsh*.¹ That is a case in which there was an information and conviction against a carrier for having game in his possession contrary to the Statute 5 Anne, cap. 14, sec. 2, which declares "that any carrier having game in his possession is guilty of an offence, unless it be sent by a qualified person." The only facts proved were that the defender was a carrier, and that he had game in his wagon on the road. The conviction was appealed on the ground that there was no evidence that the defender knew of the presence of the game in his wagon, or that the person who sent it was not a qualified person. The learned Judges held that there was a sufficient *prima facie* case, and that it was not rebutted by sufficient proof on the part of the defendant of the ignorance suggested on his behalf. I think the judgments quite plainly imply that if the defendant could have satisfied the jury of his ignorance there would have been a good defence, although the word "knowingly" was not in the statute, and it followed that in the view of the learned Judges the effect of the word "knowingly" being introduced into such an Act of Parliament might be to alter the burden of proof, but not to alter any ordinary rule of law that enables a man to plead ignorance as a lawful excuse. It had been shewn that game was in his possession as a carrier; it lay upon him to rebut that evidence; and, as he had not done so, the conviction was sustained. I think the present respondent stands exactly in the same position, not having endeavoured to rebut the inference from the facts.

Lord M'Laren intimated that LORD PEARSON, who was present at the hearing but absent at the advising, concurred in the judgment of the Court.

The LORD JUSTICE-GENERAL, not having been present at the hearing, gave no opinion.

THE COURT answered the question in the case in the negative, and sustained the appeal.

CROWN AGENT—ALEX. MORISON & Co., W.S.—Agents.

¹ 1824, 2 Barn. & Cres. 717.

No. 7.

Jan. 17, 1908.

Graham v.
Hart.

MARY GRAHAM, Appellant.—*Crabb Watt, K.C.—R. S. Brown.*
JAMES NEIL HART (Procurator-Fiscal for Lanarkshire), Respondent.
—*Sol.-Gen. Ure—A. M. Anderson, A.-D.*

Statutory Offence—Prevention of Corruption Act, 1906 (6 Edw. VII. cap. 34), sec. 1—Police Force—Police-Constable—Agent and Principal—Bribery—Police-Constable agent of the Chief Constable.—Section 1 of the Prevention of Corruption Act, 1906, makes it an offence to offer any consideration corruptly to an agent as an inducement to do, or to forbear from doing, any act in relation to his principal's affairs, and the expression "agent" is defined as including any person employed by or acting for another, and "principal" as including an employer.

In a complaint under the above Act, charging an attempt to bribe a police-constable in Glasgow while in the execution of his duty and acting for his employer the Chief Constable, *held* that the police-constable was an agent in the sense of the Act.

HIGH COURT.
(Full Bench.)
Lord Justice-General.
Lord Justice-Clerk.
Lord M'Laren.
Lord Kinnear.
LdStormonth-Darling.
Lord Low.
Lord Pearson.
Lord Ardwall.

ON 19th April 1907 Mary Graham, 207 Main Street, Glasgow, was charged in the Sheriff Court at Glasgow on a summary complaint, at the instance of James Neil Hart, Procurator-fiscal. The complaint set forth:—"That on 10th April 1907, in Main Street, Maryhill, Glasgow, while Albert Carson, police-constable in the Maryhill district of the Glasgow Police, was, in the execution of his duty, acting for his employer, J. V. Stevenson, Chief Constable, Glasgow, to prevent or to detect the commission of, and to obtain evidence in regard to, offences against the Street Betting Act, 1906, and, in particular, was engaged watching the actings of John Graham, 207 Main Street aforesaid, who was suspected of committing offences against said Act, Mary Graham, 207 Main Street aforesaid, mother of the said John Graham, did corruptly give £2, 5s. of money to the said Albert Carson as an inducement or reward or bribe to neglect his duty, and to forbear from watching the said John Graham as aforesaid, and to ignore or suppress any evidence which he might obtain or have obtained against him, and to refrain from reporting the same to his employer, contrary to the Prevention of Corruption Act, 1906, section 1,* whereby the said Mary Graham is liable to imprisonment, with or without hard labour, for a term not exceeding four months,

* The Prevention of Corruption Act, 1906 (6 Edw. VII., cap. 34), sec. 1, enacts:—"(1) . . . If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business . . . he shall be guilty of a misdemeanour, and shall be liable on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both such imprisonment and such fine, or on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding fifty pounds, or to both such imprisonment and such fine. (2) For the purposes of this Act the expression 'consideration' includes valuable consideration of any kind; the expression 'agent' includes any person employed by or acting for another; and the expression 'principal' includes an employer. (3) A person serving under the Crown or under any corporation, or any municipal, borough, county, or district council, or any board of guardians, is an agent within the meaning of this Act."

or to a fine not exceeding £50, or to both such imprisonment and such fine." Jan. 17, 1908.

The accused objected to the relevancy of the complaint, in respect that it did not set forth facts and circumstances from which an offence within the meaning of the statute libelled could be inferred; and that, in particular, the relation of principal and agent did not subsist between the Chief Constable of Glasgow and the police-constable referred to. Graham v.
Hart.

The objection was repelled, and thereafter, on 22d May 1907, the Sheriff-substitute (Fyfe), after hearing evidence, convicted the accused of the contravention charged.

The accused obtained a case, which stated :—" At the hearing of the case the facts which were admitted or proved were :—(1) That the authority vested with the appointment of a Chief Constable for the city of Glasgow is a committee of Magistrates of the city, together with the Sheriff of Lanarkshire, and the cost of maintaining the police force, including the Chief Constable's salary, is defrayed partly out of money raised from police rates and partly by Government grant. (2) That this body met on 2d April 1902 to appoint a Chief Constable in room of Mr John Boyd resigned. (3) That at that meeting, Mr James Verdier Stevenson was, as the minute of meeting bears, appointed Chief Constable, ' the said James Verdier Stevenson to hold office during the pleasure of the Magistrates' Committee and the Sheriff of Lanarkshire, subject to the provisions of the Glasgow Police Acts, 1866 to 1901, and the Police (Scotland) Act, 1890. (4) That the Chief Constable receives payment of his salary from the Police Treasurer of the Glasgow Corporation. (5) That the Chief Constable has power which he exercises without consultation with anyone to appoint constables to hold office during his pleasure, and has power also to dismiss constables without consulting anyone. (6) That the wages of constables are entered in a pay-sheet which is certified by the Chief Constable. (7) That the actual disbursement for said wages is then made by the said Police Treasurer. (8) That Albert Carson is a Glasgow constable appointed by the Chief Constable who preceded Mr Stevenson, and he is paid in the manner described. (9) That when a constable has been appointed by the Chief Constable he, before entering upon duty, makes and signs before a Magistrate a declaration that he ' will faithfully and without fear or favour discharge the office of police-constable of the city of Glasgow, and will obey all lawful orders by the Lord Provost and Magistrates and the officers placed over me, and will attend to all rules and regulations of the force.' (10) That Constable Albert Carson had duly made and subscribed this declaration on 9th September 1901. (11) That the Chief Constable is assisted in the discharge of his duties by various subordinate officers, including district superintendents, inspectors, and constables. (12) That it is not the practice for the Chief Constable to give direct instructions to the constables (who number over 1500), but instructions as to their duty are conveyed to the men through the district superintendents or inspectors. (13) That on 10th April 1907 Constable Carson was attached to the Maryhill police district of the city. (14) That on that particular day he did not receive any specific instruction from anyone as to the duty he was on that day to discharge. (15) That shortly before that day, however, he had received instructions through the district inspector to watch for possible betting offences in the district, and, in particular, to observe the move-

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ments of a family named Graham, who reside in the district, and who were suspected by the police of conducting illegal betting transactions. (16) That one of the members of this family is named John Graham. (17) That shortly before 10th April Constable Carson had made a report to the Maryhill district inspector in regard to this John Graham. (18) That on said 10th April Constable Carson and another constable were on plain clothes duty in Bridge Street, Maryhill, when they met and had some slight conversation with John Graham. (19) That later in the evening as they passed over a railway bridge, the appellant, Mrs Mary Graham (who is the mother of John Graham) was standing on the bridge. (20) That she waved the constables to come over to her, and on their doing so she said 'Are you fireproof?' (21) That she then put two sovereigns and five shillings of silver into Carson's hand, remarking, 'that is one for each of you and something to get a drink to save you from breaking it. John would have given it to you but he was frightened.' (22) That she then walked away. (23) That Constable Carson regarded this as an attempt to bribe him to refrain from observing the movements of John Graham or reporting upon them. (24) That Constable Carson took the money to the police-office and reported the incident.

"I held in law in respect the Chief Constable is entrusted with the duty of detecting crime and exercises his office through the district constables, that Constable Carson, being on 10th April engaged on police duty, was 'acting for' the Chief Constable, and therefore, in the sense of the Prevention of Corruption Act, 1906, was an agent.

"In respect of the evidence adduced I convicted the appellant of the contravention charged and imposed a penalty of £10, and in default of payment thereof within fourteen days from said date, I adjudged her to be imprisoned for the period of ten days from the date of her imprisonment."

The first question of law for the opinion of the Court was—" (1) Was Constable Albert Carson, on 10th April 1907, an agent in the sense of the Prevention of Corruption Act, 1906?"

The case was argued before the High Court of Justiciary on 8th July 1907, when a remit was made to a Full Bench.

Argued for the appellant;—The Prevention of Corruption Act, 1906, was not intended to apply to this type of case, but only to acts of corruption which were not punishable at common law. Bribery of an officer of the law was an indictable offence at common law,¹ and under the Public Bodies Corrupt Practices Act, 1889,² which was the proper statute under which to have proceeded. The police-constable was not the agent of the Chief Constable, for though he was under his orders he was neither "employed by" him nor did he "act for" him in the sense of section 1 (2) of the statute. The police-constable was not the servant of the Chief Constable in the ordinary sense of the word,³ nor had his acts any relation to the "affairs or business" of the Chief Constable—the preservation of order being the affair of the

¹ Hume on Crimes, i., p. 408; H. M. Advocate v. Dick, April 26, 1901, 3 F. (J.) 59, at p. 64, 3 Adam, 344.

² 52 and 53 Vict. cap. 69, secs. 1 (2) and 7.

³ Cf. Bain v. Burnet, Feb. 11, 1857, 19 D. 405; Young v. Magistrates of Glasgow, May 16, 1891, 18 R. 825; Girdwood v. Standing Joint Committee of the County of Midlothian, Oct. 25, 1894, 22 R. 11; Brown v. Magistrates of Edinburgh, 1907, S. C. 256.

community and not of individuals. Subsection (3) of the first section of the Act referred to the private business of the Crown and of corporations, and to their mercantile dealings only. Jan. 17, 1908.

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Argued for the respondent;—In considering whether the Act applied, it was beside the point to say that this offence was also indictable at common law and under another Act. There was nothing in the Prevention of Corruption Act to indicate that its scope was limited to mercantile agency. On the contrary, section 1 (3) expressly extended it to just such a case as the present. It was not necessary to shew that the constable was the servant of the Chief Constable in the limited sense of the word, but if it were, there were indications of judicial opinion in several cases that such was the true nature of the relationship between them.¹ It was, however, sufficient to point to the powers of appointment and dismissal possessed by the Chief Constable, and to the duty of the police-constable to obey orders, as evidence that the latter was acting for and employed by the former in the sense of the Act. The preservation of order might in one sense be the affair of the community, but in another sense it was the business, and the chief business, of the Chief Constable.²

At advising on January 17, 1908,—

LORD STORMONTH-DARLING.—(The opinion of Lord Stormonth-Darling, who was present at the hearing but absent at the advising, was read by the Lord Justice-General)—The facts of this case, as stated by the Sheriff-substitute, are that Albert Carson, a police-constable in Glasgow, was, on 10th April 1907, engaged in the execution of his duty in Main Street, Maryhill, and, in particular, was watching the actings of a certain John Graham, who was suspected of committing offences under the Street Betting Act, 1906, when John Graham's mother accosted Carson, and put two sovereigns and five shillings into his hand, making at the same a remark which referred to her son John, and which led the constable to conclude that the act was an attempt to bribe him to refrain from observing the movements of John Graham, or reporting upon them. The constable accordingly took the money to the police-office and reported the incident.

A complaint was then brought against Mary Graham in which the constable was described as "acting for his employer, J. V. Stevenson, Chief Constable, Glasgow," and the accused was charged with a contravention of the Prevention of Corruption Act, 1906, section 1. An objection to the relevancy was taken on her behalf, to the effect that "the relation of principal and agent does not subsist between the Chief Constable of Glasgow and the police-constable referred to." The Sheriff-substitute repelled the objection, and, after an adjournment of the diet to 22d May, the trial proceeded. The result was that the learned Sheriff convicted the accused of the contravention charged, and imposed a penalty of £10. The Sheriff

¹ Cf. *Melvin v. Wilson*, May 22, 1847, 9 D. 1129, at pp. 1136-7 (decided under the Glasgow Police Act, 1843, 6 and 7 Vict. cap. xcix.); *Young v. Magistrates of Glasgow*, 18 R. 825, at p. 829, *per* Lord Adam; *Brown v. Magistrates of Edinburgh*, 1907, S. C. 256, at p. 266.

² The following sections of the Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), were referred to as defining the powers and duties of the Chief Constable—Sections 71, 72, 74, 77, 78, 83, 87, 88.

Jan. 17, 1908. narrates the facts, and tells us that he held in law "in respect the Chief Constable is entrusted with the duty of detecting crime, and exercises his office through the district constables, that Constable Carson being, on 10th April, engaged on police duty, was acting for the Chief Constable, and, therefore, in the sense of the Prevention of Corruption Act, 1906, was an agent." The only question of law which the Sheriff propounds for our opinion (the second question being merely on the facts), is this—"Was Constable Albert Carson, on 10th April 1907, an agent in the sense of the Prevention of Corruption Act, 1906?"

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Darling.

I have no hesitation in answering that question in the affirmative, which is only another way of saying that I think the learned Sheriff was right in his finding in law.

It seems to me very little to the purpose to point to the native vigour of the common law of Scotland, and say that an offence such as that of which the Sheriff has convicted Mary Graham would have been cognisable at common law. So it would (see Hume, Vol. I., 408). But if a statute, which is entitled "an Act for the better prevention of corruption" covers the case, why should it not be brought into use? Equally little to the purpose is it to say that this Act was mainly intended to prevent commercial corruption by striking at secret commissions in private life. If this Act was intended to be so limited, it would have been expressly restricted to such cases, instead of which subsection (3) of section 1 conclusively shews that the Act was intended to strike at persons serving under the Crown or under any corporation or local board. This it does by sweeping in all such persons under the generic name of agent, just as "agent" is defined in the immediately preceding paragraph as "any person employed by or acting for another," and "principal" is defined as including an "employer." At all points, therefore, these definitions seem to me to meet the case in hand. Mr Stevenson, the Chief Constable, was rightly described in the complaint as Carson's employer, for the holder of the office of Chief Constable appointed him under section 74 of the Glasgow Police Act, 1866, and had, under section 77 of the same Act, the absolute power of suspending or dismissing him. Similarly Carson answers the description of a person "employed by or acting for" Mr Stevenson, because the work which he was doing at the time when the offence was committed was work which by section 83 of the same Act was made part of the "duty of the Chief Constable, and of the superintendents, lieutenants, and constables acting under or appointed by him." When we are in the region of definition, I should like to say that the reference in section 1 of the statute, when it deals with a bribe given or offered to an agent as being "in relation to his principal's affairs or business," does not seem to me to create any difficulty, for this bribe was offered to the constable as an inducement or reward for forbearing to do an act in relation to the Chief Constable's affairs or business, *i.e.*, forbearing to do a duty which was equally the Chief Constable's and his own.

I may add that if the Act of 1906 covers the case I think it quite idle to argue that another Act—the Public Bodies Corrupt Practices Act, 1889—might also be made to cover the case. Perhaps it might. But why should the fact of there being two or more statutes applicable to the offence disable the public prosecutor from making his election under which of them he is

to bring a prosecution, any more than the existence of a rule of the common law to which he might resort if he chose? I may also add that I am quite at a loss to see what bearing decisions in the civil Court as to the liability of Hart. ^{Graham v.} public officials for the wrongous acts of constables can have on the construction of a statute dealing with a criminal offence.

LORD JUSTICE-GENERAL.—I concur in that opinion.

LORD JUSTICE-CLERK.—The contention of the appellant in this case as stated at the Bar is based upon the view that the words of the statute “affairs or business” must relate to “mercantile affairs,” and cannot be applied to employment for state or municipal duties, in which no question of business in the ordinary sense is involved. I am quite unable to accept any such view of the statute for the Prevention of Corruption which was passed in 1906. That view is completely excluded by the 3d subsection of section 1, by which it is provided that “a person serving under the Crown or under any corporation, or any municipal, borough, county, or district council, or any board of guardians, is an agent within the meaning of this Act.”

A police-constable is therefore plainly in the position of a person to whom the Act may apply. Therefore the sole question here is, whether the complaint correctly describes the agency. Is the police-constable correctly described as being the agent of the Chief Constable, under whom he was serving at the time? Now, the position of the Chief Constable is this, that he has delegated to him the power and duty of selecting and appointing all constables; that he has power to suspend or dismiss all ordinary constables, such as the constable whom it was attempted to bribe in this case; that the magistrates cannot interfere with him as regards engagement, or suspension, or dismissal; and that he being entrusted with the police duties falling on the municipal authority, and having engaged constables to carry out his duties of keeping order and dealing with crime, is in the active exercise of these powers through them. The constable in doing his duties on his beat is doing so because he is employed to do so by the Chief Constable, and is responsible to him to do these duties faithfully, and to resist all attempts to seduce him into doing things contrary to his duty. I cannot doubt that the Sheriff-substitute was entitled to hold on the facts which he found proved that in law the constable was “acting for the Chief Constable, and therefore in the sense of the Prevention of Corruption Act, 1906, was an agent.”

I agree entirely with the opinion of Lord Stormonth-Darling, and do not think it necessary to say more.

LORD M'LAREN.—I concur in Lord Stormonth-Darling's opinion.

LORD KINNEAR.—I agree with the opinions which have been delivered.

LORD LOW.—I am in the same position.

LORD ARDWALL.—I also agree with Lord Stormonth-Darling's opinion.

It was intimated that LORD PEARSON, who was present at the hearing,

Jan. 17, 1908. but absent at the advising, concurred in the opinion of Lord Stormonth-Darling.
 Graham v. Hart.

THE COURT answered the first question in the case in the affirmative, and dismissed the appeal.

E. ROLLAND M'NAB, S.S.C.—CROWN AGENT—Agents.

No. 8. WALTER ROSS TAYLOR MIDDLETON (Clerk to the Conon District Fishery Board), Complainer (Appellant).—*D.-F. Campbell—Chree.*
 Mar. 10, 1908. MRS MARGARET ANDERSON TOUGH, Respondent.—*Hunter, K.C.—Munro.*
 Middleton v. Tough.

Statutory Offence—Fishing—Salmon Fishing—Weekly Close Time—Reasonable Excuse—Sunday Labour—Salmon Fisheries (Scotland) Act, 1868 (31 and 32 Vict. cap. 123), section 24, Schedule D, Bye-law 3.—Under the Salmon Fisheries (Scotland) Act, 1868, sec. 24, Schedule D, Bye-law 3, the occupier of a fishery is bound to remove and take entirely out of the water the leader of every bag-net during the weekly close time, i.e., from six o'clock on Saturday night to six o'clock on Monday morning.

In a prosecution for a contravention of this bye-law it was proved that the leaders of the bag-nets had not been removed by the occupier of the fishery on a Saturday night, and could not have been then removed owing to a storm; that they could have been removed without danger on Sunday, but that no attempt was made to do so, and that they were not removed till Monday morning. The accused pleaded that the removal of the nets on the Sunday was an impossibility, inasmuch as it would have involved a breach of the Sunday Labour Statutes, 1579, c. 70, 1661, c. 18, and 1690, c. 5, which she was not bound to commit or procure others to commit.

Held that the accused was not justified in failing to comply with the bye-law, the operation thereby prescribed being a work of necessity and not struck at by the Sunday Labour Statutes, and in any event enjoined by an Act of Parliament of later date.

Middleton v. Paterson, 6 F. (J.) 27, overruled.

Osborne v. Anderson, Nov. 4, 1887, 15 R. (J.) 12, disapproved.

Master and Servant—Sunday Labour—Statute—Acts 1579, c. 70, 1661, c. 18, and 1690, c. 5.—*Observations* on the application of the Scots Acts anent Sunday labour.

Question whether these Acts are in desuetude.

Phillips v. Innes, Feb. 20, 1837, 2 Shaw & Maclean, 465, explained.

HIGH COURT. (Full Bench.) Lord Justice-General. Lord Justice-Clerk. Lord M'Laren. Lord Kinnear. Lord Stormonth-Darling. Lord Low. Lord Ardwall.

MRS MARGARET ANDERSON TOUGH, residing in Portmahomack, occupier of the Geanies Salmon Fishery, was charged in the Sheriff Court of Ross and Cromarty, at Tain, on a summary complaint at the instance of Walter Ross Taylor Middleton, clerk to the Conon District Fishery Board.

The complaint set forth that she, "occupier of the Geanies Salmon Fishery in the parish of Tarbat and said county of Ross and Cromarty, being a fishery at which bag-nets are used, has contravened the 'Salmon Fisheries (Scotland) Act, 1868,' section 24, and the bye-law, Schedule D, section 3, annexed to the said Act,* in so far as between

* The Salmon Fisheries (Scotland) Act, 1868 (31 and 32 Vict. cap. 123), sec. 24, enacts:—"The proprietor, or when let the occupier, of every fishery at which . . . bag-nets are used shall, in regard to such nets, do all acts required by any bye-law in force within the district in which

6 o'clock P.M. on Saturday the third day of August 1907, and 6 Mar. 10, 1908. o'clock A.M. on Monday the fifth day of August 1907, and within or during the weekly close time for the district of the River Conon, ^{Middleton v. Tough.} under the Salmon Fishery Statutes, the said Mrs Margaret Anderson Tough did omit or fail entirely to remove and take out of the water the netting of the leaders of five bag-nets belonging to her on said fishery, all placed in the sea *ex adverso* of the lands of Geanies."

The case was tried on 23d October 1907, when the respondent pleaded not guilty.

After hearing evidence the Sheriff-substitute (MacWatt) assoilzied the respondent from the complaint.

In a case for appeal he stated the facts, and the grounds of his judgment, in the following terms:—"At the trial the evidence led established the following facts:—

"That the respondent is the occupier of the salmon-fishings specified; that she failed to remove and take out of the water the netting of the leaders of said five bag-nets belonging to her on the Saturday night in question; that owing to a strong wind and rough sea it was dangerous for the respondent or her men to remove the leaders on the Saturday night; that the leaders could have been removed without danger on Sunday, and that one of said leaders was in fact removed about eight o'clock that morning by bailiffs in the employment of the Fishery Board; that no attempt was made on the part of the respondent or her men to remove the leaders referred to on the Sunday in question, but they were removed as soon as possible on Monday morning.

"It was proved that the appellant wrote to the respondent on 22d March 1906, intimating that the Board held her bound to remove leaders on Sunday, when it was impossible to do so on the Saturday night. There was no evidence that the respondent's men were ever asked by her, or that they refused, to remove leaders on Sunday, or that it was impossible for the respondent to hire men willing to remove leaders on a Sunday.

"On these facts the Sheriff-substitute held that there was no contravention of the statute by the failure to remove the leaders on the Saturday night; and in respect of the decision in *Middleton v. Paterson* (6 F. (J.) 27), he refused to convict on account of the failure to remove on the Sunday."

The question of law stated was:—"Whether—the weather having been suitable—the respondent was bound, on the Sunday in question, to entirely remove and take out of the water the netting of the leaders of the five bag-nets specified?"

The case was sent to a Full Bench on 5th December 1907, and was argued on 10th March 1908.

Argued for the appellant;—The Salmon Fisheries Acts were unambiguous and imperative,¹ and must be obeyed to the letter

such fishery is situated for the due observance of the weekly close time," under a penalty, and Schedule D contains a bye-law with regard to the observance of the weekly close time which requires—"3. That the netting of the leader of each and every bag-net shall be entirely removed and taken out of the water."

¹ *Irving v. Phyn*, Dec. 14, 1891, 19 R. (J.) 7, 3 White, 46, distinguishing *Osborne v. Anderson*, Nov. 3, 1887, 15 R. (J.) 12, 1 White, 497; *Parr v. Mitchell*, Feb. 24, 1890, 2 White, 434.

Mar. 10, 1908. unless a reasonable cause were shewn to the contrary.¹ In the present case no reasonable cause had been alleged. It could not be said that it was impossible to perform the work, for it was expressly stated that no attempt had been made to find men to do the work on the Sunday. The only reason which had been suggested was that it was illegal to do such work on Sunday. The case of *Middleton v. Paterson*,² founded on in this connection by the respondent, was wrongly decided. It proceeded on an erroneous view as to the scope of the Scots statutes against Sunday labour.³ These Acts—if they were not in desuetude—only prohibited such work as could be performed as well on weekdays as on Sunday,⁴ and had no application to works of necessity, such as the present, where the necessity arose from the fact that the work had been expressly enjoined by the Salmon-Fisheries Act. If the order to remove the nets on the Sunday had been given by the respondent to the men in her employment, it would have been a reasonable order, such as they would have been bound to obey.⁵

Argued for the respondent;—The present case was indistinguishable from *Middleton v. Paterson*.² If here no evidence had been led by the respondent to shew that no men could be procured to do the work on Sunday, that was only because it was matter of common knowledge that in this district Sunday labour was against the feelings of the people, and that no one would consent to do such work. The case of *Middleton*⁶ was rightly decided in law. It was a sufficient excuse for a breach of the Salmon Fisheries Acts that it was an impossibility to obey them. In this case the impossibility lay in the fact that Sunday labour was illegal. The Sunday Labour Statutes³ were not in desuetude, as appeared from the recent cases in which they had been recognised,⁶ and also from the fact that they were not included among the statutes abrogated by the Statute Law Revision (Scotland) Act, 1906.⁷ In these circumstances, as it would have been illegal to do the work, it would also have been illegal to procure the doing of the work, and it was not to be presumed that the Salmon Fisheries Acts intended to make it an offence to refrain from committing an illegal act.

LORD JUSTICE-GENERAL.—The question brought before your Lordships is whether there ought to have been a conviction on the following facts, as stated by the learned Sheriff-substitute who states the case.

In the county of Ross and Cromarty, at the Geanies Salmon Fishery, there is in operation by force of law the bye-law contained in Schedule D of the Salmon Fisheries (Scotland) Act of 1868. The section of that

¹ *Macrorie v. Forman*, Nov. 17, 1905, 8 F. (J.) 23, 4 Adam, 682.

² 6 F. (J.) 27, 4 Adam, 321.

³ 1579, c. 70; 1661, c. 18; 1690, c. 5.

⁴ *Phillips v. Innes*, Feb. 20, 1837, 2 Shaw & Maclean, 465; *Bute v. More*, Nov. 24, 1870, 9 Macph. 180, 1 Coup. 495; *Nicol v. M'Neill*, July 13, 1887, 14 R. (J.) 47, 1 White, 416.

⁵ *Wilson v. Simson*, July 11, 1844, 6 D. 1256.

⁶ *Phillips v. Innes*, Feb. 20, 1837, 2 Shaw & Maclean, 465; *Bute v. More*, Nov. 24, 1870, 9 Macph. 180, 1 Coup. 495; *Irving v. Phyn*, Dec. 14, 1891, 19 R. (J.) 7, 3 White, 46; *Middleton v. Paterson*, Jan. 30, 1904, 6 F. (J.) 27, 4 Adam, 321; *H. M. Advocate v. Gollan*, July 23, 1883, 5 Coup. 317.

⁷ 6 Edw. VII. cap. 38.

statute which imposes the penalty is the 24th, and it puts upon the proprietor or occupier of every fishery the obligation of doing all acts for the due observance of the weekly close time, required by any bye-law in force within the district. The bye-law imposed by Schedule D provides that regard to the due observance of the weekly close time, which is a close time imposed from six o'clock on Saturday afternoon till six o'clock on Monday morning, "the netting of the leader of each and every bag-net shall be entirely removed and taken out of the water." Your Lordships will therefore observe that a positive duty is put upon the owner or the occupier of every fishing. The occupier, who is the respondent in this case, is a Mrs Tough, and she admittedly upon the occasion specified did not take out the leaders of her bag-nets during the whole of the specified period, but left them there from six o'clock on Saturday evening till a very early period on Monday morning. *Prima facie*, therefore, it is quite clear that she has contravened the statute, and consequently is liable to conviction. What, then, is her excuse? She says, and the learned Sheriff-substitute holds that it is proved, that at six o'clock on Saturday evening the state of the weather was such that it was a physical impossibility to remove the leaders. Then he goes on to say that the leaders could have been removed without danger on Sunday. As a matter of fact one of them was removed by the Fishery Board people on that day, and he further finds that there was no evidence that the respondent's men were ever asked by her to remove the leaders on the Sunday, or that they refused to do so, or that it was impossible for the respondent to hire men willing to remove leaders on the Sunday.

Upon that state of the facts I think that there must be a conviction here, because the *onus* upon the prosecutor is satisfied as soon as he shews that there was a contravention of the bye-law. That he does by shewing that the leaders were not removed. No doubt there may be an answer to that which has always been held as an answer satisfactory to avoid conviction, namely, that there was impossibility. Physical impossibility there undoubtedly was at six o'clock on Saturday evening by reason of the weather, but it was not, according to the stated facts, impossible on the Sunday morning. Therefore, there must have been some other class of impossibility which the respondent was bound to table, and she has not proved either that she took the slightest trouble to try and get her men to remove the leaders, or failing them that she could not get others. Practically speaking, that is enough for the decision of the case.

But Mr Hunter has appealed to us not to decide the case upon that matter alone, because I understand that this case has been brought up in order to review the decision in *Middleton v. Paterson*.¹ I have no hesitation in saying that I agree with the opinion of Lord Moncreiff in *Middleton v. Paterson*,¹ and that I do not think that case was rightly decided. There are various grounds for my opinion. The argument for inability is admittedly entirely based upon the Scottish statutes against Sunday labour. These are certain old statutes of the Scottish Parliament. I am bound to say that for myself I am greatly in doubt whether these statutes are still in operation, or whether they have not fallen into desuetude. But I do not

¹ 6 F. (J.) 27, 4 Adam, 321.

Mar 10, 1908. think it is necessary to decide that question, as I shall presently explain.

Middleton v. Tough. *Prima facie* I do not think that these statutes have anything to do with it, because the question is not as to whether a conviction could be secured under these statutes for doing a certain thing, but whether this person was prevented from doing what she should otherwise have done by *vis major*. Lord Justice-General. I use that expression because it comprehends laws of every kind, physical or otherwise. It may be that you could find persons who would be content to work on the Sunday and take their risk of a conviction under the statutes, and looking at the general state of affairs as matters go nowadays, I do not think the risk would be a very great one. But it was argued that this was so clearly against the statutes that really it becomes tantamount to an impossibility, because if you engage anybody to do that thing, you would be engaging him to do a thing which was in itself unlawful. I cannot follow that, because, assuming as I do for the moment, that the statutes are still in observance and not in desuetude, I cannot say that the act here would ever be struck at by the statutes. What may be called the leading case for the statutes is that of *Phillips v. Innes*,¹ where it was held that looking to the prohibitions of the statutes a barber's apprentice in Dundee, who had been engaged to do his master's work, holidays excepted, was justified in refusing to shave customers as an ordinary business on Sunday before ten o'clock in the morning. The one point was that shaving customers before ten o'clock on Sundays was ordinary work, and that if he had been obliged to do it, he would have had to shave Sunday after Sunday just as on other days. In point of fact, he might have had to shave more than on ordinary days, because there are men of peculiar habits who prefer shaving on Sundays rather than on other days. But the learned Lords who decided that case seem to have been very careful to distinguish between ordinary and regular labour and labour of a casual sort, which might be called for in an emergency, because the Lord Ordinary and one of the noble and learned Lords, Lord Wynford, put as an exception the particular case of a man being called upon to shave someone suffering from acute illness, and the shaving of whose head became more or less a work of necessity. I am of opinion that this particular operation of taking up the leaders on a Sunday, when it has been rendered impossible on Saturday by the state of the weather, is just such a work of necessity, and there again I agree with the opinion of Lord Moncreiff in *Middleton v. Paterson*.² Mr Hunter read a passage in Lord Brougham's opinion in *Phillips*'¹ case, in which the noble and learned Lord used some expressions which seem to mean that the necessity must be that of the person called upon to work, and not that of the person whom he serves. That view, I think, is absolutely untenable. It is perfectly evident that you cannot so limit it, for it is possible, not only to have works of necessity where the necessity is for the weal of the public in general, but also to identify the interests of the master and servant. If it were not so the feeding of cattle, *e.g.*, would not be lawful, because there is no necessity, so far as the servant is concerned, it being the master's loss and not his if the cattle die.

But the matter does not end there, because I think there is another

¹ 2 Shaw & Maclean, 465.

² 6 F. (J.) 27, 4 Adam, 321.

ground which takes this case out of the decision in the case of *Phillips*,¹ Mar. 10, 1908. and it is this. These old statutes may not be in desuetude, but they certainly are not, to say the least of it, rigorously enforced. Then, in 1868 *Middleton v. Tough*. Parliament passed another Act, which shews upon the face of it that something must be done by somebody on Sunday, because Parliament must be Lord Justice-General. held to have had the common sense to know that occasionally there would be states of the weather which would make it impossible to remove the leaders on Saturday. Still, Parliament has held that the leaders must be taken out of the water during the weekly close time. That is equivalent to a positive enactment, not necessarily repealing the old statutes, but holding that such a work is a work of necessity. Upon that ground I come to the opinion clearly that there was here no justifiable excuse for not complying with the Act of Parliament. Of course, whether a person could get a servant or not to do the work is another matter. The duty is put upon the occupier or owners, and if they cannot do it themselves they must get someone who will. You might find certain persons who would not work for you on Mondays, but you may contract with those who will. Or, take one religion, and you will find a person who refuses to work on a Saturday. But that is your affair. All that it is necessary to say here is that such an excuse is not *vis major*. Whether you can get a servant to do the work or not is simply a matter of contract. That is sufficient, I think, but I ought also to say that *Osborne's case*² was overruled by the case of *Irving*,³ and on the whole matter I come to the conclusion that in this case there ought to have been a conviction.

LORD JUSTICE-CLERK.—I entirely concur with your Lordship. The statute providing for the weekly close time is imperative, and lays upon the occupiers of salmon fisheries a positive duty to throw their nets out of gear by removing the leaders. I do not consider that the existence of those old Scots Acts dealing with Sunday labour provides any excuse for not obeying the directions contained in an Imperial Act of recent date.

It is of course quite true that there may be cases where a servant, by refusing to carry out the instructions of his employer, may put his employer unavoidably in the position of contravention of a statutory enactment, but that is a question of fact, and there is no suggestion in the case before us that that was what happened here. This case differs from that of *Middleton v. Paterson*,⁴ because here it is expressly said that the respondent's servants were never asked to remove the leaders on the Sunday in question, while there it did appear that there had been an attempt made to get the work done, and that there was a refusal to do it.

With regard to the case of *Middleton v. Paterson*,⁴ where the judgment seems to be in conflict with what we are deciding here, I should like to say that I was very doubtful about that case at the time, but, in my position at the hearing, I had no vote in the decision, except in the case of disagreement between my brethren, which in fact was what occurred. In that case there was this peculiarity, that there was an official of the Fishery Board present, and that he did not require that the leaders should be

¹ 2 Shaw & Maclean, 465.

³ 19 R. (J.) 7, 3 White, 46.

² 15 R. (J.) 12, 1 White, 497.

⁴ 6 F. (J.) 27, 4 Adam, 321.

Mar. 10, 1908. removed. In these circumstances I felt constrained to concur with Lord Trayner in a conclusion which meant acquittal, rather than with the conclusion of Lord Moncreiff, which meant conviction.

Middleton v.
Tough.

Lord Justice-
Clerk.

I may add that it seems to me that, in the case of *Osborne v. Anderson*,¹ the majority of the Court proceeded on a fallacy. It appeared that owing to the tide at the particular time and place the nets could not be put out of fishing order until several hours after the appointed time on the Saturday, and that similarly they could not be put again in fishing order on the Monday until some hours after the lawful time, and that the nets were out of fishing order for the full period of thirty-six hours, although not precisely between the times prescribed in the statute. Now, I agree with Lord Rutherford Clark, who dissented there, that this was not an admissible construction of the Act, which plainly intends that all nets should be out of action during the fixed time—Saturday night at a fixed hour and Monday morning at a fixed hour. The object aimed at is to give the fish a free run for the specified period past all nets, and that object would obviously be defeated if the result was that fish which passed nets, the leaders of which had been lifted, were in risk of being caught in those which had been left down.

LORD M'LAREN.—I also concur with your Lordship in the chair. So far as the question is affected by authority I think the explanation given by the Lord Justice-Clerk of the case of *Middleton v. Paterson*² is very important, because I understand that in that case, and according to the constitution of this Court, his Lordship only gave a casting vote, and it is well known that in such circumstances considerations are taken into account which would not affect a vote given under ordinary conditions. In any case, this question has been remitted to a full bench of Judges, and it is for us to decide the matter now.

Even supposing the earlier statutes relating to Sunday trading and Sunday labour to be in observance to certain effects, it is the fact that a later statute has been passed by the Imperial Parliament imposing the duty of putting the salmon nets out of fishing order during the whole period from Saturday evening until Monday morning. This consideration in my judgment is sufficient for the decision of the case. As, however, the whole law of the subject has been discussed, I think it desirable that we should also consider how far the old statutory law opposes obstacles to the performance of what most people would regard as necessary and suitable Sunday labour. There may be a difficulty in consequence of the case of *Phillips*³ in holding that the statutes are altogether in desuetude. But in the case of *Bute v. More*⁴ no precedent could be found for a conviction under these Acts, and neither the ingenuity of counsel nor the experience of the Judges composing the Court was able to discover any form of process under which a person might be penalised for the contravention of those statutes. Therefore, it is not saying too much when I conclude that these statutes are not likely to be again enforced. Indeed, without doing any violence to authorised

¹ 15 R. (J.) 12, 1 White, 497.

³ 2 Shaw & Maclean, 465.

² 6 F. (J.) 27, 4 Adam, 321.

⁴ 9 Macph. 180, 1 Coup. 495.

expositions of the law, it may very well be held that the statutes have gone Mar. 10, 1908. out of use altogether. But, without entering further into that question, we know that it was the practice of the Scottish Legislature to pass statutes Middleton v. Tough. which were expressed in very general terms, which were not always work- Lord M'Laren. able without the aid of judicial construction, and which were intended to be worked out by the Courts of law applying common-sense principles to their interpretation. Both before and after the passing of these Scottish statutes it is needless to say that there were certain descriptions of labour which had to be regularly performed on Sundays. Domestic service and a considerable portion of the work of farm service had to be carried on upon the first day of the week. Horses had to be fed, cows had to be milked, cattle had to be driven out to the pasturage in the morning and brought home at night. The statutes never were understood to prohibit anything except such work as was ordinarily carried on during weekdays and could be as well done on any other day as on the Sunday. The tailor or boot-maker was not to work at his trade nor to require his men to work for him on Sundays. The case of fishing for salmon with all its statutory obligations, and the work of putting nets out of gear, must be held to be *ejusdem generis* with these kinds of work which have to be carried on upon Sundays, and as the Act of Parliament makes it necessary that the leaders should be removed either at six o'clock on the Saturday evening or as soon thereafter as the state of the weather permits, that is a sufficient reason why the lessee of such fisheries should be held bound to engage men who are willing to do this trifling amount of Sunday work when occasion requires. I have no conception that there would be any difficulty in finding men willing, when necessary, to perform these services on Sunday, just as servants can be found to undertake other services which are usually performed on Sundays as well as weekdays. I agree with your Lordship in the chair that we should answer the question by holding that the person accused was liable to be convicted.

LORD KINNEAR.—I agree entirely with the Lord Justice-General, and I only add, since this case has been brought for the purpose of reviewing the decision in *Middleton v. Paterson*,¹ that I agree with the opinion of Lord Moncreiff in that case, and that my only difficulty in doing so has been removed by what the Lord Justice-Clerk has said.

LORD STORMONTH-DARLING.—I concur in the opinion of your Lordship in the chair, and particularly in your Lordship's agreement with the dissent of Lord Moncreiff in the case of *Middleton v. Paterson*.¹ He there points out that "Sunday constitutes two-thirds of the weekly close time, and the regulations contain no sanction for non-observance of them on that day, on any ground whatever."

LORD LOW.—I concur.

LORD ARDWALL.—On the application of the statute and the general law of the case, I entirely agree with your Lordship in the chair and with Lord

¹ 6 F. (J.) 27, 4 Adam, 321.

Mar. 10, 1908. Moncreiff's opinion in the case which has been cited. I should be very sorry if anything that we are deciding should seem in any way to derogate from the proper observance of Sunday. And I recommend the following view of the matter to these worthy people in Ross-shire who, greatly as I think to their credit, are desirous of avoiding unnecessary labour on the first day of the week. In the first place, I would point out that by leaving the nets set for fishing all Sunday, the people who fail to remove the leaders are truly guilty of engaging in the industry of fishing the whole of the Sabbath day. In the next place, it may well be considered a work of necessity or mercy to lift the leaders of the nets on the Sabbath day. The phrase "work of necessity or mercy," though embodied in a statute, is taken from the Confession of Faith and the Shorter Catechism, and these excellent documents profess to be founded on, and binding only so far as founded on, Scripture. Now, in Scripture I find direct authority to the effect that if a sheep fall into a pit on the Sabbath day, it is lawful to lay hold on it and lift it out (see Matt. xii. 11). I hold that it is an analogous act to take up the leaders of salmon nets on the Sabbath day, and let out the unfortunate salmon which have been entrapped by an illegal net, and mercifully to restore them to their native freedom.

THE COURT answered the question in the case in the affirmative, sustained the appeal, and found that the Sheriff-substitute ought to have convicted the respondent.

JOHN C. BRODIE & SONS, W.S.—ALEXANDER ROSS, S.S.C.—Agents.

No. 9.

PATRICK FALCONER, Complainer.—*Morton.*

ROBERT ALGERNON WHYTE, Respondent.—*Cooper, K.C.—
C. D. Murray.*

Mar. 20, 1908.

Falconer v.
Whyte.

Public Health—Sale of Food—Prosecutions by officers of Local Government Board and Board of Agriculture as private purchasers—Sale of Food and Drugs Act, 1875 (38 and 39 Vict. cap. 63), secs. 6, 12, 14, 20—Sale of Food and Drugs Act, 1899 (62 and 63 Vict. cap. 51), secs. 2 (1) (2), 3 (2) (3), 23, 24.—The Sale of Food and Drugs Act, 1899, confers on the Local Government Board and the Board of Agriculture, and the corresponding boards in Scotland and Ireland, powers, in default of action by the Local Authority, to institute proceedings at the instance of their officers against persons infringing the provisions of the Sale of Food and Drugs Acts, and prescribes procedure to be followed in such prosecutions.

Held that the exercise of these powers was optional and not obligatory; that the officers of these boards were entitled to institute proceedings as private individuals in the method prescribed by the Sale of Food and Drugs Act, 1875; and that they were not limited in prosecutions at their instance to the procedure prescribed by the Act of 1899.

HIGH COURT.
Lord Justice-
Clerk.
Lord Low.
Lord Ardwall.

ON 21st November 1907 Patrick Falconer, provision merchant, 70 Main Street, Gorbals, Glasgow, was charged in the Sheriff Court at Glasgow on a summary complaint at the instance of "Robert Algernon Whyte, of Glenmaye, Manchester Road, West Timperley, Altrincham, Cheshire," setting forth "that the complainer caused the analysis to be made, of which the certificate is herewith annexed, and from which it appears that the following offence has been committed against the Sale of Food and Drugs Acts, 1875 to 1899:—

"That Patrick Falconer, provision merchant, 70 Main Street, Gorbals, Glasgow, did, on the 24th day of August 1907, in his shop at 70 Main Street, Gorbals, Glasgow, sell to the complainer to his prejudice half a pound of Irish butter which was not of the nature, substance, and quality demanded by the complainer, in respect that the complainer demanded Irish butter, and that the article sold to him as aforesaid did not consist of genuine Irish butter, in respect that it contained foreign fat to the extent of 74·30 per cent or thereby, contrary to the Sale of Food and Drugs Acts, 1875 to 1899, particularly the Sale of Food and Drugs Act, 1875, section 6, and that said offence is a first offence, whereby the said Patrick Falconer is liable to pay a penalty not exceeding £20." *

Mar. 20, 1908.
Falconer v.
Whyte.

* The Sale of Food and Drugs Act, 1875 (38 and 39 Vict. cap. 63), enacts :—

Sec. 6. "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty"

Sec. 12. "Any purchaser of an article of food or of a drug in any place being a district, county, city, or borough, where there is any analyst appointed under this or any Act hereby repealed, shall be entitled, on payment to such analyst of a sum not exceeding ten shillings and sixpence, or if there be no such analyst then acting for such place, to the analyst of another place, of such sum as may be agreed upon between such person and the analyst, to have such article analysed by such analyst, and to receive from him a certificate of the result of his analysis."

Sec. 14 (as amended by the Food and Drugs Act, 1899 (62 and 63 Vict. cap. 51), sec. 13):—"The person purchasing any article with the intention of submitting the same to analysis shall after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst, and shall divide the article into three parts to be then and there separated, and each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall if required to do so, deliver one of the parts to the seller or his agent. He shall afterwards retain one of said parts for future comparison, and submit the third part, if he deems it right to have the article analysed, to the analyst."

Sec. 20. "When the analyst having analysed any article shall have given his certificate of the result, from which it may appear that an offence against some one of the provisions of this Act has been committed, the person causing the analysis to be made may take proceedings for the recovery of the penalty herein imposed for such offence . . . in a summary manner."

The Sale of Food and Drugs Act, 1899 (62 and 63 Vict. c. 51), enacts :—

Sec. 2 (1). "The Local Government Board may, in relation to any matter appearing to that Board to affect the general interest of the consumer, and the Board of Agriculture may, in relation to any matter appearing to that Board to affect the general interests of agriculture in the United Kingdom, direct an officer of the Board to procure for analysis samples of any article of food, and thereupon the officer shall have all the powers of procuring samples conferred by the Sale of Food and Drugs Acts, and those Acts shall apply as if the officer were an officer authorised to procure samples under the Sale of Food and Drugs Act, 1875, except that (a) the officer procuring the sample shall divide the same into four parts, and shall deal with three of such parts in the manner directed by section 14 of the Sale of Food and Drugs Act, 1875, as amended by this Act, and shall send the fourth part to the Board. . . ."

Sec. 2 (2). "The Board shall communicate the result of the analysis of any such sample to the local authority, and thereupon there shall be the like

Mar. 20, 1908. **Falconer** was convicted by the Sheriff-substitute (A. O. M. Mackenzie) and adjudged to pay a penalty of £10.
 —
Falconer v.
Whyte.

He brought a bill of suspension in which he stated, *inter alia*:—
 (Stat. 2) “ . . . The respondent is Chief Inspector for Great Britain employed by the Department of Agriculture and Technical Instruction for Ireland, and part of his duties as such inspector is to look after the sale of Irish produce in Great Britain, and to see that it is sold as such. Some months before the date of the prosecution he was instructed by the Irish Department of Agriculture to go to Glasgow and make investigations about the sale of Irish produce there, and as the result of these investigations he received further instructions to again visit Glasgow and make purchases with the object of prosecuting the sellers. Those instructions were given by the said Board in the interest of the consumer and of agriculture in the United Kingdom. On 24th August last, in fulfilment of these instructions, he made four purchases of Irish butter, including the purchase from the complainer. When making said purchases, and, in particular, the purchase from the complainer, upon which the prosecution was instituted, the respondent stated he was making such purchase on behalf of the Irish Board of Agriculture for analysis.”
 (Stat. 5) “After purchasing said butter from the complainer the respondent divided it into three parts—one of which he kept for himself, another of which he gave to the complainer, and the third part he sent to be analysed by Mr F. W. Harris, one of the city analysts for Glasgow. When the respondent received the analyst’s certificate he handed it to Lord Ikerrin, the British Commissioner upon the Department of Agriculture and Technical Instruction for Ireland. The said certificate was considered by Lord Ikerrin and by the Department of Agriculture and Technical Instruction for Ireland.”
 (Stat. 6) “ . . . No communication was sent to the Local Authority in Glasgow with regard to the purchase of said butter by the respondent or by the said Department of Agriculture and Tech-

duty and power on the part of the local authority to cause proceedings to be taken as if the local authority had caused the analysis to be made.”

Sec. 3 (2). “If the Local Government Board or Board of Agriculture, after communication with a local authority, are of opinion that the local authority have failed to execute or enforce any of the provisions of the Sale of Food and Drugs Acts in relation to any article of food, and that their failure affects the general interest of the consumer or the general interest of agriculture in the United Kingdom, as the case may be, the Board concerned may by order empower an officer of the Board to execute and enforce those provisions, or to procure the execution and enforcement thereof in relation to any article of food mentioned in the order.”

Sec. 3 (3). “The expenses incurred by the Board or their officer under any such order shall be treated as expenses incurred by the local authority in the execution of the said Acts, and shall be paid by the local authority to the Board on demand, and in default the Board may recover the amount of the expenses with costs from the local authority.”

Sec. 23. “This Act shall apply to Scotland with the substitution for ‘The Local Government Board’ of ‘The Local Government Board for Scotland.’ . . .”

Sec. 24. “This Act shall apply to Ireland with the substitution for ‘The Board of Agriculture’ of ‘The Department of Agriculture and Technical Instruction for Ireland,’ and for ‘The Local Government Board’ of ‘The Local Government Board for Ireland,’ and for ‘The London and Edinburgh Gazettes’ of ‘The Dublin Gazette.’”

nical Instruction for Ireland, or with regard to the analysis of it by Mr Harris, and no request was made by the respondent or by or on behalf of the said Board to the said Local Authority that they should enforce the provisions of the Sale of Food and Drugs Acts." (Stat. 8)

Mar. 20, 1908.
Falconer v.
Whyte.

"The respondent when procuring the sample did not divide the same into four parts, and did not deal with the same in the manner provided by the provision (a) of subsection (1) of section 2 of the Sale of Food and Drugs Act, 1899, in respect that no fourth part was transmitted by him to the Board under whose instructions he was acting." (Stat. 9) "In convicting the complainer the Sheriff-substitute stated that he held it proved that the respondent had been instructed to prosecute, and did prosecute, by direction of the Board of Agriculture and Technical Instruction for Ireland, but that nevertheless he was in the same position as any other private person who made a purchase on his own behalf and for his own purposes in a Glasgow shop and submitted the same for analysis."

The complainer pleaded, *inter alia*;—(1) The conviction and sentence complained of having been obtained upon a complaint brought by the respondent on behalf and by direction of the Department of Agriculture and Technical Instruction for Ireland, and said complaint having been brought without an analysis of the butter complained of, and a request to prosecute having first been communicated to the Local Authority at Glasgow, said conviction and sentence are invalid, and ought to be suspended. (2) The conviction and sentence complained of having been obtained upon a complaint brought by the respondent on behalf and by direction of the Department of Agriculture and Technical Instruction for Ireland, and the butter referred to in said complaint having been divided into three instead of into four parts contrary to the provisions of the Sale of Food and Drugs Acts relative to a prosecution on behalf of said Department, said conviction and sentence are invalid, and ought to be suspended, with expenses.

Argued for the complainer;—The respondent had in fact made his purchase and instituted his proceedings not *qua* private individual, but *qua* officer of the Board of Agriculture. As such he was bound to proceed under the Sale of Food and Drugs Act, 1899,¹ the provisions of which were obligatory upon him. He could not proceed under the Sale of Food and Drugs Act, 1875,² as he might have done had he been a private individual. Admittedly he had not complied with the provisions of the Act of 1899,¹ and accordingly the conviction was bad.

Argued for the respondent;—He had proceeded under, and admittedly complied with, the Act of 1875,² which was available to everybody, whether member of the ordinary public or inspector. The conviction, accordingly, was good. The Act of 1899¹ was merely an enabling statute, intended to confer additional powers on the Boards and their officers, but not to deprive them of those they already had under the Act of 1875.² Its use was optional.

LORD JUSTICE-CLERK.—It has been frankly admitted by Mr Morton that if the Act of 1875 had stood by itself then he could not have made any objection to this complaint on any ground which he has now stated.

¹ 62 and 63 Vict. cap. 51, secs. 2, 3.

² 38 and 39 Vict. cap. 63, secs. 12, 14.

Mar. 20, 1908. Under that Act a person purchasing any article, no matter who he is, is entitled to state, after he gets the article, that he intends to use that article for analysis in order to test whether it is genuine or not. And if he does that—if he announces that he is to take that specific course—he must divide the sample that he takes into three parts, one of which he hands to the seller, another of which he keeps to himself, and the third of which he must submit to a public analyst. If he gets a certificate from the public analyst, which is to be evidence under the Act, he is entitled to prosecute the person who sold him the article if he finds cause. A difficulty thereafter arose as to whether or not a public official going to buy an article of that kind could prosecute, in respect that he was not *bona fide* purchasing the article for his own consumption, but specially and solely for the purposes of analysis. That difficulty was put right by special enactment which prohibited the sellers from refusing to sell a specimen of any of the goods they had falling under the Act to a person coming officially and asking for it.

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Clerk.

Now, therefore, we are in this position—Mr Whyte, who comes from Ireland in the interests of the Department of Agriculture and Technical Instruction of Ireland, purchased a sample of butter, taking the course prescribed by the Act of 1875 and dividing it into three parts and distributing them as he was required to do by that Act. He proceeded to get an analysis from the public analyst, which justified a prosecution. He instituted his prosecution, and he was successful in obtaining a conviction. In that I can see nothing that was in the least degree irregular. Mr Morton says that since the Act of 1899, Mr Whyte, being an inspector of the Department in Ireland, could no longer proceed under the Act of 1875, and he founds upon section 3 of the Act of 1899, which gives the Board of Agriculture in Ireland certain powers which it had not before, *inter alia*, that where the Board is not satisfied that the Act has been carried out efficiently by the Local Authority, the Board can, after certain procedure, empower one of its own officers to execute and enforce the provisions of the Act, and, if necessary, prosecute at the Local Authority's expense.

Now, there can be no doubt that, if the Board avails itself of the special powers conferred by the Act, it must also carry out its other provisions including the division of the sample taken into four parts, a proceeding which seems to be solely for its own information, or possibly to keep a sample for the Local Authority on which the expense of the proceedings is to be put. If, however, the Board does not think it feasible or necessary to avail itself of these special powers, but instead chooses itself to use the machinery provided by the Act of 1875, as it has done in the present case at its own expense, I can see nothing in the Act of 1899 to forbid it to do so. What it could have done before, it can do still. It has, it is true, certain additional advantages under the Act of 1899, but it may consider that in certain circumstances it is better not to make use of these advantages but to proceed in the ordinary way. I have no difficulty in holding that this suspension must be refused.

LORD LOW.—I am of the same opinion. It is conceded, and is clear, that if it was competent for the respondent in this suspension (the

complainer in the Sheriff Court) to proceed under the Act of 1875 the Mar. 20, 1908. whole proceedings were regular and cannot be objected to. But it was ^{Falconer v.} argued that the respondent, being the Chief Inspector for Great Britain of Whyte. the Board of Agriculture for Ireland, and having acted under the instruc- ^{Lord Low.} tions of that Board, proceedings could only be taken in terms of the provisions of the 2d and 3d sections of the Sale of Food and Drugs Act of 1899. I confess that I was at first impressed by that argument upon reading the parts of these sections which alone are set forth in the case, because, if that were all that these sections contained, it would look very like a code regulating the procedure which must be followed if the Board in Ireland chose to raise questions in Scotland through one of their inspectors. But I think that, when the whole sections are read, it becomes plain what the object of these enactments was. It was to enable the Board in Ireland to carry through proceedings in Scotland at the expense of the Local Authority within whose jurisdiction the offence had been committed, and that explains why there are all these careful provisions. That being so, if the Board in Ireland choose to bear their own expenses, I see no reason why their inspector should not proceed, as an ordinary purchaser, under the Act of 1875. And, therefore, I have no doubt that the Sheriff was right here.

LORD ARDWALL.—When I learned at a very early stage in this debate that the complainer in the suspension had no objections to the instance of the original complaint, I at once came to the conclusion that this suspension must fail, because the first and second pleas in law are founded upon this—that certain procedure prescribed by the Sale of Food and Drugs Act, 1899, where proceedings are initiated by the Department of Agriculture and Technical Instruction for Ireland, had not been followed,—that is all. Now, that Act was passed for the purpose of giving additional powers to central authorities, and did not, in the least, detract from remedies provided by the Act of 1875, and Mr Morton's argument resolved itself into this amazing series of propositions—he argued that the respondent, instead of proceeding as if the complaint were at his own instance, which it is, ought to have proceeded under the powers and privileges given to the Department of Agriculture in Ireland under the Act of 1899; and in the next place, that if he had done so he would have required to have done certain things which he has not done, and, therefore, the whole of the proceedings complained of must be quashed. Now, it is very considerate of an accused person in a case of this sort to suggest the procedure the prosecutor ought to have followed, but a complainer can adopt what procedure he likes provided he keeps within the terms of the statutes, and the procedure in this case was properly conducted under the Act of 1875. The respondent was under no obligation whatever to take advantage of the Act of 1899. I am accordingly of opinion that this bill of suspension should be refused.

THE COURT refused the bill of suspension.

NORMAN M. MACPHERSON, S.S.C.—ERSKINE DODS & RHIND, S.S.C.—Agents.

No. 10.

ALEXANDER FORBES AND OTHERS, Complainers.—*Macphail*.
 JOHN MAIN (Procurator-Fiscal for the County of Linlithgow),
 Respondent.—*A. M. Anderson, A.-D.*

Mar. 20, 1908.

Forbes v.
Main.

Procedure—Proof—Witness—Citation of witnesses for precognition on oath—Lotteries Act, 1823 (4 Geo. IV. cap. 60).—The Procurator-fiscal of a county presented a petition to the Sheriff setting forth that at a Masonic bazaar held in October 1907 a lottery had been carried on in contravention of the Lotteries Act, 1823, and that the Chief Constable had endeavoured to get evidence against persons engaged in the lottery from persons able to give information, but that they had refused to give it, and praying for a warrant to cite all available witnesses for precognition on oath if necessary.

The Sheriff granted the warrant craved, and certain persons were cited.

The Court *suspended* the warrant and citations.

Observed that it was conceivable that in very serious cases such a warrant and citation might be justifiable.

HIGH COURT.
Lord Justice-
Clerk.

Lord Low.

Lord Ardwall.

JOHN MAIN, Procurator-fiscal of Court for the county of Linlithgow, presented a petition to the Sheriff of the Lothians and Peebles in the following terms:—

“That the petitioner has received information that raffling or disposing of goods by lottery was extensively carried on at a Masonic bazaar in the Victoria Hall, Linlithgow, on 3d, 4th, and 5th October 1907, in contravention of the Lotteries Act, 1823, and notwithstanding of ample warning having been given to the promoters of the said bazaar that this proceeding was illegal, and also in the full knowledge, as advertised by the promoters of said bazaar, that raffling had been stopped, which was baffling their efforts to raise the money they required.

“That the Chief Constable has endeavoured to obtain evidence against individuals who were prominently engaged in the said raffling or disposing of goods by lottery from persons who are well known to be able to give such information, but that several of such persons refuse to give any information to the police.

“That the present application is therefore necessary, to have a precognition of all available witnesses who can give evidence against the principal offenders.

“May it therefore please your Lordship to grant warrant to officers of Court to cite all available witnesses for precognition on oath if necessary regarding their knowledge of the premises; or to do otherwise in the premises as to your Lordship shall seem proper.”

The Sheriff-substitute (Macleod) granted warrant as craved.

Thereafter Alexander Forbes, road surveyor, Royal Terrace, Linlithgow, was cited by a police-constable “to compear within the Sheriff Court House, Linlithgow, upon the sixth day of December 1907 years, at ten o’clock forenoon, to be examined in precognition on oath if considered necessary, at the instance of the Procurator-fiscal of Court for the public interest, anent contraventions of the Lotteries Act, 1823, at the Masonic Bazaar, Linlithgow, on 3d, 4th, and 5th October 1907, with certification.”

Similar citations were served upon Robert Jamieson junior, Charles F. Cran, and John Hebson.

Forbes, Jamieson, Cran, and Hebson all brought bills of suspension.

Forbes stated, *inter alia*;—3. “The said application does not set forth that any person has been arrested, or is suspected of any offence

or contravention of any statute, or that any charge of any kind has been made against any person whatsoever. It further does not state what provisions, if any, of the said Lotteries Act have been contravened. 4. It is believed and averred that the sole object of the respondent is illegally and unwarrantably to endeavour to coerce the complainer into making statements on oath, in the hope that he may thereby obtain information to enable him to take proceedings against some person or persons unknown, and the complainer is under the necessity of applying to your Lordships for redress."

Mar. 20, 1908.
Forbes v.
Main.

Forbes pleaded;—The proceedings complained of being illegal and incompetent, the complainer is entitled to suspension and sist thereof, as craved; *et separatim*, the proceedings complained of are oppressive.

The same averments and plea were stated for the other complainers.

Counsel for the complainers maintained that a warrant to cite witnesses for the purpose merely of precognition was, in the circumstances disclosed, unheard of and illegal.¹

Counsel for the respondent appeared and stated that he did not oppose the suspension.

LORD JUSTICE-CLERK.—There is no doubt whatever that these warrants ought to be quashed. I can conceive that in very serious cases what was done here might be resorted to, and might be useful, but it is quite inapplicable to such a case as that with which we are dealing. This is certainly a proceeding which has not been taken before in our time in ordinary cases, and I think it might tend to a very evil practice on the part of those investigating crime to sanction it in such a case as this.

LORD LOW and LORD ARDWALL concurred.

THE COURT suspended the warrant and citations.

CORNILLON, CRAIG, & THOMAS, S.S.C.—CROWN AGENT—Agents.

JOHN TURNBULL, Complainer.—*Crabb Watt, K.C.—Trotter.*

No. 11.

HIS MAJESTY'S ADVOCATE, Respondent.—*Sol.-Gen. Ure—*

Lyon Mackenzie.

Mar. 20, 1908.

Review—Appeal—Appeal from Sheriff to Court of Quarter Sessions—Merchandise Marks Act, 1887 (50 and 51 Vict. cap. 28), secs. 2 (5), 21.— Turnbull v. H. M. Advocate.
The Merchandise Marks Act, 1887 (50 and 51 Vict. cap. 28), enacts:—
Sec. 2 (5). "If any person feels aggrieved by any conviction made by a Court of Summary Jurisdiction, he may appeal therefrom to a Court of Quarter Sessions." Sec. 21. "In the application of this Act to Scotland the following modifications shall be made:— . . . The expression 'Court of Summary Jurisdiction' means the Sheriff Court, and all jurisdiction necessary for the purpose of this Act is hereby conferred on Sheriffs."

Held that in a prosecution in Scotland under the Merchandise Marks Act, 1887, the above enactments did not make it competent to appeal from the judgment of the Sheriff to a Court of Quarter Sessions.

JOHN TURNBULL, tweed merchant, 110 Houston Street, Glasgow, who carried on business in Hawick under the name of Armstrong & Company, was charged in the Sheriff Court of Roxburgh, Berwick, and Selkirk, at Hawick, with a contravention of the Merchandise

HIGH COURT.
Lord Justice-
Clerk.
Lord Low.
Lord Ardwall.

¹ Hansard's Parliamentary Debates, vol. 314, p. 390.

Mar. 20, 1908. **Marks Act, 1887,¹ on a complaint brought under the Summary Jurisdiction (Scotland) Acts, 1864 to 1881.**

Turnbull v.
H. M. Advocate.

He was convicted and sentenced by the Sheriff (Chisholm) to one month's imprisonment.

He presented a bill of suspension and liberation, in which he stated a number of objections to the regularity of the conviction which are immaterial to this report.

At the hearing his counsel stated that the complainer was about to appeal to the Court of Quarter Sessions under the provisions of the Merchandise Marks Act, 1887,* and craved the Court to pronounce an order of interim liberation pending such appeal.

Argued for the complainer;—The appeal was clearly competent under the Merchandise Marks Act, 1887,¹ secs. 2 (5) and 21. Pending its result the Court were bound to grant interim liberation.² Even if the competency of the appeal were doubtful, that question must first be decided by the tribunal to which the appeal was taken, viz., the Court of Quarter Sessions.³ The fact that an appeal to the High Court was permitted by the Summary Prosecutions Appeals (Scotland) Act, 1875,³ could not deprive the complainer of the special appeal conferred by the Merchandise Marks Act. It was further immaterial that the appeal had not actually been taken, as the Act prescribed no time limit.

Argued for the respondent;—Interim liberation could only be granted where an appeal had been already taken. The proposed appeal, however, was incompetent. In Scotland an appeal from the Sheriff Court to a Court of Quarter Sessions would be absurd. Statutory provisions as to procedure contained in Acts applicable both to England and Scotland had to be construed in the light of the practice of each country.⁴ So construed section 2 (5) of the Act obviously only applied to England. The complainer's proper remedy was under the Summary Prosecutions Appeals (Scotland) Act, 1875,³ section 3 of which provided for an appeal to the High Court by stated case, and section 3, subsection 6, for interim liberation pending such appeal.

LORD JUSTICE-CLERK.—The complainer here asks for interim liberation pending an appeal to a Court of Quarter Sessions of a case which was tried before the Sheriff. Such an appeal would be an absolute novelty in procedure, and, I think, an absolute innovation on procedure. In a case in which jurisdiction is committed to the Sheriff it is absurd to say that he should have his decision reviewed by a Court of Quarter Sessions, and not by this Court, which usually has the power of review. This Act of Parliament was originally framed as an English Act, in which the original proceedings were before the Justices, and gives an appeal to Quarter Sessions, which is the usual Court of Appeal in that country. But the Legislature in applying the Act to Scotland saw fit to exclude the jurisdiction of the Justices and to give the jurisdiction to the Sheriff. I think the sound view is, that if the Justices are not to try the case in the first instance, the Court of

¹ 50 and 51 Vict. cap. 28.

* Quoted in rubric.

² Pirrie v. List, June 8, 1867, 5 Irvine, 433.

³ 38 and 39 Vict. cap. 62.

⁴ Dunbar v. Johnston, Dec. 22, 1904, 7 R. (J.) 40, 4 Adam, 505.

Quarter Sessions cannot be the Court of review. It must be borne in mind Mar. 20, 1908. that a proceeding before a Court of Quarter Sessions is not a process of review, but a new trial from the beginning, the proceedings before the Justices in Petty Sessions being nullified by the appeal. It is inconceivable if the Legislature had intended to bring about this extraordinary result of a new trial by Justices of a case dealt with by the Sheriff that they should do it by a side wind, and should have left open two alternative modes of review—(first) an appeal to a Court of Quarter Sessions, and (second) an appeal by way of stated case to the High Court of Justiciary under section 3 of the Summary Appeals Act, 1875. If the complainer here had brought an appeal by way of stated case instead of a suspension, he would have been in a more favourable position, for he would then have been heard on the merits. I hold that the suggestion of an appeal to a Court of Quarter Sessions is quite out of the question. I adopt what Lord Kinnear says in the following passage from his judgment in the case of *Dunbar v. Johnston*¹—“There are Summary Jurisdiction Acts in England and also in Scotland. Trial in the manner provided by the Summary Jurisdiction Acts means trial in the manner provided by the Summary Jurisdiction Acts in force in either country according as the trial takes place in the one or the other.” (His Lordship then adverted to points not now reported.) I am of opinion that the suspension should be refused.

LORD LOW and LORD ARDWALL concurred.

THE COURT refused the bill.

J. D. TURNBULL, S.S.C.—W. F. HALDANE, W.S., Crown Agent—Agents.

PETER MAGUIRE, Complainer.—*Morton*.

No. 12.

H. M. ADVOCATE, Respondent.—*Sol.-Gen. Ure—A. M. Anderson, A.-D.*

May 12, 1908.

Procedure—Indictment—Relevancy—Specification—Fair Notice—Reset—Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. cap. 35), secs. 19 and 58.—An indictment for reset set forth that “during the period between 1st July 1907 and 3d March 1908,” at a place libelled, “on different occasions during said period, the particular occasions being to the prosecutor unknown,” the accused “did reset in all 25 lbs. of brass and copper electric and gas fittings, and 25 lbs. of solder, the same having been dishonestly appropriated by theft.” Annexed there were (1) a list of productions, including certain specified brass and copper electric and gas fittings, and 2 lbs. 10 ounces of solder; and (2) a list of witnesses.

Maguire v.
H. M. Advocate.

Held that, in view of the provisions of the Criminal Procedure (Scotland) Act, 1887, secs. 19 and 58, the indictment was relevant; and that read along with the lists of productions and witnesses it gave the accused sufficient notice of the charge he had to meet.

H. M. Advocate v. M'Donald, 1888, 1 White, 593, 15 R. (J. C.) 47, commented on.

PETER MAGUIRE, general dealer, 1 St John Street, Edinburgh, was indicted at the instance of His Majesty's Advocate, the charge being “that during the period between 1st July 1907 and 3d March 1908, in the premises at 27 Jeffrey Street, Edinburgh, occupied by” the accused “on different occasions during said period, the particular occa-

High Court.
Lord Justice-
Clerk.
Lord Low.
Lord Ardwall.

¹ 7 R. (J.) 40, 4 Adam, 505.

May 12, 1908.

Maguire v.
H. M. Advocate.

sions being to the prosecutor unknown," the accused "did reset in all 25 lbs. of brass and copper electric and gas fittings, and 25 lbs. of solder, the same having been dishonestly appropriated by theft."

Annexed to the indictment there was a list of productions containing, *inter alia*, the following items:—

- "Label 1. A brass electric lamp suspending eye.
- „ 2. Thirty electric shade carrying rings.
- „ 3. Seventeen pieces of brass and copper fittings.
- „ 4. A brass and copper electric lamp gallery, 2 brass and 1 copper leaves.
- „ 5. Eighteen old brass couplings.
- „ 6. 2 lbs. and 10 ounces of solder."

There was also a list of witnesses, containing the names and designations of six persons.*

At the first diet it was objected for the panel that the indictment was irrelevant in respect it did not give the accused fair notice of the charge he had to meet.

The Court (Sheriff-substitute Orphoot) repelled the objection, and the panel pleaded not guilty.

At the second diet the panel was tried before the Sheriff of the Lothians and Peebles (Maconochie) and a jury. He was found guilty as libelled, and was sentenced to four months' imprisonment.

Maguire thereupon brought a bill of suspension and liberation.

The complainer averred:—(Stat. 7) "From the evidence led against him (the complainer) it was manifest that the prosecutor had all along intended to prove that on particular occasions, viz., in the month of August 1907 and in the months of November or December 1907, as well as on other occasions, the complainer had purchased certain brass and copper electric and gas fittings and solder from John Fraser . . . and James Thomson . . . both of whom immediately before the sales to the complainer had stolen said fittings and solder from the premises of their employers, David Purves & Company, plumbers . . . In addition to being examined as to occasions, the dates of which they did not specify, the said John Fraser and James Thomson were examined by the prosecutor as to particular occasions on which they had stolen metal from the premises of David Purves & Company and sold it to the complainer, viz., an occasion in the month of August 1907 and an occasion in November or December 1907. Witnesses in the employment of David Purves & Company were examined by the prosecutor as to thefts from said premises by the said John Fraser and James Thomson

* The Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. cap. 35), enacts:—Sec. 19. "It shall not be necessary to set forth in an indictment . . . productions . . . but it shall be sufficient that they be entered in the list of productions to be used at the trial. . . ."

Sec. 58. " . . . Under any indictment charging the resetting of property dishonestly appropriated . . . it shall not be necessary to set forth any details of the crime by which the dishonest appropriation was accomplished, but it shall be sufficient to set forth that the person accused received such property, it having been dishonestly appropriated by theft, or robbery, or by breach of trust and embezzlement, or by falsehood, fraud, and wilful imposition, as the case may be."

Schedule A. "Examples of Indictments . . . You did reset a watch and chain, pocket-book, and fifteen pounds, eleven shillings of money, the same having been dishonestly appropriated by theft or robbery."

of the very articles which the complainer was alleged to have resetted. May 12, 1908.
There was no reason why the indictment should not have contained information of the particular charges which the complainer would be required to meet." Maguire v.
H. M. Advocate.

The complainer pleaded ;—The indictment on which the complainer was convicted being irrelevant in respect that it did not give him fair notice of the charge he had to meet, the sentence complained of should be suspended, and liberation granted, with expenses as craved.

The case was heard before the High Court of Justiciary on 12th May 1908.¹

LORD JUSTICE-CLERK.—I think that this suspension cannot be sustained. The crime of reset is peculiar, and it is often difficult to draw an indictment which shall be specific and detailed. For instance, in the case of workmen employed in a granary stealing grain and selling it to dealers, it is impossible to specify the particular parcels of grain taken, and the exact time at which they were taken. Now here we have a case in which the prosecutor says: "You at certain times between July 1907 and March 1908, (I being unable to state the particular times), did reset 25 lbs. of brass and copper electric and gas fittings and 25 lbs. of solder." That would be sufficient specification in charging thieves, and I cannot see why it should not be sufficient in the case of a resetter. There is no doubt that the indictment is in accordance with the forms prescribed by the Criminal Procedure Act, 1887. But it has been suggested that it does not give sufficient notice to the prisoner, and that where the prosecutor has not the means of stating the particular articles resetted he should make a statement in the old form that the particular articles are to him unknown. But I do not think that that is necessary. With regard to the case of *M'Donald*² I am bound to say that having carefully considered the judgment of Lord Trayner, I do not understand his reasoning. Under the Criminal Procedure Act, 1887, such words as "the particular occasion being to the prosecutor unknown," are unnecessary. Where it is alleged that an act has been done on a number of occasions, without the particular occasions being specified, it is implied that the particular occasions are unknown. The Solicitor-General has pointed out that under the Act of 1887 it is no longer necessary to name the articles to be produced in the indictment. It is enough if they are named in the list of productions. On the whole matter I think there are no grounds for the suspension, and that it must be refused.

LORD LOW.—I am of the same opinion. I understand that the objection is, not so much that there is a want of specification in the indictment as to the time when the alleged crime was committed, as that there is not sufficient notice to the accused of where the articles which he is charged with resetting came from, and what these articles actually were.

¹ *Authorities referred to :—*

For the Complainer: *H. M. Advocate v. M'Donald*, 1888, 1 White, 593, 15 R. (J. C.) 47; *Macdonald's Criminal Law*, p. 359; *Gold v. Neilson*, 1908, S. C. (J.) 5.

For the Respondent: *Criminal Procedure (Scotland) Act, 1887* (50 and 51 Vict. cap. 35), secs. 19 and 58.

² 15 R. (J. C.) 47.

May 12, 1908.

Maguire v.
H. M. Advocate.

Lord Low.

It appears that at the trial it was found that the accused had bought certain brass and copper fittings, and some solder, from two men who had stolen these things from their employer; and the objection substantially is that these facts ought to have been set out in the indictment. It is plain that so far as form goes that was not necessary in view of section 58 of the Criminal Procedure Act of 1887, which provides that "it shall not be necessary to set forth any details of the crime by which the dishonest appropriation was accomplished, but it shall be sufficient to set forth that the person accused received such property, it having been dishonestly appropriated by theft" and so on.

There may, however, I imagine, be cases in which, although the indictment cannot be said, so far as form goes, to fall short of what is required by the statute, it may not, in the peculiar circumstances of the particular case, give the accused fair and reasonable notice of the case to be met by him. That consideration has occasioned me some difficulty in view of the opinion of Lord Trayner in the case of *M'Donald*,¹ but I have come to the conclusion that, taking the indictment, list of productions, and list of witnesses together, the accused had reasonable notice of the case to be made against him, and accordingly I agree with your Lordship that there are no sufficient grounds for suspending the conviction.

LORD ARDWALL. — I agree. The indictment here is in the form prescribed by statute. But it is said that it does not give the accused sufficient notice of the precise charge which he has to meet, but when one looks at the list of witnesses and productions coupled with the indictment, it cannot be said that these together fail to give such due notice as the accused is entitled to, and such as is sufficient to enable him to prepare for his defence.

THE COURT refused the bill.

NORMAN M. MACPHERSON, S.S.C.—CROWN AGENT—Agents.

No. 13.

May 12, 1908.

Martin v.
Boyd.

DANIEL MARTIN, Complainer.—*Lippe*.
LEONARD CECIL BOYD (Burgh Prosecutor, Ayr), Respondent.—
Hon. W. Watson.

Statutory Offences—Prevention of Crimes Act, 1871 (34 and 35 Vict. cap. 112), secs. 7 and 20—"Crime"—"Theft which may be punished with penal servitude."—The Prevention of Crimes Act, 1871, by sec. 20, defines the expression "crime" as meaning in Scotland, *inter alia*, "any theft which in respect of any aggravation or of the amount in value of the money, goods, or thing stolen may be punished with penal servitude," and by sec. 7 makes certain enactments to apply where a person has been convicted on indictment of a crime and a previous conviction of a crime has been proved against him.

Held that where a person had been convicted in the Sheriff Court on indictment of theft, aggravated by five previous convictions of theft and attempt to steal obtained in the Sheriff and Police Courts (followed by sentences varying from fourteen days' to six months' imprisonment), he had been convicted of a "crime," and had had "a previous conviction of a crime" proved against him, within the meaning of the Prevention of

¹ 15 R. (J. C.) 47.

Crimes Act, 1871, although he had never been convicted in any Court May 12, 1908. which could competently impose a sentence of penal servitude.

Observed (*per* the Lord Justice-Clerk) that any person who is charged with theft may be tried before the High Court, and on conviction may be sentenced to penal servitude. Martin v. Boyd.

Procedure—Proof—Proof of previous conviction—Proof of previous conviction of theft aggravated by previous conviction—Prevention of Crimes Act, 1871 (34 and 35 Vict. cap. 112), secs. 7 and 20—Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. cap. 35), sec. 67.—Held in a prosecution under the Prevention of Crimes Act, 1871, that in view of sec. 67 of the Criminal Procedure (Scotland) Act, 1887, the production of an extract of a previous conviction on indictment in the Sheriff Court of theft aggravated by five previous convictions, three of theft and two of attempt to steal, scheduled thereto, was, in the absence of any objection by the prisoner to such previous convictions, sufficient evidence both of a conviction on indictment of a “crime,” and of previous conviction of a “crime,” within the meaning of the Prevention of Crimes Act, 1871.

Review—Suspension—Improper statement by prosecutor.—In a suspension the complainer, *inter alia*, alleged that in his address to the magistrate the prosecutor (the procurator-fiscal) had made an allegation which was not proved in the evidence. In his answers the procurator-fiscal stated that the magistrate had intimated that he would not allow himself to be influenced by the allegation complained of. The Court refused the suspension.

DANIEL MARTIN was charged in the Police Court of the burgh of Ayr upon a complaint at the instance of the Procurator-fiscal and Burgh Prosecutor for said burgh, which set forth that the accused “who was, on 18th May 1903, convicted on indictment before the Sheriff and Jury Court at Kilmarnock of the crime of theft, aggravated by a previous conviction of theft, which is a crime *within the meaning of section 20 of the Act after mentioned, and punishable with penal servitude, and against whom there was then proved a previous conviction obtained against him on 9th December 1901, on indictment before the Sheriff Court at Glasgow of the crime of theft, aggravated by previous convictions of theft, which is a crime punishable with penal servitude within the meaning of said Act, and against whom there was passed on the date first above mentioned a sentence of six months’ imprisonment, was, on the 18th day of April 1908, being a date within seven years immediately after the expiration of the foresaid sentence passed on him, found within an enclosed yard in the rear of the pawn office at 70 High Street, in said burgh of Ayr, occupied by Daniel Eadie Hill, about to commit theft by housebreaking, which is an offence punishable on indictment or summary conviction, contrary to the Prevention of Crimes Act, 1871, section 7, whereby the accused is liable to imprisonment, with or without hard labour, for a term not exceeding one year.” **

HIGH COURT.
Lord Justice-Clerk.
Lord Low.
Lord Ardwall.

* The Prevention of Crimes Act, 1871 (34 and 35 Vict. cap. 112), enacts:—

Sec. 7. “Where any person is convicted on indictment of a crime, and a previous conviction of a crime is proved against him, he shall, at any time within seven years immediately after the expiration of the sentence passed on him for the last of such crimes, be guilty of an offence against this Act and be liable to imprisonment, with or without hard labour, for a term not exceeding one year, under the following circumstances or any of them:—
. . . Thirdly, if he is found in any place, whether public or private,

May 12, 1908. The words printed in italics were introduced by amendment before the complaint went to trial.

Martin v. Boyd. The accused's law-agent objected to the competency and relevancy of the complaint on the ground that it was not averred that the accused had been previously convicted of a crime within the meaning of the Prevention of Crimes Act, 1871. The Magistrate repelled the objection. Thereafter the amendments above referred to were allowed to be made upon the complaint. The accused's law-agent objected that the two thefts of which the accused was alleged to have been convicted were not "crimes" within the meaning of the Prevention of Crimes Act, 1871. The Magistrate repelled the objection.

The accused pleaded not guilty.

Evidence was led. *Inter alia*, Malcolm M'Phee, detective-sergeant, Kilmarnock, produced an extract of a conviction on indictment in the Sheriff Court of Ayrshire at Kilmarnock, on 18th May 1903, of the theft of a purse containing £3, 9s. 5½d., and previous conviction of dishonest appropriation of property, upon which conviction the extract bore that the accused was sentenced to six months' imprisonment.* David Gillies, detective-officer, Glasgow, produced an extract

under such circumstances as to satisfy the Court before whom he is brought that he was about to commit or to aid in the commission of any offence punishable on indictment or summary conviction, or was waiting for an opportunity to commit or aid in the commission of any offence punishable on indictment or summary conviction."

Sec. 20. "The expression 'crime' means . . . in Scotland any of the pleas of the Crown, any theft which, in respect of any aggravation, or of the amount in value of the money, goods, or thing stolen, may be punished with penal servitude. . . ."

* Appended to the extract conviction there was a "Schedule of Previous Convictions" in the following terms :—

Date.	Court.	Crime.	Sentence.
1899. Jan. 31.	Eastern Police, Glasgow.	Attempt to Steal.	14 days' imprisonment.
1899. Aug. 26.	Do.	Theft.	30 days' imprisonment.
1901. Jan. 18.	Northern Police, Glasgow.	Do.	40 days' imprisonment.
1901. May 6.	Sheriff Court, Glasgow.	Attempt to Steal.	4 months' imprisonment, hard labour.
1901. Dec. 9.	Do.	Theft.	6 months' imprisonment.

The Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. cap. 35), enacts :—

Sec. 67. " . . . Where any person is convicted of any crime, and also of any aggravation by previous conviction, the Clerk of the Court in which sentence is pronounced shall enter in the record of the trial a statement of the contents of any extract conviction that is put in evidence, setting forth the date, the place of trial, the Court, the nature of the crime, the aggravations accompanying it, if any, and the sentence pronounced; and where such person is again accused of any offence, in regard to which such conviction may be competently used as an aggravation, a duly certified extract of the conviction setting forth the particulars of previous conviction as above shall be admissible and sufficient as evidence to prove against him all the previous convictions and aggravations therein set forth."

of a conviction against the accused under the name of James Brown in the Sheriff Court at Glasgow, on 9th December 1901, on indictment for theft of a purse, 6s. 3½d. of money, and ten receipts, aggravated by previous conviction of theft and attempt to steal, upon which conviction the extract bore that the panel was sentenced to six months' imprisonment.

May 12, 1908.
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The Magistrate, in respect of the evidence adduced, found the accused guilty of the contravention charged, and sentenced him to six months' imprisonment.

Martin brought a bill of suspension and liberation.

The complainer in the suspension averred (with regard to the objection taken as above mentioned to the competency and relevancy of the complaint):—(Stat. 4) “. . . The grounds of this objection were that the two convictions of theft founded on in the complaint had both been obtained in the Sheriff Court; that the thefts charged could not, therefore, have been punished with penal servitude; and that penal servitude was not the appropriate punishment, the sentence in each case being one of six months' imprisonment.” (With regard to the witness David Gillies above mentioned, and the production by him of the second extract conviction referred to, *supra*),—(Stat. 7) “In the course of his examination, it transpired that the said David Gillies had not been present in Court when the suspender was said to have been convicted on said 9th December 1901; that he had no personal knowledge of the conviction; and that such knowledge as he had was derived from the fact that he was present in the Eastern Police Court, Glasgow, on 18th January 1907, when, he stated, the suspender was charged with a contravention of the Glasgow Police (Further Powers) Act, 1892, and the conviction in question was proved to apply to him. The suspender's agent thereupon objected to the admissibility of the evidence of the witness Gillies on the ground that it was mere hearsay, and also to the production by him of the extract conviction referred to, but the presiding Magistrate repelled the objection and allowed the evidence to be received and the witness to put in the extract conviction as a production in the case. The suspender's agent thereupon asked that his objection to the admissibility of the evidence of the witness, and to the production of the extract conviction, be noted, in order to an appeal, but the clerk of Court, with the approval of the presiding Magistrate, declined to note said objection.” (Stat. 8) “After evidence in support of the complaint had been led, the respondent and the suspender's agent addressed the Court, and, in the course of his address, the respondent, in spite of the remonstrances of the suspender's agent, and in order to shew the suspender's intent to commit the crime of theft by house-breaking, laid stress upon the fact that, at the time of his apprehension, the suspender had been seen at the *locus* libelled in the complaint acting in concert with a man named Hutchison, who had pleaded guilty to a precisely similar charge as that brought against the suspender, and who had been sentenced to a year's imprisonment. No evidence was led to shew that the suspender had been with Hutchison on the occasion in question, or that Hutchison had pleaded guilty to the charge foresaid; but the suspender believes and avers that the Magistrate was influenced in coming to a decision on the merits of the case by the representations made to him, as aforesaid, and for which there was no warrant in the evidence adduced.”

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The complainer pleaded, *inter alia*;—The said conviction and sentence should be set aside in respect—(1) That the suspender has never been convicted of a “crime” within the meaning of the Prevention of Crimes Act, 1871, and that section 7 of said Act does not apply to him. (6) That the evidence of the witness Gillies, being mere hearsay, was incompetent, and that neither it nor the extract conviction produced by him should have been received. (7) That the procedure was illegal and irregular in respect of . . . (b) the Clerk of Court’s refusal to note the objection to the admissibility of the evidence of the witness Gillies, and the production of the extract conviction put in by him; and (c) the introduction by the respondent in his address to the presiding Magistrate of matters not brought out in evidence, whereby the Magistrate was prejudiced in coming to a decision on the merits of the case.

The procurator-fiscal lodged answers in which he stated, *inter alia*, with regard to the evidence of Gillies and the extract conviction produced by him—(Ans. 7) “. . . Explained that no written notice of objection to said convictions was given, in terms of the section 66 of the Criminal Procedure Act, 1887, and that the convictions specified in said extract conviction and in the schedule annexed thereto had already been proved in evidence by the witness Malcolm M’Phee, detective officer, Kilmarnock, and by the extract conviction of date 18th May 1903, produced in evidence by him.” (Ans. 8) “Denied. There was ample evidence laid before the Court to shew that the suspender and the man Hutchison had been arrested together at the same time and place. . . . The Magistrate was not influenced in coming to a decision by what had happened to Hutchison, but on the contrary intimated to the respondent and the suspender’s agent, through the Clerk of Court, that he (the Magistrate) would deal with suspender’s case entirely on its own merits.”

The case was heard before the High Court on 12th May 1908.¹

LORD JUSTICE-CLERK.—In this bill of suspension it is maintained in the first place that the complainer was never convicted of a crime within the meaning of the Act of 1871, and that section 7 of that Act does not apply. That contention amounts to this, that because the Public Prosecutor has seen fit to send a case of theft to be tried by the Sheriff and a jury, the accused, no matter how often he has been previously convicted, has not been guilty of a crime punishable with penal servitude. I am unable to hold that to have been the intention of the Legislature. The definition in the Act is a very unfortunate one indeed. In this country every person accused of theft may be brought before a jury in the High Court of Justiciary. That to do so is competent I have no doubt. It is equally competent for the High Court to pronounce a sentence of penal servitude, if it thinks that the circumstances warrant that course, and therefore every such case is a case in which a sentence of penal servitude may be pronounced.

But no such question arises here, because we are dealing with a case of theft with aggravation. That comes in under plea 7 (b). It is not dis-

Authorities referred to:—Prevention of Crimes Act, 1871 (34 and 35 Vict. cap. 112), secs. 7 and 20; Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. cap. 35), secs. 66, 67, and 71; Christie v. Adamson, 1853, 1 Irv. 293.

puted that the conviction of 18th May 1903 was properly proved. To the May 12, 1908.
extract conviction was attached a schedule of previous convictions to the Martin v.
number of five, and, under section 67 of the Criminal Procedure Act, Boyd.
1887, it is not necessary to prove these convictions again. I therefore Lord Justice-
hold that all these convictions were properly before the Court. The Clerk.
prisoner was entitled to impugn these convictions, and to shew that he
was not the person convicted, or at least he would have been entitled to
do so if he had given notice. He did not attempt to do so, and must
be held to have confessed that he was convicted of these offences. There
were five convictions previous to the conviction of May 1903, the sen-
tences ranging from fourteen days' to six months' imprisonment. Can it
be suggested that that man could not have been punished with penal
servitude? He might have been brought before the High Court of Jus-
ticiary, and, if he had, he would probably have received a sentence of penal
servitude.

The only remaining objection is the last of all. It would be most
hazardous to hold that because a prosecutor in his address to the Court
says something which he ought not to say the conviction must be set aside.
But in this case we have it stated in the answers, which we must take to
have the authority of the Magistrate, that he did not allow himself to be
influenced by what was said with regard to the man Hutchison, and that
he dealt with the suspender's case entirely on its own merits. I think that
the suspension must be refused.

LORD LOW and LORD ARDWALL concurred.

THE COURT refused the bill.

GARDINER & MACFIE, S.S.C.—JAMES AYTON, S.S.C.—Agents.

DAVID HASSON, Appellant.—*Crabb Watt, K.C.—Findlay.*
GEORGE NEILSON (Police Court Procurator-Fiscal, Glasgow),
Respondent.—*Morison, K.C.—M. P. Fraser—A. Crawford.*

No. 14.
May 12, 1908.

Statutory Offences—Betting—Street Betting Act, 1906 (6 Edw. VII. cap.
43), *secs. 1 (1) and (4) and 3—"Passage."*—The Street Betting Act, 1906,
sec. 1 (1), enacts that "any person frequenting or loitering in streets . . .
for the purpose of . . . betting" shall be liable to a penalty. Sec. 1
(4) enacts that "for the purpose of this section the word 'street' shall
include any . . . public . . . passage," and sec. 3 enacts that "in
Scotland . . . 'passage' includes common close or common stair, or
passage leading thereto."

Hasson v
Neilson.

In a prosecution under the Act for loitering in a public passage for the
purpose of betting, it was proved (a) that the passage in question was a
passage to which the public had no right of access, but to which the public
in fact could obtain access owing to the lock of the door being broken, and
(b) that it led directly to a court which gave access to at least one common
stair.

Held that the passage in question was not a public passage within the
meaning of sec. 1 (4) of the Street Betting Act, 1906; and (2) that it was
not a passage leading to a common close or common stair within the mean-
ing of sec. 3 of that Act.

May 12, 1908.

Hasson v.
Neilson.

HIGH COURT.
Lord Justice-
Clerk.

Lord Low.
Lord Ardwall.

DAVID HASSON was charged in the Western District Police Court, Glasgow, upon a complaint, under the Glasgow Police Acts, the Summary Jurisdiction (Scotland) Acts, 1864 to 1881, and the Criminal Procedure (Scotland) Act, 1887, at the instance of George Neilson, writer, Glasgow, Procurator-fiscal of Court, in which it was alleged that the accused did on "Friday, 14th June 1907, loiter in a public passage, *videlicet*, a common passage at 167 Finnieston Street, and in a public court, *videlicet*, a common court at 169 Finnieston Street, both of Glasgow, said passage and court each being a street within the meaning of the Street Betting Act, 1906, on behalf either of himself or of some other person to the complainer unknown, for the purpose of betting on horse races with David Alexander, of 2 Hill Street, Anderston, Glasgow, and with four men whose names and addresses are to the complainer unknown, being an offence contrary to and within the meaning of the Street Betting Act, 1906, sections 1 and 3 thereof, and such offence is the first offence, whereby the accused is liable to a fine." *

The accused pleaded not guilty, but after evidence had been led he was found guilty by the Magistrate of the offence charged as libelled, but that only in the public passage libelled, and was fined £10, with the alternative of sixty days' imprisonment.

Hasson appealed upon a case stated.

With regard to the passage and court libelled, the Magistrate found the following facts proved:—"Many years ago Messrs James & George Thomson, engineers and shipbuilders, were the sole occupants of the premises at Nos. 167 and 169 Finnieston Street, and while so possessed the premises were occupied by them as their engineering work and offices. At that time the public had not free access either to the passage or the court. Shortly after Messrs James and George Thomson left the premises the present state of the occupation came into existence, and has now subsisted for a number of years. That occupation is as follows:—The entrance at No. 167 is a door described on the plan produced and put in evidence as a door with lock, but the lock is broken and useless, and has been so for some considerable time. While the door may occasionally be pulled close at night, the entrance is freely accessible to the public, night and day. The door in question forms the entrance to the passage libelled, which is not more than 15 feet long by about 5 feet broad. In the passage there is a door with a padlock on it . . . that door being the entrance to a small store occupied by Thomas Sergeant, cooper, one of the witnesses for the defence. The passage is quite open at the south end, and leads directly into the court libelled. This gives an entrance to the court available to the public by the open door at No. 167. At No. 169 there is a sliding door or gate of access to the court, but from disuse the southern half of that gateway, in which there are

* The Street Betting Act, 1906 (6 Edw. VII. cap. 43), enacts,—Sec. 1 (1), "Any person frequenting or loitering in streets or public places on behalf either of himself or of any other person for the purpose of bookmaking or betting or wagering, or agreeing to bet or wager, or paying or receiving or settling bets, shall" in the the case of a first offence, be liable to a fine.

(4) "For the purpose of this section the word 'street' shall include any highway and any public bridge, road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not. . . ."

Sec. 3. "In Scotland . . . 'passage' includes common close or common stair, or passage leading thereto. . . ."

letter-boxes for the use of some of the tenants in the court, has become fixed, and always stands closed. The other or northern half of the gateway, which half the plan shews to be about 11 feet wide, is constantly open for access, with this exception, that it is sometimes, but not regularly, shut from Saturday nights till Monday mornings. There are at least ten different tenancies entering from the court by various doors or entrances, including a door at the western extremity of the building on the north side of the court leading to a common stair, by which is approached the Dock Labourers' Hall, shewn on the plan, and other occupancies. On the south face of the south wall of the old pay-box, now forming part of Sergeant's store . . . there are painted the words 'No admittance except on business.' The lettering is very indistinct, and has not been re-painted since the whole premises were occupied as stated by Messrs James & George Thomson."

The question of law was:—"Was I right in holding the passage libelled to be a street within the meaning of the Street Betting Act, 1906?"

The case was heard before the High Court of Justiciary on 12th May 1908.¹

LORD LOW.—The question in this case is whether the Magistrate was right in holding that the passage shewn on the plan as entering from 167 Finnieston Street was a "street" within the meaning of the Street Betting Act, 1906. The circumstances are very fully stated in the case. It appears that the passage was originally used as the entrance from Finnieston Street to an office or pay-box. Between Finnieston Street and the passage there is a door with a lock, but the lock is broken, and accordingly there is nothing to prevent anyone who chooses from entering the passage. The passage, after passing the pay-box, leads into a court, the main entrance to which is from Finnieston Street by means of the large door marked 168 on the plan. Various premises, and, at all events, one common stair, are entered from the court. The question is whether in these circumstances the passage is a street within the meaning of the Street Betting Act.

By section 1, subsection 4, of the Act, it is provided that "the word 'street' shall include any public . . . passage." Leaving out of view for the present the definition of the word "passage" in section 3, I am clearly of opinion that the passage in question is not a public passage within the meaning of section 1 (4). The public are able to go there only because the door is out of repair. That does not make the passage a public passage in the sense of the statute, because I apprehend that when a statute speaks of a place as being "public," it means a place where the public are entitled to be as a matter of right, and does not include private property to which the public can obtain access simply because there is no sufficient barrier to keep them out. Therefore, so far as subsection 4 of section 1 of the Act is concerned, I do not think that this case presents any difficulty.

It is, however, necessary to consider section 3, which gives a special definition of the word "passage" in the application of this Act to Scotland.

¹ *Authorities cited*:—Street Betting Act, 1906 (6 Edw. VII. cap. 43), secs. 1 (1) and (4) and 3; Vallance v. Campbell, 1906, 5 Adam, 70, 8 F. (J. C.) 62; M'Arthur v. Magistrates of Edinburgh, 1906, 8 F. 1123.

May 12, 1908. The provision is that "In Scotland 'passage' includes common close or common stair, or passage leading thereto." I am inclined to agree with Mr Fraser that the word "passage" which is there defined must be read as meaning "public" passage. At all events, I shall assume that that is so, but even upon that assumption I do not think that section 3 affects the conclusion at which I arrive upon a construction of section 1 (4).

Hasson v.
Neilson.

Lord Low.

The passage is of course not a common stair, and it is not contended that it is a common close. The question therefore is whether it is a passage leading to a common close or a common stair? As I have already pointed out, the passage leads directly into the court, and I think that it is sufficiently clear that the court which is shewn on the plan is not a subject of the kind to which in Scotland the term "close" is applied. Indeed I did not understand it to be contended that the court was a "common close." It was, however, maintained that the passage leads to a common stair. That is true to this extent, that the passage leads into the court, and the court gives access to a common stair. But I do not think that that position of matters satisfies the description in the statute of a passage "leading" to a common stair. It seems to me that what is meant is a passage leading directly to a common stair, and not a passage leading directly to some other place from which in turn access can be had to the common stair. I am, therefore, of opinion that the question of law should be answered in the negative.

LORD ARDWALL.—I agree. The *locus* in this case seems to have been inside a small house, originally used as a pay office of a large public work. One half of the house is apparently still kept carefully locked up, but in the other part, which is the place in question, there is a door which, having got out of repair, is not kept closed, and which persons may pass through and gain access to an open space lying beyond. The fact, however, that the door is not kept locked does not make the house a public or common passage. The place in question is private property, and any person using it for betting purposes does so as a mere trespasser, and cannot correctly be said to be loitering in a public passage.

LORD JUSTICE-CLERK.—I concur with your Lordships. I have no doubt that if it had been in contemplation that there were such places as this where betting might be carried on, the Act would have been so framed as to have covered them. This, however, was not done, so the conviction here must be quashed.

THE COURT answered the question of law in the negative, and quashed the conviction.

BRYSON & GRANT, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

JAMES STENHOUSE, Complainer.—*M'Lennan, K.C.—Paton.*
 THOMAS DYKES (Govan Burgh Prosecutor), Respondent.—
M. P. Fraser—D. P. Fleming.

No. 15.

May 13, 1908.

Stenhouse v.
Dykes.

Summary Procedure—Conviction—Alternative charge and general conviction—Street Betting Act, 1906 (6 Edw. VII. cap. 43), sec. 1 (1).—A person was charged with loitering in a street libelled “for the purpose of bookmaking or betting or wagering, or agreeing to bet or wager, or paying or receiving or settling bets,” contrary to the Street Betting Act, 1906, sec. 1. He was found “guilty of the offence charged.”

Held that this was not a case to which the rule against a general conviction proceeding upon an alternative charge could be held to apply, and conviction sustained.

Summary Procedure—Sentence—Imprisonment in default of immediate payment of fine—Street Betting Act, 1906 (6 Edw. VII. cap. 43), secs. 1 (1) (a) and 3—Summary Procedure Act, 1864 (27 and 28 Vict. cap. 53), sec. 18 (3) and (6), Schedule K, 3 and 6—Summary Jurisdiction (Scotland) Act, 1881 (44 and 45 Vict. cap. 33), sec. 6 (b).—The Street Betting Act, 1906, enacts, sec. 1 (1) (a), that a person for a first offence against the Act shall be liable to a fine not exceeding £10, and sec. 3, that in Scotland “in the event of an offender failing to make payment of a fine imposed under sec. 1 (1) (a) . . . he shall be liable to imprisonment in accordance with the provisions of the Summary Jurisdiction Acts.”

A person who had been convicted of an offence under sec. 1 (1) (a) of the Act was fined £10, “and in default of immediate payment thereof” was sentenced to be imprisoned for thirty days, this sentence being in the form of Schedule K, 3, of the Summary Procedure Act, 1864.

Held that, in view of the provisions of sec. 3 of the Street Betting Act, 1906, and of sec. 6 (b) of the Summary Jurisdiction (Scotland) Act, 1881, this was a case of a contravention of an Act of Parliament under which the accused, in default of payment of a penalty, was liable to be imprisoned for a period limited to a certain time in the sense of sec. 18 (3) of the Summary Procedure Act, 1864, and that consequently a sentence in the form of Schedule K, 3, of that Act was competent.

JAMES STENHOUSE, baker, Govan, was charged in the Police Court of the burgh of Govan upon a complaint, under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887, at the instance of Thomas Dykes, writer, Glasgow, the Burgh Prosecutor, which set forth that the accused “did on the 22d day of November 1907, between the hours of 12.30 P.M. and 2 P.M., loiter in Lambhill Street, between Paisley Road and Tower Street, in the burgh of Govan, said Lambhill Street being a street within the meaning of the Street Betting Act, 1906, section 1, on behalf of himself or some other person or persons to the complainer unknown, for the purpose of bookmaking or betting or wagering, or agreeing to bet or wager, or paying or receiving or settling bets with a person or persons to the complainer unknown, on horse races publicly announced to take place on or about the date libelled, at Manchester, England, or on other horse races or events whereof the dates, places, and particulars are to the complainer unknown, contrary to the said Street Betting Act, 1906, section 1, particularly subsection 1 thereof, and such offence is a first offence, whereby the accused is liable on conviction to a fine not exceeding £10, and in default of payment to imprisonment for a period not exceeding two months.”

The accused pleaded not guilty. Evidence was led in support of the complaint, and the Magistrate, of date 29th November 1907, “in

HIGH COURT.
Lord Justice-
Clerk.
Lord Low.
Lord Ardwall.

May 13, 1908.

Stenhouse v.
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respect of evidence adduced," found "the accused guilty of the offence charged, and therefore" fined and amerced him "in the sum of ten pounds sterling, payable to the Clerk of Court, and in default of immediate payment thereof," sentenced and adjudged "the said accused to be imprisoned for the space of thirty days from this date, unless said fine be sooner paid, and thereafter to be set at liberty; and for that purpose" granted "warrant to officers of law to convey the said accused to the prison of Glasgow, thereafter to be dealt with in due course of law."

Stenhouse brought a bill of suspension.

The complainer averred:—"(4) The charge brought against the complainer was an alternative one, but the conviction following thereon is general, and it cannot be ascertained therefrom, or from the whole proceedings, of what the complainer was convicted. (5) The sentence pronounced by the said Magistrate is *ultra vires*, incompetent, and oppressive. The statute founded on does not authorise imprisonment for a first offence in default of immediate payment of the fine imposed."

The complainer pleaded;—(2) The conviction or sentence complained of ought to be suspended in respect that a general conviction was pronounced on a charge which is alternative. (3) The sentence complained of being illegal, incompetent, and oppressive, the conviction ought to be suspended.*

* The Street Betting Act, 1906 (6 Edw. VII. cap. 43), enacts:—

Sec. 1. "(1) Any person frequenting or loitering in streets or public places, on behalf either of himself or of any other person, for the purpose of bookmaking or betting or wagering, or agreeing to bet or wager, or paying or receiving or settling bets, shall (a) in the case of a first offence be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding ten pounds. . . ."

Sec. 3. "In Scotland . . . in the event of an offender failing to make payment of a fine imposed under sec. 1 (1) (a) . . . of this Act, he shall be liable to imprisonment in accordance with the provisions of the Summary Jurisdiction Acts."

The Summary Procedure Act, 1864 (27 and 28 Vict. cap. 53), provides:—

Sec. 18. "In cases of conviction or judgment against the respondent in prosecutions and proceedings under this Act the sentence of the Court may be in one or other of the forms contained in the Schedule K to this Act annexed, or as nearly as may be in such form according to the nature and circumstances of the complaint, viz.— . . . (3) In complaints for the contravention of any Act of Parliament under which the accused is or shall be liable to forfeit a penalty, and in default of payment thereof to be imprisoned for a period limited to a certain time, at the expiration of which he shall be entitled to liberation although the penalty has not been paid, the judgment of the Court shall be in the form No. 3 in the said Schedule. . . . (6) In complaints for the contravention of any Act of Parliament under which the accused is or shall be liable to a penalty, and where no special provision is made for the recovery thereof, or for the substitution of a term of imprisonment in default of payment . . . the judgment of the Court shall authorise execution by arrestment, poinding, and sale, and imprisonment (unless recovery by imprisonment is excluded by the terms of the Act), and may be in the form No. 6 in the said Schedule. . . ."

Schedule K, form No. 3 (*Conviction for a penalty and in default of payment Imprisonment*), is as follows:—"The justices [or justice or sheriff or magistrate] in respect of the judicial confession of the said J K [or of the

The case was heard before the High Court of Justiciary on 13th May 1908.¹

Counsel for the respondent were not called upon.

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LORD JUSTICE-CLERK.—I do not think it is necessary to call for a reply. As to the first objection that this was a general conviction following on an alternative charge, I see no ground for it. The Act specifies loitering as an offence in certain circumstances, namely, loitering for the purpose of book-making or betting or wagering, or agreeing to bet or wager, or paying or receiving or settling bets. If a man is found loitering for all or any of these purposes, it does not matter which, he is liable to fine or imprisonment. In many cases where two modes of committing a crime are specified a general

evidence adduced] convict the said J K of the contravention [or offence] charged [or state to what extent he is guilty] and therefore adjudge him to forfeit and pay the sum of £ of penalty [or of modified penalty where there is power to modify,] [with the sum of £ of expenses, where expenses may be awarded], and in default of immediate payment thereof [or if time is allowed, say within days from this date] adjudge him to be imprisoned in the prison of for the period of from the date of his imprisonment unless the said sum [or sums] shall be sooner paid, and grant warrant to officers of Court to apprehend him and convey him to the said prison and to the keeper thereof to receive and detain him accordingly.

[Signature of judges or judge]."

Schedule K, form No. 6, *Judgment for a penalty recoverable by Diligence*, is as follows :—"The justices [or justice or sheriff or magistrate] in respect of the judicial confession of the said J K [or the evidence adduced] convict the said J K of the contravention [or offence] charged [or state to what extent he is guilty], and therefore adjudge him to forfeit and pay the sum of £ of penalty [or modified penalty where there is power to modify] of £ , and also find the said J K liable in £ of expenses to the complainer, and ordain instant execution by arrestment, and also execution by poinding [and imprisonment where there is power to imprison]; grant warrant to officers of Court to arrest all debts and sums of money owing to the said J K, and [if time is allowed add in default of payment within days from this date] to poind his goods and effects, and to sell the same at the expiration of not less than forty-eight hours after such poinding without further notice or warrant; [where the Act authorises imprisonment, add] and appoint a return or execution of such poinding and sale to be made within days from the expiration of the period hereby allowed for payment, under certification of imprisonment [if for a term, specify the term] in default of payment or recovery of the said sums with the expenses of diligence before the time allowed for such report.

[Signature of judges or judge]."

The Summary Jurisdiction (Scotland) Act, 1881 (44 and 45 Vict. cap. 33), enacts :—

Sec. 6. "In all proceedings under the Summary Jurisdiction Acts . . .

¹ *Authorities cited by the complainer* :—(1) In argument on his 2d plea :—Bradford v. Dawson, L. R., [1897] 1 Q. B. 307; Lang v. Walker, 1902, 4 Adam, 82, 5 F. (J.) 8 (*distinguished*); Murray v. M'Dougall, 1883, 5 Couper, 215, 10 R. (J.) 42; Gemmell v. Weir, 1897, 2 Adam, 227, 24 R. (J.) 23. (2) In argument on his 3d plea :—Summary Procedure Act, 1864, sec. 18 (3), and (6), Schedule K, 6; Street Betting Act, 1906, sec. 1 (1) (a); Todd v. Magowan, 1905, 4 Adam, 544, 7 F. (J.) 50; Simpson v. Board of Trade, 1892, 3 White, 167, 19 R. (J.) 66; Gardner v. Bremridge, 1901, 3 Adam, 309, 3 F. (J.) 46; Summary Jurisdiction (Scotland) Act, 1881, secs. 6 (b) and 8 (1).

May 13, 1908. conviction cannot follow, but it is not the law that wherever you find the word "or" you have an alternative charge.

Stenhouse v.
Dykes.

Lord Justice-
Clerk.

I think that this case is very like that in which it was held that where a man was charged with trespass in pursuit of "game, or of deer, roe, wood-cocks, snipes, quails, landrails, wild ducks, or conies," a general conviction following on that charge was not bad. It was held that all these details were merely descriptive of the mode in which the crime might be carried out. It was not necessary to a conviction that the accused should have done any of these things. It was enough that he was there for the purpose of doing one or more of them. It is the same in the present case. If the evidence satisfies the Magistrate that the prisoner was loitering for purposes connected with betting, for all of them, or for any one or more of them, he may convict, although in the latter case, he cannot specify the particular purpose which the prisoner had in his mind.

But then it is said that imprisonment was not competent. That could not have been said if section 3 of the Street Betting Act had contained a repetition of the details in section 6 (b) of the Act of 1881. When you find in the Summary Jurisdiction Act, 1881, a section which prescribes the period of imprisonment which shall correspond to a fine of a certain amount, and a later Act of Parliament provides that in default of payment of a fine the offender may be imprisoned in accordance with the provisions of the Summary Jurisdiction Acts, I do not doubt that the Magistrate is entitled to go back to the Act of 1881, and pronounce sentence in terms of it.

LORD LOW concurred.

LORD ARDWALL.—I concur with what has been said by your Lordship regarding the contention of the complainer that this is a case of a general conviction on an alternative charge.

With regard to the penalties it was maintained that the warrant for imprisonment was wrong, and it was said that under the Summary Procedure Act, 1864, the conviction should have been in terms of Schedule K, number 6, instead of Schedule K, number 3, annexed to that Act. I think that the Magistrate was right in adopting Form K, number 3.

Subsection 3 of section 18 of the Act of 1864 provides :—"In complaints for the contravention of any Act of Parliament under which the accused is or shall be liable to forfeit a penalty, and in default of payment thereof to be imprisoned for a period limited to a certain time, at the expiration of which he shall be entitled to liberation although the penalty has not been

(b) where a warrant of imprisonment is granted, whether in default of payment of a penalty or expenses, or for failure to find caution or security, or in default of recovery of sufficient goods by poinding and sale, when the amount adjudged to be paid or for which security is to be found . . . exceeds five pounds but does not exceed twenty pounds, the period of imprisonment shall not exceed . . . two months."

Sec. 8. "(1) Subject to the provisions of sec. 6, in all proceedings under the Summary Jurisdiction Acts where a warrant of poinding and sale is competent, a warrant of imprisonment in default of recovery of sufficient goods shall likewise be competent for a period not exceeding three months, and the Court shall specify the term of imprisonment in the warrant."

paid, the judgment of the Court shall be in the Form No. 3" in Schedule May 13, 1908.

K. It was said that this subsection did not apply because the Street Betting Act, 1906, section 1 (a), does not provide that on default of payment of a fine the accused should be imprisoned for a period *limited to a certain time*. But at the time when the Street Betting Act was passed the Summary Jurisdiction Act, 1881, was in force. Stenhouse v. Dykes.
Lord Ardwall.

By section 3 of the Street Betting Act it is provided that in the event of an offender failing to make payment of a fine under section 1 (a) he shall be liable to imprisonment in accordance with the provisions of the Summary Jurisdiction Acts. One of these Acts is the Summary Jurisdiction Act of 1881. In section 6 (b) of that Act we find that the period for which an offender is liable to imprisonment, where the penalty is £10, is limited to two months. In considering whether subsection 3 of section 18 of the 1864 Act applies to a penalty imposed under the Street Betting Act, I read that Act as incorporating section 6 (b) of the Act of 1881, and doing so there is no doubt that it does prescribe a period of imprisonment limited to a certain time, because by reading section 6 (b) we arrive at the period of imprisonment which it is lawful to give. In the present case the penalty imposed being £10, the period of imprisonment is limited to "a certain time," namely, to two months, and, this being so, it follows that Schedule K, No. 3, of the Act of 1864 was the proper form of conviction to adopt in the present case.

With regard to the application of subsection 6, section 18, of the 1864 Act, I think on reading it along with Schedule K, No. 6, that it does not apply to the present case, and that if the Magistrate had given judgment in the form of Schedule K, No. 6, he would have acted wrongly, because in the present case the Act of Parliament for the contravention of which the accused was liable to a penalty contains a special provision for the substitution of a term of imprisonment in default of payment.

THE COURT refused the bill.

GILL & PRINGLE, W.S.—M. J. BROWN & Co., S.S.O.—Agents.

JAMES MITCHELL, Complainer.—*Kemp.*

JAMES MORRISON (Justice of Peace Court Procurator-Fiscal of Banffshire), Respondent.—*D.-F. Campbell—A. M. Mackay.*

No. 16.

May 13, 1908.

Review—Suspension—Exclusion of Suspension—Special Statutory Appeal—Public-House—Breach of Certificate—Third offence—Proof—Summary Procedure—Licensing (Scotland) Act, 1903 (3 Edw. VII. cap. 25), secs. 53, 91, 102, and 103.—A publican who had been convicted of breach of certificate, "upon a complaint bearing that it was a third offence," brought a suspension upon the ground that after evidence for the prosecution and the defence had been led, the cases for the respective parties closed, and parties heard with regard to the particular breach alleged, and after the justices had found the accused guilty thereof, a witness was put in to prove two previous convictions against the accused, that this evidence was incompetently admitted, that no other evidence of the offence charged being a third offence had been led, and that such evidence should have been led, as this was a substantive part of the charge. *Held* that the procedure complained of amounted to nothing more at most than a "deviation in point of form from the statutory enactment," that consequently the only form of Mitchell v. Morrison.

May 13, 1908. review competent was an appeal under sec. 102 of the Licensing (Scotland) Act, 1903, and that the suspension was incompetent.
 Mitchell v. Morrison. *Opinions* that the procedure followed by the Justices was competent and proper.

HIGH COURT. JAMES MITCHELL, hotelkeeper, Delnashaugh Hotel, Ballindalloch, in the county of Banff, was charged in the Justice of Peace Court at Banff upon a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887, at the instance of James Morison, solicitor, Banff, Procurator-fiscal of Court, which set forth that the accused "who holds a certificate for the sale of exciseable liquors at his premises at Delnashaugh Hotel aforesaid, granted to him under the provisions of the Licensing (Scotland) Act, 1903, which, *inter alia*, provides that he shall not himself be in a state of intoxication on the premises, has contravened the terms and conditions of said certificate, in so far as upon Tuesday, the 3d day of September 1907, the said James Mitchell was in a state of intoxication on the said licensed premises occupied by him at Delnashaugh aforesaid, whereby, this being the third offence, he is liable to forfeit and pay a sum not exceeding £20, together with the expenses of conviction to be ascertained upon conviction, and in addition to said penalty the certificate granted to the said James Mitchell shall be declared to be forfeited, and to become void and null, all in terms of sections 53 and 91 of the said Licensing (Scotland) Act, 1903."

There was no reference in the complaint to any particular previous convictions for breach of certificate against the accused.

The complaint was tried on 19th October 1907. The accused pleaded not guilty.

The Justices convicted the accused of the contravention charged, "and adjudged him to forfeit and pay £3 of modified penalty, with £1, 10s. of expenses, and" in respect this was "the third offence," declared "the certificate held by the" accused "to be forfeited and to become null and void."

Mitchell brought a bill of suspension.*

The minutes of procedure bore that after four witnesses had been examined in support of the complaint and two in exculpation,

* The Licensing (Scotland) Act, 1903 (3 Edw. VII., cap. 25), enacts:—

Sec. 102. "It shall be competent to any person conceiving himself aggrieved by any warrant, sentence, order, decree, judgment, or decision made or given by any sheriff, justice, or justices of the peace, or magistrate in any cause, prosecution, or complaint raised under the authority of this Act, for any offence punishable by fine or by imprisonment, to bring the case by appeal before the High Court of Justiciary. . . . Provided always that such appeal shall be competent only when founded on the ground of corruption or malice and oppression on the part of the sheriff, justice, or justices of the peace, or magistrate as the case may be, or on such deviations in point of form from the statutory enactments as the Court shall think have prevented substantial justice from having been done. . . ."

Sec. 103. "No warrant, sentence, order, decree, judgment, or decision made or given by any quarter sessions, sheriff, justice, or justices of the peace, or magistrate in any cause, prosecution, or complaint, or in any other matter under the authority of this Act, shall be subject to reduction, suspension, or appeal, or any other form of review or stay of execution, on any ground or for any reason whatever, other than by this Act provided."

* William Morrison, retired inspector of Police, Keith, produced May 13, 1908 extract convictions against respondent, of date 28th February 1905, and 31st October 1905. . . . The agent for the respondent objected to previous convictions being proved, after the charge found proven, without notice that such previous convictions were to be used against him. The Court repelled the objection." Mitchell v. Morrison.

The complainer averred that after the witnesses in support of the complaint had been examined the respondent (the procurator-fiscal) closed his case, and that after the witnesses in exculpation had been examined, "the respondent and the agent for the complainer were then heard on the case, after which the Justices, having retired to consider the matter, returned to the Court and found the complainer guilty of the offence charged." (Stat. 3) "After the complainer had been found guilty, the respondent put William Morrison, retired inspector of police, Keith . . . into the witness-box, and he on oath spoke to two previous convictions for similar offences as applicable to the complainer. The agent for the complainer objected to this form of procedure, and also to the evidence of ex-inspector Morrison being received, in respect that no notice had been given that these previous convictions were to be put in evidence against the complainer; but the Court allowed the evidence of ex-inspector Morrison, and thereafter the said Justices pronounced sentence upon the complainer," as narrated *supra*.

The complainer pleaded, *inter alia*;—(2) No evidence was competently led by the respondent to prove a third offence against the complainer, and the minutes of procedure disclose no previous convictions as having been produced or put in evidence as part of the case against him. (3) The Court incompetently admitted the evidence of the said William Morrison after both the respondent and complainer had closed their case and addressed the Court, and after the Court had found the complainer guilty.

The case was heard before the High Court of Justiciary on 13th May 1908.

The respondent objected to the competency of the suspension.¹

The complainer maintained that the suspension was competent:—The proceedings were fundamentally null,² or at least so grossly irregular as to justify suspension.³ The allegation that the breach of certificate charged was a third offence was a substantive part of the charge, which must be proved before the complainer could be convicted of the contravention charged.⁴

LORD ARDWALL.—I think this suspension must be refused as being incompetent, because the only question brought up is one which, if it is of any importance at all, could have been made the subject of an appeal under

¹ *Authorities cited*:—On competency—Licensing (Scotland) Act, 1903, secs. 102 and 103; M'Kenzie v. M'Phee, 1889, 2 White, 188, 16 R. (J.) 53; Rattray v. White, 1891, 3 White, 89, 19 R. (J.) 23; Mackenzie v. Martin, 1891, 2 White, 589, 18 R. (J.) 16. On the merits—Licensing (Scotland) Act, 1903, secs. 53, 54, and 91.

² Massey v. Lamb, 1906, 5 Adam, 59, 8 F. (J.) 88.

³ Bell v. M'Phee, 1883, 5 Couper, 312, 10 R. (J.) 78; MacArthur v. Campbell, 1896, 2 Adam, 151, 23 R. (J.) 81.

⁴ Licensing (Scotland) Act, 1903, secs. 53 and 54; Gordon v. Scott, 1891, 3 White, 251; Cochran v. Walker, 1900, 3 Adam, 165, 2 F. (J.) 52.

May 18, 1908. section 102 of the Licensing Act, 1903. The objection taken to this conviction and these proceedings is that William Morrison, a retired inspector of police, was put into the box, and produced an extract conviction after the evidence was closed, and after the particular offence of being found intoxicated on 3d September 1907 had been found proved. Now, the evidence for the prosecution relating to the offence of being found intoxicated on 3d September was duly led, the witnesses in exculpation had been heard, and after that the Justices considered the question whether the complainer should be found guilty of that offence, and came to the conclusion that he was guilty. After that was done, and before sentence was pronounced, the prosecutor led evidence of previous convictions, and William Morrison went into the box and proved two such convictions. It is said that that was incompetent, because the two previous convictions formed part of the substantive charge. Now, on the merits I should not have thought this objection well founded, and even if I thought the proceeding irregular, I should not have thought that it was such a deviation from the statutory enactments as prevented substantial justice being done. But if the objection is anything at all, it is an objection to the proceedings, founded on a deviation in point of form from the statutory enactments. That being so, I think it is clear that such objection could have been dealt with in an appeal under section 102. By section 103 every other mode of review is excluded. If this had been a case of defect of jurisdiction, or if the proceedings had been *ex facie* fundamentally null, a suspension might have been competent, but there is nothing of that kind set forth in the present bill of suspension, and, in my opinion, it must be refused.

LORD LOW.—I am of the same opinion. It seems to me that none of the matters which have been discussed here can be regarded as more than irregularities of procedure. That being so, it is clear that the only remedy competent to the complainer was an appeal under section 102 of the Licensing (Scotland) Act, 1903. Such appeal is competent only when founded on the ground of corruption or malice and oppression, or on “such deviations in point of form from the statutory enactments as the Court shall think have prevented substantial justice from having been done.” If the irregularities are not such as can support the appeal, then all review is excluded under section 103. I agree that the suspension must be refused.

LORD JUSTICE-CLERK.—I am of the same opinion. Here a complainer could have had the conviction set aside by the Court of Appeal if he could shew that it was due to corruption or malice and oppression, or such deviations in point of form from the statutory enactments as shall have prevented substantial justice from having been done. But we have always held that we have power, notwithstanding the exclusion of suspension, to suspend convictions if something is done so fundamentally contrary to principle that the conviction was fundamentally null.

Such, however, is not the case here. The whole proceedings have been conducted with care and reasonable regularity. I see nothing to the prejudice of the accused. The only thing done was not to bring forward

the previous convictions till after the conviction. Under the Act of 1887 May 13, 1908. previous convictions could be brought forward after conviction. The jury ^{Mitchell v.} knows nothing of previous convictions. The peculiarity here is that if the ^{Morrison.} party does not object no witnesses are required to prove previous convictions. That they are brought forward at the end of the case cannot ^{Lord Justice-} prejudice the accused, but is rather in his favour, as they cannot then affect ^{Clerk.} the Court in considering the evidence. Such procedure is quite in accordance with the spirit of the Act of 1887, section 67. I accordingly think there is no ground for suspension.

THE COURT refused the bill.

SHARPE & YOUNG, W.S.—ALEX. MORISON & Co., W.S.—Agents.

THE CALEDONIAN RAILWAY COMPANY, Appellants.—*Blackburn, K.C.* No. 17.
—*King.*

JOHN ROPER, Respondent.

May 13, 1908.

Statutory Offences—Railway—Railways Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 33), sec. 96—Travelling without paying fare—Intent to avoid payment.—A workman, who had travelled by a workman's train, attempted to leave the station where he alighted without giving up a ticket (his intention being to defraud the railway company), but was prevented from doing so, and thereupon produced from his pocket and tendered a workman's ticket valid and available for the journey. Workmen's tickets are not dated, and can be used at any time. ^{Caledonian Railway Co. v. Roper.}

Held that the workman had not been guilty of travelling "without having previously paid his fare and with intent to avoid payment thereof" in the sense of the Railways Clauses Consolidation (Scotland) Act, 1845, sec. 96.

JOHN ROPER, 2 Gladstone Place, Dalmuir, was charged in the ^{HIGH COURT.} Sheriff Court at Dumbarton upon a complaint under the Summary ^{Lord Justice-} Jurisdiction (Scotland) Acts, 1864 and 1881, at the instance of the ^{Clerk.} Caledonian Railway Company, which set forth that the accused on ^{Lord Low.} 17th December 1907 "did travel on the complainers' railway from ^{Lord Ardwall.} Old Kilpatrick Station to Alexandria Station in the county of Dumbarton," by a certain train specified, "without having previously paid his fare, and with intent to avoid payment thereof, contrary to the Railways Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 33), section 96."

The accused pleaded not guilty, and evidence was led for the prosecution.

The Sheriff-substitute (Blair) in respect of the evidence adduced dismissed the complaint.

The Caledonian Railway Company appealed upon a stated case.

In the case the Sheriff-substitute stated:—

"I found the following facts proved—(1) That the respondent, John Roper, travelled by said train that morning from Old Kilpatrick Station to Alexandria Station. (2) That said train is a workman's train. (3) That workman's tickets are issued to workmen, available by this and other trains, in lots of six at a price of one shilling per lot, each ticket being available for a return journey between Old Kilpatrick and Alexandria Stations. (4) That these workmen's tickets

May 13, 1908. are not dated, and can be used at any time. (5) That on the morning in question the respondent, on leaving the train at Alexandria Station, instead of leaving the station by the proper exit, where the ticket collector was stationed, attempted to pass down the embankment into the street. (6) That in doing so he intended to defraud the Company by not giving up his ticket. (7) That the respondent, John Roper, while attempting to leave the station premises by means of the embankment, was stopped by the witnesses Simpson and Scott, who had been placed there for the purpose. (8) That the respondent's name and address was taken by these witnesses, and that he was thereafter conducted to the proper exit, where the ticket collector was stationed. (9) That the respondent there and then produced from his pocket a workman's ticket valid and available for the journey he had made, and offered it to the collector. (10) That the collector refused, on the instructions of the witnesses Simpson and Scott, to take the said ticket from the respondent.

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Roper.

"In these circumstances I dismissed the charge against the respondent on the ground that the statutory complaint libelled that the respondent had not previously paid his fare, when in fact he held a ticket valid for the journey he had made.

"At the same time I was satisfied that the respondent intended to defraud the Company, and to use the ticket which he had in his possession for a future journey."

The question of law was:—"Was the Sheriff-substitute, in view of his finding in fact that the respondent intended to defraud the Company, although he held a ticket valid for the journey he had made, right in dismissing the complaint?" *

The case was heard before the High Court of Justiciary on 13th May 1908.

There was no appearance for the respondent.

LORD JUSTICE-CLERK.—I cannot see any ground for holding that the Sheriff has erred. If a passenger proceed to travel by a railway without having paid his fare, and intending to avoid paying his fare, he is liable, at common law and under the Railway Acts, to be punished. But I cannot see how a man can be said to have travelled without a ticket when he had a ticket actually in his possession. No doubt he was subject to the obligation to deliver the ticket up at the end of his journey, and in order to do so he must leave the station at the proper place provided for that purpose. Here he attempts to leave the station without giving up his ticket. That is a distinct fraud, for which he could have been charged in the ordinary Police Court, and the Company could have had him summoned to that Court. If he had started without a ticket, and had never intended to pay, or if he had given away his ticket to someone else, the case would have been totally different. Here he had a ticket and failed to give it up, and was not in the position of travelling without a ticket.

* The Railways Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 33), enacts:—

Sec. 96. "If any person travel or attempt to travel in any carriage of the company . . . without having previously paid his fare, and with intent to avoid payment thereof . . . every such person shall, for every such offence, forfeit to the company a sum not exceeding forty shillings."

LORD LOW and LORD ARDWALL concurred.

May 13, 1908.

THE COURT answered the question of law in the affirmative, and dismissed the appeal.

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Roper.

HOPE, TODD, & KIRK, W.S., Agents.

GEORGE RATCLIFFE, Pursuer (Appellant).—*Carmont*.
JAMES FARQUHARSON, Defender (Respondent).—*Riach*.

No. 18.

May 14, 1908.

Sheriff—Small-Debt Court—Sist—Decree in absence or in foro by default—Litiscontestation—Small-Debts (Scotland) Act, 1837 (1 Vict. cap. 41), sec. 16.—In a Sheriff Court small-debt case both parties appeared at the first diet, when, after a statement of the defence and some discussion thereon, the case was continued for proof. At the adjourned diet the defender failed to appear, and decree was pronounced against him. He thereafter applied for and obtained a sist under section 16 of the Small-Debts (Scotland) Act, 1837, and was ultimately assoilzied. The pursuer appealed upon the ground that the sist was incompetent, the decree having been a decree *in foro* after litiscontestation, and not a decree in absence.

Ratcliffe v.
Farquharson.

Held that the decree was a decree in absence, that the sist was consequently competent, and appeal *dismissed*.

Oliver v. Simpson, 2 Adam, 601, 1 F. (J.) 12, *followed*.

Observations on the use of the expression litiscontestation with regard to procedure in the Sheriff Small-Debt Court.

ON 24th September 1907 George Ratcliffe, Medicated Lozenge Works, Leeds, brought a small-debt action in the Sheriff Court at Airdrie against James Farquharson, M.D., Coatbridge, in which he concluded for payment of £2, 19s. 1d.

HIGH COURT
Lord Justice-
Clerk.
Lord Low.
Lord Ardwall.

The Sheriff-substitute (Glegg) having assoilzied the defender, the pursuer appealed.

The appellant stated :—"On the case being called in Court on 1st October the respondent pled in defence of the claim, through an agent, that the account was prescribed, that the debt had not been incurred, and if it had been incurred, the price thereof had since been paid. A discussion took place on the legal points raised, and thereafter the Sheriff indicated that proof would be necessary before finally deciding the case, and for that purpose continued the case until the 15th October 1907. When the case was called on the 15th October 1907 the appellant was ready to proceed with the proof, but no appearance was made for the respondent, and decree passed against him for the sum sued for, with expenses. On the 16th day of said month the respondent applied for and obtained a summons sisting the case for rehearing. Said sist was called in Court on 29th October 1907, and was continued until 5th November 1907, and on that date continued further until 19th November 1907. On 29th October 1907 the appellant intimated to the respondent's agents, in writing, that he pled that the proceedings taken by the respondent under the sist were incompetent and irregular, in view of the discussion which had taken place at the bar on 1st October 1907, and that litiscontestation had therefore taken place. The appellant also pled that no actings of either party in the cause could, after 1st October 1907, make any proceedings of the nature of a sist now competent, these proceedings being *ex facie* incompetent and irregular. . . . The presiding Sheriff (Glegg), after hearing parties' agents, repelled the

May 14, 1908. **always more or less dangerous to qualify purely statutory procedure by analogies drawn from common law. Looking to the statute, my opinion is that the only question on which the present case turns is whether the decree was pronounced in the presence or absence of the parties, and if it was pronounced in the absence of either party, it is a decree in absence, and a sist may be granted under section 16 of the Small-Debt Act. I am therefore of opinion that this appeal ought to be refused.**

THE COURT refused the appeal.

BALFOUR & MANSON, S.S.C.—DAVID DOUGAL, W.S.—Agents.

No. 19. WILLIAM H. MAIR AND ANOTHER (John Mair's Trustees) AND ANOTHER,
Pursuers (Appellants).—*Mair*.
May 8, 1908. WILLIAM MILLER, Defender (Respondent).—*Paton*.

Mair's
Trustees v.
Miller.

Sheriff—Small-Debt Court—Appeal—Competency—Deviation from statutory form—Counter Claim—Small-Debts (Scotland) Act, 1837 (1 Vict. cap. 41), secs. 11, 31.—In a small-debt action for payment of £14 as house rent due under a written lease, the Sheriff, after a proof, gave decree for £5.

The pursuer appealed. Appeal *sustained* on the ground of incompetency and deviation from statutory form, in respect that as the decree was for a sum which had no relation to what was sued for, it was incompetent; or, otherwise, that if, as explained by the defender, the Sheriff had deducted from the sum sued for a sum in name of damages for breach of contract on the part of the landlord in failing to do his best to re-let the house, such a claim was a counter claim, of which the defender was bound to give notice, as required by section 11 of the Small-Debts Act, 1837, and that as he had failed to do so the Sheriff was not entitled to consider it.

Circuit Court
at Glasgow.
Lord Ardwall.
Lord Guthrie.

WILLIAM H. MAIR and John Mair, both residing in Glasgow, trustees of the late John Mair, and Mungo Robertson, 21 Rutland Crescent, Glasgow, factor for the said trustees, raised an action in the Small-Debt Court of Lanarkshire, at Glasgow, against William Millar, 5 Harvey Street, Govan, for a sum of £14, 16s. 3d., being three quarters' rent of a dwelling-house at 25 Rutland Crescent, Glasgow, let by them to the defender on a yearly let from Whitsunday 1907 to Whitsunday 1908, and due and payable at the terms of Lammas and Martinmas 1907 and Candlemas 1908, at the rate of £4, 18s. 9d. per quarter.

The Sheriff-substitute (Boyd) decerned in favour of the pursuers for the sum of £5. The pursuers thereupon appealed to the Circuit Court at Glasgow.

The note of appeal set forth that "on the case being called in Court before Mr Sheriff-substitute Boyd, the said Mungo Robertson appeared for the appellants, and the respondent appeared personally with his law-agent, and evidence was given by the said Mungo Robertson and the respondent, and it was proved and admitted that the house was duly let to the respondent, and that the three quarters' rent sued for was unpaid. The Sheriff-substitute, however, indicated that in view of the house not having been occupied by the respondent, although taken by him, he would not grant decree for the sum sued for, and continued the case to give the parties an opportunity of making some arrangement. The case was accordingly continued till the 2d day of March, but not being then reached, was again continued till the 17th day of March 1908 in chambers, when there appeared the agents for

the parties, and it was intimated by the appellants that they refused May 8, 1908. to make any arrangement such as had been suggested, and desired decree for the amount of rent admittedly unpaid, and the learned Sheriff-substitute, after hearing parties' agents, indicated that he was not satisfied that the appellants had done all they could to re-let the house, and accordingly gave decree for £5 only, without expenses." The grounds of appeal were two, viz.:—" (First) There has been malice and oppression in terms of the Small-Debt Act of 1837, sec. 31, on the part of the learned Sheriff-substitute in not giving judgment with expenses for rent due and unpaid under an admitted lease; that he was not concerned with any consideration of whether it were a hardship to the respondent that judgment should be asked as craved; that the rent being admittedly unpaid his only course was to grant decree for the amount with expenses. (Second) That in granting decree in favour of the appellants for a sum apparently in name of damages instead of for the claim made by them in name of rent, the learned Sheriff-substitute deviated from the statutory enactments, and has accordingly prevented substantial justice from being done to the appellants."

The case was heard at the Circuit Court at Glasgow on 8th May 1908.

Argued for the appellants;—The rent sued for being due under a probative lease, which was admitted, decree should have been given for the full sum sued for, with expenses. The Sheriff-substitute must either have treated the case as one, not for rent, but for damages, or made a deduction in respect of an alleged breach of agreement as to re-letting the house. If he had done the first, the judgment was incompetent;¹ if he had done the second, the appeal should be sustained on the ground of deviation from statutory form.

Argued for the respondent;—The appeal was incompetent, because the grounds did not amount to malice and oppression, or to deviation from statutory form. The decree did not bear to be for damages, and must be taken to be for rent. If decree was given for a smaller amount of rent than was sued for, that was not oppression.² Refusal of expenses was always in the discretion of the Court, and did not form a ground of appeal.³ The Sheriff-substitute had obviously applied his mind to the case, and decided it on its merits, and the soundness of his decision was not within the jurisdiction of the Court of Justiciary.⁴ If the Sheriff-substitute had erred, it was an error in law, and that was not a ground of appeal.

LORD ARDWALL.—I think this appeal ought to be sustained on the ground of incompetency and deviation from statutory form in the Court below. This is an action for rent, and in the first place decree is not given for the rent sued for, but decree is given for the sum of £5, which can be nothing else than damages, how arrived at does not appear, but the sum has no relation of any kind or description to what is sued for, the action being one solely for rent due under a formal stamped missive. That being so, I think

¹ Beale & M'Tavish v. Singer Manufacturing Co., Nov. 17, 1905, 8 F. (J.) 29, 4 Adam, 673.

² Wilson v. Scott, Nov. 21, 1890, 18 R. 233.

³ Renfrew v. Hall, Nov. 26, 1901, 4 F. (J.) 27, 3 Adam, 517.

⁴ Sprott v. Portpatrick and Wigtownshire Joint Committee, May 18, 1898, 25 R. (J.) 71.

May 8, 1908. **Mair's Trustees v. Miller.** the judgment is incompetent, because it decerns for something totally different in nature and amount from that which is sued for. I think that is quite sufficient for the decision of the case; but it is said for the respondent that the Sheriff-substitute having applied his mind to the question Lord Ardwall. held that there was an agreement between the parties that the appellants here should do their best to let the house, and that the Sheriff was convinced that agreement had not been implemented by the appellants, and it is explained that he arrived at the £5 by deducting from the rent a sum as damages for breach of agreement. Now, I can only say that if that is what the Sheriff did it was incompetent, and constituted a deviation from statutory form, because any such claim for damages should have been set forth in the proceedings as prescribed by section 11 of the Small-Debt Act, 1837, as a counter claim. I therefore think that there being no counter claim, no other course was open to the Sheriff-substitute but either to throw out the summons altogether, or else to grant decree for the sum sued for.

I accordingly propose that we sustain the appeal, recall the judgment of the Sheriff-substitute, and remit to him to grant decree for the sum sued for with expenses.

LORD GUTHRIE concurred.

THE COURT sustained the appeal, recalled the judgment of the Sheriff-substitute, remitted to him to grant decree for the sum sued for with expenses, and found the appellants entitled to expenses, modified to five guineas.

BROWN, MAIR, GEMMILL, & HISLOP, Writers, Glasgow—BOYD, AULD, & MACKENZIE, Writers, Glasgow—Agents.

No. 20.

NORMAN MACLEOD ALLAN, Appellant.—*D.-F. Campbell—D. P. Fleming.*

June 18, 1908.

GEORGE NEILSON (Procurator-Fiscal of the Central Police Court, Glasgow), Respondent.—*T. B. Morison, K.C.—A. Crawford.*

Allan v. Neilson.

Statutory Offences—Breach of Regulations—"Public Show"—Glasgow Police (Further Powers) Act, 1892 (55 and 56 Vict. cap. clxv.), sec. 7.—A saloon or arcade, which opened directly off a public street, contained a number of automatic machines operated by placing a penny in the slot. Most of the machines exhibited pictures or produced music by phonographic records; a few told fortunes, gave electric shocks, or recorded weight or strength. The doors were always open during business hours, and admission was free.

Held that the entertainment was a "public show" within the meaning of section 7 of the Glasgow Police (Further Powers) Act, 1892.

HIGH COURT.
Lord Justice-Clerk.
Lord Low.
Lord Ardwall.

NORMAN MACLEOD ALLAN, 43 Kier Street, Pollokshields, Glasgow, was charged in the Central Police Court at Glasgow, on a complaint setting forth that "he did, on Sunday, the fifth day of January 1908, in premises on the ground floor at 28 Argyle Street, Glasgow, open and use for exhibition to, and entertainment of, a large number of persons then admitted thereto, a public show or entertainment called an Automatic Vaudeville, and consisting of automatic peep-shows, moving figures, phonographs, fortune-telling machines, and other apparatus of entertainment of the like kind, in contravention of the regulations and prohibitions lawfully made by the Magistrates' Committee of the

Corporation of the City of Glasgow, in and annexed to the permission June 18, 1908. granted by them to him on the 30th day of July 1907, for said Automatic Vaudeville, particularly No. 1 of said regulations and prohibitions, being an offence contrary to the Glasgow Police Acts, particularly the Glasgow Police (Further Powers) Act, 1892, section 7, whereby the accused is liable to a penalty." *

—
Allan v.
Neilson.

On that complaint he was tried before a magistrate and found guilty of the offence charged.

He obtained a case, which set forth the following facts, *inter alia*, as proved:—

"The premises libelled in the complaint occupied by the appellant are situated on the ground floor at 28 Argyle Street, Glasgow, and consist of a saloon or arcade opening directly off Argyle Street. The folding-doors, 20 feet broad, are shut only when the premises are closed. The premises are used by the appellant for keeping a number of automatic machines, exhibiting pictures, and reproducing music by phonographic records on the penny-in-the-slot principle as hereinafter more particularly detailed. Admission to the premises is free.

"On 20th July 1907 the appellant applied to the Magistrates' Committee of the Corporation of the City of Glasgow for permission to open and set up a public show or other place of entertainment on the premises libelled. In this application the said premises were described as 'An automatic Vaudeville or Arcade exhibiting coin-freed and entertainment machines, such as phonographs, &c.' After due inquiry the Magistrates' Committee, on 30th July 1907, granted said permission to the appellant under the regulations and prohibitions which are annexed thereto and printed on the back of

* The Glasgow Police (Further Powers) Act, 1892 (55 and 56 Vict. cap. clxv.), enacts:—

Sec. 7. "No public show of any description whatever, whether in open ground, or in any house, or building, or caravan, or tent, and no swings, switchback railways or hobby-horses, and no shooting gallery, singing or dancing-saloon, or bowling or nine-pin alley, and no place for playing skittles (all which are hereinafter referred to as public shows or other places of entertainment), shall be opened or set up without the permission of the Magistrates' Committee; and the Magistrates' Committee may regulate, restrain, remove, or prohibit all such shows or other places of entertainment, and make regulations and prohibitions for that purpose, and if any person shall open or set up, or be concerned in opening or setting up, any such public show or place of entertainment without the permission of the Magistrates' Committee, or shall contravene any such regulation or prohibition, every such person shall, for every such offence, be liable to a penalty not exceeding Five pounds, and also to a daily penalty of Five pounds."

Sec. 9. "The Magistrates' Committee may from time to time make bye-laws and regulations for the safety and comfort of the public, and for maintaining order in theatres or other places of amusement, public shows, or other places of entertainment, and billiard-rooms or bagatelle-rooms, for which the Magistrates' Committee are empowered to grant licences under the preceding sections of this Act, and they may provide in such bye-laws for the safety and comfort of the public, for the suppression of disorderly conduct, for the prevention or regulation of smoking, for regulating the times at and during which the same may severally remain open, and for prohibiting the opening thereof on Sundays; and any person contravening any of those bye-laws and regulations shall be liable to a penalty not exceeding ten pounds."

June 18, 1908. said permission. The first of these regulations and prohibitions is—‘That the said Exhibition shall not be opened or used on Sundays.’

—
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Neilson.

“Some months after this the appellant formed the opinion that his said premises did not require a licence or permission under the Act owing to their not being a public show, and that he was not therefore bound to obey the regulations and prohibitions referred to. On the date libelled, Sunday 5th January 1908, on being visited by officers of the Glasgow police, who gave evidence in Court, the premises referred to were found open, and a large number of persons frequenting the same. On that day there were in the premises:—

“54 picture machines, some of which are of the kind known as mutoscopes, and others of the moveable stereoscopic pattern.

“50 phonographs.

“10 combined phonographs and picture machines.

“3 fortune-telling machines.

“2 electric batteries.

“3 strength-testing machines.

“1 weighing machine.

“Each of these was put in use by the insertion of a coin in the slot, and the public or persons present were using one or more of the same. In the mutoscopes there were shewn animated pictures displaying incidents in action, and in each of the other picture machines several fixed stereoscopic pictures were shewn in succession. In all the picture machines the picture is viewed through a peep-hole in which there is set a magnifying lens. In the phonographs the sounds reproduced included songs, recitations, and pieces of instrumental music. The pictures exhibited were only visible to, and the phonographs heard by, the individual customers in each case. On all the phonographs bills or advertisements were fixed announcing that duplicates of the records could be purchased from the cashier if required. None of these were sold on the date libelled. On previous dates a number had been sold. They are kept on the basement flat of the premises. Appellant himself stated that his drawings substantially consisted of the coins put in the slots, but that he hoped the business of selling records would increase and ultimately become the leading source of revenue.”

The questions of law for the opinion of the Court were:—“(1) Was the complaint relevant? (2) Did the automatic machines, as used by the appellant, constitute the said Automatic Vaudeville a public show within the meaning of the Glasgow Police (Further Powers) Act, 1892, section 7?”

Argued for the appellant;—The entertainment was not a “public show.” A “public show,” in the ordinary signification of the term, meant an exhibition which the public went into and saw collectively, having first paid their entry money at the door. Here, looking to the character of many of the machines, it was difficult to see how there was a “show” at all, but at anyrate it was not “public,” because each individual paid a penny for a private view of a particular picture, or a private performance of a particular tune. The place, accordingly, was a shop where for a penny one could purchase the particular form of entertainment desired. Further, the expression “public show” in section 7 must be read, according to the *ejusdem generis* rule, as qualified or limited by the examples given, and from them it was quite apparent that the entertainment in question did not fall

within the section.¹ In any event, the condition prohibiting Sunday opening was *ultra vires*. Such a condition could only be imposed by bye-law under section 9,² and subject to the various provisions as to bye-laws regarding ratification, &c., imposed by the Glasgow Police Act, 1866,³ and incorporated with the Act of 1892. Allan v. Neilson.

Argued for the respondent;—The entertainment was a “public show” within the meaning of section 7.⁴ The public were admitted, paid money, and saw, heard, or got something in return. The fact that the money was not taken at the door, but was put into machines, was immaterial. The condition as to Sunday closing was not *ultra vires*. The Magistrates had the right to make such a regulation under section 7. Probably they might have attained the same end by passing a bye-law under section 9, but it was not obligatory upon them to do so. A bye-law under section 9 was appropriate in the case of permanent institutions such as theatres and music halls, but not in the case of a temporary show.

At advising,—

LORD JUSTICE-CLERK.—The alleged show in this case consists of premises in a public street, the front wall of the premises on the street level having been entirely taken out, so that the entrance consists of the whole width of the building. Inside there are a number of cabinets in which are pictures, also phonographs, either with or without direct communication with the pictures. There are also fortune-telling machines, electric machines, strength-testing machines, and a weighing machine. Admission to the place is free, and the gain to be made is by the pennies which visitors may put in the slots of the machines, in order to cause them to work. In all the picture cabinets the pictures are seen through lenses set in front of the case. The proprietors have placards on the premises that duplicates of the phonograph records can be purchased.

Now, it is plain that the place is one to which the public are invited to come, in the hope that they will bring a profit to the proprietor, by the money which they will expend in order to see the exhibits, and hear the phonograph music. His expectation is to make money by their being tempted to put their pennies into the slots, and so to get entertainment from him. It is quite true that if members of the public do not feel tempted after they get in to pay their pence to get entertainment, they can leave without any payment being exacted. If an entrance fee was exacted it could not be disputed that the proprietor would be carrying on a show. But he provides for those who choose to pay a show in his premises, which are opened for no other purpose than to give show entertainment to those who will pay for it. It is not like a shopkeeper holding a bazaar in his premises at Christmas time. That is an adjunct of the ordinary shop business of selling to buyers, and is for the purpose of stimulating sales. This place is open solely to induce people to pay for entertainment to eye and ear. Any person who came in and stayed there without taking any

¹ Walker v. Lamb, Feb. 16, 1892, 3 White, 194, 19 R. (J.) 50; Maxwell on the Interpretation of Statutes (4th ed.), p. 494.

² Rossi v. Magistrates of Edinburgh, Nov. 21, 1904, 7 F. (H. L.) 85.

³ 29 and 30 Vict. cap. cclxxiii., secs. 405 to 413.

⁴ Patrick v. Wood, Nov. 15, 1905, 4 Adam, 648, 8 F. (J.) 4.

June 18, 1908. entertainment could be required to leave. They were free to enter, but only free to occupy if they took entertainment and paid for it. Otherwise they had no right to remain. I do not think that the question is at all affected by the fact that those who are pleased with any of the entertainments can purchase duplicates of the records from which the entertainment was got. In many shows the drawings may be increased by sales of books of words, or souvenirs, or portraits of performers. But that is an adjunct of the entertainment, and does not affect the question whether the place is carried on as a show or place of entertainment.

Allan v.
Neilson.

Lord Justice-
Clerk.

In these circumstances the Magistrate held as matter of fact that the appellant's premises are carried on as a place of show or public entertainment, and must obtain a licence, and conform to the regulations prescribed by the licence, and that the appellant is liable to a penalty for carrying it on without a licence. I am unable to see that the decision can be impugned upon any legal ground. The place is public. It is used to supply entertainment for payment to all members of the public who choose to come there and make payments. That the entertainments are obtained by putting pennies in slots does not seem to me to make it a wrong decision in law to declare the place to be a place of "public entertainment." If the owner himself took the pence it would undoubtedly be a show. That the pence are deposited so as to set the machine to work cannot make any difference.

I am therefore of opinion that this appeal should be dismissed.

LORD LOW.—I have had the advantage of reading and considering your Lordship's opinion, and I entirely concur.

LORD ARDWALL.—I have felt some difficulty about this case, but on consideration I am of opinion that both the questions put should be answered in the affirmative. I think, on the whole, that the appellant's exhibition falls within the category of a "public show" within the meaning of section 7 of the Glasgow Police (Further Powers) Act, 1892. It is of some importance to notice that the appellant himself formerly considered that his exhibition fell within the description of a "public show," that it certainly partakes more of the character of a "show" than of a shop, and that the name by which the appellant designated it in his application for a licence on 24th July 1907, viz., "an Automatic Vaudeville," is more appropriate to a show than to a shop, while the appellant's advertisement card bears the warning, which is common to places where "public shows" are going on, "beware of pickpockets." Last of all, I may observe that in a case of this description great weight must always be given to the opinion of the local magistrate, who must be presumed to have knowledge and information regarding the nature of the exhibition which are not available to this Court. And on that account I should not think of disturbing his decision except for much stronger reasons than any that have been presented to us by the appellant in this case. I therefore concur in the course proposed by your Lordship in the chair.

THE COURT answered the questions of law in the affirmative, and dismissed the appeal.

ANDREW H. HOGG, S.S.C.—CAMPBELL & SMITH S.S.C.—Agents.

WILLIAM SWEENIE AND OTHERS, Complainers.—*MacRobert*.
 GEORGE HART (Procurator-Fiscal, Paisley), Respondent.—
Sol.-Gen. Ure—A. M. Anderson, A.-D.

No. 21.

June 18, 1908.

Review—Suspension—Sentence—Illegal Sentence—Detention in Reformatory—Restriction of Sentence—Competency—Reformatory Schools Act, 1893 (56 and 57 Vict. cap. 48), sec. 1.—Three boys, all fifteen years of age, were each sentenced to be detained for four years in a reformatory, the effect of this sentence being that the period of detention would not expire until after the time at which the offenders would attain the age of nineteen years, which is contrary to sec. 1 of the Reformatory Schools Act, 1893. The offenders having brought a suspension, counsel for the Crown did not oppose the quashing of the sentence. Sweeney v. Hart.

The Court *quashed* the conviction and sentence as *ultra vires* and illegal.

Observations on the distinction between a sentence of imprisonment and a sentence of detention in a reformatory school.

Observed that there might be circumstances in which the Court would, instead of quashing a sentence of detention, reduce the period of detention so as to make it conform to the statute.

On 23d March 1908 William Sweeney, Daniel Fulton, and Daniel Hampsey were charged in the Sheriff Court at Paisley at the instance of the Procurator-fiscal with the crime of theft, aggravated by previous conviction. They pleaded guilty. The Sheriff-substitute (Lyell) on 23d March 1908, in respect of their judicial confession, found them guilty of the crime charged, aggravated as charged, and further in respect that they were all “under the age of sixteen years, and” appeared “to the Court to be not less than twelve years of age.” Sweeney “having been born, so far as has been ascertained, on the 21st day of June 1892,” Fulton “having been born, so far as has been ascertained, on the 8th day of August 1892,” and Hampsey “having been born, so far as has been ascertained, on the 20th day of June 1892, in pursuance of the Reformatory Schools Acts, 1866 and 1893,” * sentenced Sweeney and Fulton “to be sent to the Kibble Reformatory School for Boys, Paisley, . . . and to be there detained for the period of four years each, commencing from 23d March 1908,” and sentenced Hampsey “to be sent to the Roman Catholic Reformatory School for Boys, Parkhead, Glasgow, . . . and to be there detained for the period of four years . . . commencing from” 23d March 1908. HIGH COURT.
Lord Justice-Clerk.
Lord Low.
Lord Ardwall.

Sweeney, Fulton, and Hampsey, with the special advice and consent of their respective fathers, as their curators and administrators-in-law, brought a bill of suspension and liberation.

The complainers averred that their dates of birth were as stated in

* The Reformatory Schools Act, 1893 (56 and 57 Vict. cap. 48), enacts:—

Sec. 1. “Where a youthful offender, who in the opinion of the Court before whom he is charged is less than sixteen years of age, is convicted . . . and either (a) appears to the Court to be not less than twelve years of age; or (b) is proved to have been previously convicted of an offence punishable with penal servitude or imprisonment, the Court may, in addition to or in lieu of sentencing him according to law to any punishment, order that he be sent to a certified reformatory school, and be there detained for a period of not less than three and not more than five years, so, however, that the period is such as will in the opinion of the Court expire at or before the time at which the offender will attain the age of nineteen years.”

June 18, 1908. the sentences above narrated; set forth section 1 of the Reformatory Schools Act, 1893; and further averred as follows:—(Stat. 4) “. . . The said warrants or sentences complained of bear to have been pronounced and were pronounced in pursuance of the section quoted.” (Stat. 5) “The sentences of the complainers will not have expired at or before the time at which they will respectively attain the age of nineteen years. The ages of the complainers were known to the Sheriff-substitute, and this appears *in gremio* of the warrants or sentences complained of. The said warrants or sentences are accordingly *ultra vires* and illegal.”

Sweeney v.
Hart.

The complainers pleaded;—The said warrants or sentences complained of being *ultra vires* and illegal . . . ought to be suspended as craved, with expenses.

Argued for the complainers;—The sentence was plainly illegal and contrary to the statute.¹ The only course open to the Court was to quash it. The Court could not competently amend or restrict the sentence so as to make it legal.²

Counsel for the Crown appeared, but stated that they did not oppose the complainers' motion for quashing the conviction and sentence.

At advising on 18th June 1908,—

LORD LOW.—It is a well-settled rule that where a sentence of imprisonment is for an illegal period it must be quashed, and cannot be modified by limiting it to a period which the law allows. In this case, although the boys who seek to have the sentence which has been passed upon them suspended have not been sentenced to imprisonment in the ordinary sense, they have been sentenced to be detained in a reformatory school for a period of years, and it was argued that there was no substantial difference between such a sentence and an ordinary sentence of imprisonment, the determining element of deprivation of personal liberty being equally present in both cases.

I am not prepared altogether to adopt that view. Reformatory schools have been established not only or mainly as a method of punishment, but for the better care and reformation of youthful offenders. That being so, I think that it would be very unfortunate if this Court could not correct a mere error of calculation in regard to the period for which a youthful offender could lawfully be sentenced to detention in a reformatory school. But assuming that the Court has the power to modify such a sentence so as to bring it within the limits allowed by law, I think that this power should not be lightly exercised, but should be confined to cases in which the Court is satisfied that it is in the public interests, and still more in the interests of the offenders, that the sentence should be carried out so far as the law allows. In this case we know nothing except that an illegal sentence has been pronounced. Counsel for the Crown were present at the hearing of the case, but they did not intervene in the discussion, but intimated that they were instructed not to oppose the application. I think that we must

¹ Reformatory Schools Act, 1893 (56 and 57 Vict. cap. 48), sec. 1.

² Dingwall v. Davidson, 1896, 2 Adam, 80, 23 R. (J.) 31; Moffat v. Shaw, 1896, 2 Adam, 57, 23 R. (J.) 18; Macleod v. Mackenzie, 1901, 3 Adam, 507, 4 F. (J.) 13; Macbeath v. Fraser, 1886, 1 White, 286, 14 R. (J.) 16; Stewart v. M'Niven, 1891, 2 White, 627, 18 R. (J.) 36; Bonthron v. Renton, 1886, 1 White, 279.

assume that the Crown authorities had good grounds for adopting that June 18, 1908. course, and accordingly I am of opinion that in this case the Court should ^{Sweeney v.} treat the sentence as if it were an ordinary sentence imposing an unautho-^{Hart.} rised penalty, and should quash it.

LORD ARDWALL and the LORD JUSTICE-CLERK concurred.

THE COURT suspended the conviction and order of detention complained of *simpliciter*, and ordained the complainers to be instantly liberated.

MACPHERSON & MACKAY, S.S.C.—W. S. HALDANE, W.S., Crown Agent—Agents.

MAXWELL TELFORD, Appellant.—*Cooper, K.C.—Lippe.*

No. 22.

PETER FYFE, Complainer (under Sale of Foods and Drugs Acts),
Respondent.—*Morison, A.-D.—M. P. Fraser—Crawford.*

July 16, 1908.

Public Health—Food and Drugs—Summary Procedure—Conviction—Competency—Delivery of milk in several cans—Deficiency of quality in each can—Sale of Food and Drugs Act, 1875 (38 and 39 Vict. cap. 63), secs. 6, 13—Sale of Food and Drugs Act Amendment Act, 1879 (42 and 43 Vict. cap. 30), sec. 3.—Samples having been taken from fourteen out of sixteen cans of milk in course of delivery in one consignment, and all the samples having been found deficient in quality, the consignor was charged with and convicted of fourteen offences under section 6 of the Sale of Food and Drugs Act, 1875. *Held* that, there having been only one delivery, it was incompetent to charge and convict of more than one offence.

Telford v.
Fyfe.

Conviction—Competency—Form—Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. cap. 53), sec. 18, Schedule K, No. 6, sec. 34.—A conviction in form No. 6 of Schedule K of the Summary Procedure Act, 1864, granted warrant to arrest all debts and sums of money owing to the accused, and to poind his goods and sell the same, and appointed a return of such poinding and sale to be made “within eight days from the expiration of the period hereby allowed for payment.” No period was allowed for payment, the interlocutor ordaining instant execution.

Opinion that the conviction was not incompetent as being impossible of execution.

Public Health—Food and Drugs—Milk in course of delivery—Fair sample—Sale of Food and Drugs Act Amendment Act, 1879 (42 and 43 Vict. cap. 30), sec. 3.—A consignment of milk was delivered in sixteen cans which were cylindrical in shape and about two feet deep. Each can was taken into a store-room by the consignor’s servant, where it was opened by him. An inspector of nuisances then agitated the milk in the can with a wooden spoon about a foot in length, and a sample was taken by dipping a measure into the milk just under the surface and removing about fourteen ounces. Samples were thus taken from fourteen of the cans. The milk in the cans was on delivery poured into a large vat in the storeroom.

Opinion that the method of sampling was not unfair or improper, and that it afforded a fair test of the contents of each can; and, further, that it would have been incompetent to take a sample after delivery into the vat, the milk being then no longer in course of delivery.

A COMPLAINT under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, brought in the Sheriff Court of Lanarkshire at Glasgow at the instance of the respondent, Peter Fyfe, set forth:—

High Court.
Lord Justice-
Clerk.

“That the complainer has been appointed by the Corporation of the City of Glasgow (Police Department), being the Local Authority

Lord Low.
Lord Ardwall.

July 16, 1908. for Glasgow under the Sale of Food and Drugs Acts, 1875 to 1899, to enforce the said Acts.

Telford v.
Fyfe.

“ That the complainer caused the analysis to be made, of which the certificates are hereto annexed, and from which it appears that the following offences have been committed against the said Acts :—

“ (1) That Maxwell Telford, dairyman, Nos. 87 and 89 Crown Street, Glasgow, in pursuance of a contract of sale whereby the said Maxwell Telford contracted to sell, *inter alia*, sweet milk, pure, new, as milked from the cow, and without addition of water, preservative, or any foreign substance, the sweet milk to contain not less than 3% (three per cent) of butter fat, to the Parish Council of the parish of Glasgow and the Glasgow Lunacy District Board, which contract of sale was constituted by a tender made by the respondent on or about 23d March 1907 to said Parish Council and Lunacy Board, and duly accepted by them, did, on the 10th day of February 1908, forward as sweet milk, under said contract, 10 gallons of milk, in a 10-gallon tin, to the Stobhill Hospital, Springburn, Glasgow: That William Denovan, ordinary sanitary inspector or police-constable, Glasgow, did, on behalf of the complainer, and under the direction of the said Local Authority, procure on said date at said Stobhill Hospital, Springburn aforesaid, being the place of delivery of said 10 gallons of milk, and in course of the delivery of the same, a sample (No. 37) of the said milk for the purposes of the said Acts: That the said William Denovan, suspecting said milk to have been sold contrary to the provisions of the said Acts, did, on the instructions and behalf of the complainer, submit said sample to be analysed: And that said sample has, on analysis as prescribed by the said Acts, been found not to be of the nature, substance, and quality demanded, in respect that the said contract demanded pure, new, sweet milk, and that said sample was not genuine pure, new, sweet milk, but was deficient in its natural fat to the extent of 7 per cent or thereby.” [The complaint libelled thirteen other charges in reference to thirteen other tins in similar terms, and proceeded] “ contrary to the sale of Food and Drugs Acts, 1875 to 1899, particularly the Sale of Food and Drugs Act, 1875, section 6,* and the Sale of Food and Drugs Act Amendment Act, 1879, section 3,† and the Sale of Milk Regulations, 1901,

* The Sale of Food and Drugs Act, 1875, enacts :—

Sec. 6. “ No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds. . . . ”

Sec. 13. “ Any . . . inspector of nuisances . . . under the direction and at the cost of the Local Authority appointing such . . . inspector . . . or charged with the execution of this Act, may procure any sample of food or drugs, and if he suspect the same to have been sold to him contrary to any provision of this Act, shall submit the same to be analysed by the analyst of the district or place for which he acts . . . and such analyst . . . shall analyse the same. . . . ”

† The Sale of Food and Drugs Act Amendment Act, 1879, enacts :—

Sec. 3. “ Any . . . inspector of nuisances . . . may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee, in pursuance of any contract for the sale to such purchaser or consignee of such milk; and such . . . inspector . . . if he suspect the same to have been sold contrary to any of the provisions of the principal Act, shall submit the same to be analysed, and the same

section 1, to the same effect as if the said respondent had, place and date above libelled, sold said samples, and as if the same had been purchased by the said William Denovan for the complainer, to his prejudice: Whereby the said Maxwell Telford, for each of said fourteen offences, being first offences, is liable to pay a penalty not exceeding twenty pounds. May it therefore please your Lordship to cite the said Maxwell Telford to appear before you to answer to this complaint, and thereafter to convict him of each of the foresaid offences, and to adjudge him to suffer the penalties provided by the said Acts.”

The accused pleaded not guilty, but after a proof the Sheriff-substitute (Glegg) convicted him of each of the offences charged, and pronounced an interlocutor in the following terms:—“Glasgow, 4th May 1908.—The Sheriff-substitute, in respect of the evidence adduced, convicts the said Maxwell Telford of each of the offences charged, and therefore adjudges him to forfeit and pay the sum of £28, being £2 of penalty for each offence, and ordains instant execution by arrestment, and also execution by poinding: Grants warrant to officers of Court to arrest all debts and sums of money owing to the said Maxwell Telford, and to poind his goods and effects, and to sell the same at the expiration of not less than forty-eight hours after such poinding, without further notice or warrant, and appoints a return or execution of such poinding and sale to be made within eight days from the expiration of the period hereby allowed for payment, under certification of imprisonment for ten days in default of payment or recovery of the said sum, with the expenses of diligence, before the time allowed for such report; and appoints the Clerk of Court in the event of said penalty being paid to him to account for and pay the same to the treasurer of the police assessment of the burgh of Glasgow.”

Maxwell Telford appealed by stated case, in which the facts found at the trial and the Sheriff-substitute's findings thereon were set forth as follows:—

“By contract, dated 10th April 1907, being No. 1 of process, the appellant undertook to supply the Parish Council of Glasgow and the Glasgow Lunacy District Board for Stobhill Hospital, with ‘sweet milk, pure, new, as milked from the cow, and without addition of water, preservative, or any foreign substance,’ for the year from 16th May 1907 to 1908, ‘deliveries to be made daily in such quantities as may be required at the different institutions, not later than 7 A.M. The sweet milk to contain not less than 3% (three per cent) of butter fat.’ The amount required for each day was ordered the day previous.

“On Monday, 10th February 1908, the appellant's servant in supplying such an order arrived with 16 ten-gallon tins of milk at the hospital about 6.40 A.M. He was requested to wait until the arrival of the Food and Drugs Inspectors, who came about 6.50 A.M. On their arrival each tin was lifted by the appellant's lorryman into the store, where it was opened by him. One of the inspectors then agitated the milk in the can by stirring it with a wooden spoon of about a foot in length, the can itself being about two feet in depth

shall be analysed, and proceedings shall be taken and penalties on conviction be enforced in like manner in all respects as if such . . . inspector . . . had purchased the same from the seller or consignor under section 13 of the principal Act.”

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and cylindrical. The precise nature of the stirring and its duration were not established. The other inspector then dipped a handless tin measure of 4 to 6 inches in depth into the milk until just under the surface, and removed about 14 oz. of milk. This was divided into three parts as required by the Act, and the analysis of the samples shew that in the case of the fourteen tins on which proceedings were taken the deficiencies in natural fat were:—No. 67, 7 per cent; No. 65, 7 per cent; No. 63, 5 per cent; No. 61, 8 per cent; No. 59, 15 per cent; No. 57, 5 per cent; No. 51, 10 per cent; No. 49, 5 per cent; No. 47, 5 per cent; No. 45, 7 per cent; No. 43, 5 per cent; No. 41, 5 per cent; No. 39, 6 per cent; No. 37, 7 per cent.

“According to the usual practice of the appellant’s business the milk from which the supply in question should have been taken was supplied to him from some twenty-three different farmers. The milk came to Telford, the appellant, with a line like No. 1 of appellant’s productions. This milk arriving at appellant’s premises on Saturday was poured into large vats there. On Sunday forenoon it was pasteurised, cooled to about 45 degrees, and then poured into the tins for the hospital. On Monday it was driven some two or three miles through the streets of Glasgow to the hospital.

“The appellant when pressed for supplies of sweet milk, as he was at this season, sometimes made it up by mixing separated milk and cream, but he gave orders that the milk for the hospital was not to be obtained in this way, but only from the supplies as sent in by the farmers. No evidence was led, apart from the said general practice, as to how the milk in question had been handled, or from whom it was obtained.

“The usual method of giving delivery was that the appellant’s lorryman emptied the cans into one large vat in the storeroom at the Stobhill Hospital.

“After the milk was poured into the cans on Sunday the cream would rise to the top, but this tendency would be retarded to some extent by the previous pasteurisation. The driving through the streets would tend to redistribute the cream through the milk, while the stoppage at the hospital would allow it to a small extent again to rise. On the whole, however, the treatment the milk received prior to the time that it was stirred by the inspector would result in a marked accumulation of cream at the top.

“Stirring the milk in the can with a stick would drive the cream from the centre to the sides of the can, and if a dipper were inserted in the centre of the vortex immediately after a regular and prolonged stirring, it would abstract milk less rich in cream than it would have done if no stirring had taken place. I held that it was not shewn that the stirring to which the milk was subjected reduced the part from which the sample was taken to a condition more devoid of fat than if the fat in the tin had been equally distributed throughout the whole contents of the tin. I therefore held that the method of sampling adopted was not unfair or prejudicial to the appellant.”

The questions of law for the opinion of the Court were:—“(1) Was a proper method of sampling adopted, so as to ensure a fair sample of the contents of each can? (2) The milk in course of delivery on the date in question being contained in sixteen cans, was the respondent entitled to take a sample from each can, so as to competently sue for a separate penalty in respect of individual cans? (3) Should the whole bulk of the consignment of 10th April have been sampled

after delivery into the vat at the storeroom in Stobhill Hospital? (4) July 16, 1908.

Was the form of conviction competent?"

Argued for appellant;—(1) The method adopted for sampling the milk was unfair. There was only one consignment, and any sample taken ought to have been a sample of the whole consignment. No sample was taken from two of the cans. There might be a deficiency of butter fat in some cans in a consignment, and no deficiency in the whole consignment.¹ In order to get a fair sample of the consignment, it was necessary to sample the whole and to sample it as a whole. To stir with a stick and take some milk out of some cans without mixing the milk in the cans and without mixing the samples was unfair. There ought to have been one sample, and it ought to have been taken from the whole milk after it was mixed in the vat. A fair sample was not even taken from each can, because only the milk at the top of each can was agitated. (2) It was incompetent to charge fourteen offences in respect of one delivery of milk. The statute only required that the delivery should be in accordance with contract, but there could be only one offence in respect of one delivery. The case of *Fecitt v. Walsh*,² which the Sheriff-substitute had followed, was wrong, and was not binding on him. It was based on an inaccurate analogy between the procurement of a sample by an inspector of nuisances and a purchase under section 13 of the 1875 Act. The decision ignored the terms of the contract under which delivery was made. It was not a contract for delivery of so many cans, but of a certain quantity of milk. (3) The conviction was bad, because it was not in proper form. It appointed something to be done within eight days from the expiration of a period allowed, and no period had been allowed. This was not mere surplusage, and it was not such a defect in form as might, under section 34 of the Summary Procedure Act, be disregarded. It was intrinsically bad, because it could not be worked out.

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Argued for respondent;—(1) The method of sampling adopted was fair and reasonable. A fair sample was taken from fourteen cans, and each was found to be deficient. To mix these samples would not have cured the deficiency. No question could now be raised as to the method of taking the sample, because the fairness or unfairness of the method adopted was a question of fact for the Sheriff-substitute. He had found that the method adopted was in fact a fair method. The method suggested by the appellant, to take a sample from the vat after the whole had been poured into it, could not have been followed, because the milk would no longer have been in course of delivery.³ The point in *Crawford v. Harding*⁴ was that when the samples of milk from all the receptacles had been mixed, there was no deficiency in quality. (2) The Sheriff-substitute was right in following *Fecitt v. Walsh*.² The scheme of the statutes was to enable the inspector to take a sample from any receptacle in which the milk was being delivered, and to prosecute in respect of that sample. Section 3 of the 1879 Act used the words "any sample of any milk." It was in respect of the deficiency in the sample that the prosecution was brought. If fourteen samples were separately and fairly taken,

¹ *Crawford v. Harding*, Nov. 20, 1906, 1907, S. C. (J.) 11, 5 Adam, 184.

² L. R., [1891] 2 Q. B. 304.

³ *Semple v. Dunbar*, July 20, 1904, 6 F. (J.) 65, 4 Adam, 399.

⁴ Nov. 20, 1906, 1907 S. C. (J.) 11, 5 Adam, 184.

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each from different milk, it was competent to libel fourteen offences. The terms of the contract were of no moment; the offence did not depend on the contract. By the statutes each procurement of a sample by the inspector was made equivalent to a purchase, and he might prosecute for each as for each purchase. In *Semple v. Dunbar*¹ different samples were taken, but there was only one offence charged, because only one sample was deficient. The offence related to the deficient sample as to a purchase which was not of the proper quality. It was, at anyrate, desirable that statutes which applied to the United Kingdom should be similarly construed in the several countries.² (3) Section 34 of the Summary Procedure Act* enacted that no conviction was to be quashed for want of form, and that section applied here. At the most it was a case of want of form. There was not even a surplusage of words, because the conviction had to be read as if the word "instantly" occurred after "adjudges him to forfeit and pay." That word was implied, and, if that were so, the reference to the time allowed was not inaccurate, and did not render the conviction incapable of execution.

LORD ARDWALL.—With regard to question 1, I am of opinion that on the facts stated the method of sampling adopted was, so far as circumstances permitted, not an unfair or improper method of sampling, and practically afforded a fair sample of the contents of each can. But I think that seeing the sale was of the whole 160 gallons of milk, the samples ought to have been mixed before being analysed.

With regard to question 3, I was at the discussion much impressed by the argument in favour of answering it in the affirmative, but having regard to the terms of section 3 of the Sale of Food and Drugs Act, 1879, I have come to the opinion that it would not be competent to adopt the method of sampling there set forth, and that for the reason that the only power conferred on the inspector, or other person charged with the execution of the Act, is that he "may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk." Now, it appears to me that after the consignment of milk had been delivered into the vats it was too late for the inspector to exercise his powers, because the milk was no longer in course of delivery, but had been delivered, and that into a receptacle belonging to the purchaser, for the condition of which the seller could not be held responsible. But this technical difficulty might possibly have been got over by the inspector taking possession of the cans, pouring them into a vat obtained by him for the purpose at the hospital, and taking his sample out of the whole bulk of the milk.

The important question in this case is raised by the second question of law, and upon that question I am of opinion that while the respondent was entitled to take a sample from each can, yet it was not competent for him to sue for a separate penalty in respect of each individual can. The sale and

¹ July 20, 1904, 6 F. (J.) 65, 4 Adam, 399.

² Morton v. Fyfe, Nov. 2, 1896, 24 R. (J.) 9, 2 Adam, 174.

* The Summary Procedure (Scotland) Act, 1864, enacts:—

Sec. 34. "No conviction . . . in pursuance of this Act shall be quashed for want of form. . . ."

delivery of the whole of the milk in question on the day libelled was one July 16, 1908. transaction and one act, and in my opinion it was wholly incompetent to sue for a separate penalty in respect of each and any portion of the milk so sold. Such a proceeding might be carried on indefinitely according to the size and number of the vessels in which any sale of milk in bulk happened to be contained, and what was really one act of infringement of the Food and Drugs Act would by this means be converted into as many acts as there were vessels, which seems to me to be absurd.

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Lord Ardwall.

With all respect to the learned Judges who decided the case of *Fecitt v. Walsh*,¹ I cannot concur in the decision they gave. The fallacy, I think, is apparent from the opinion of Mr Justice Day, for he says—"Acting under the provisions of the Acts of 1875 and 1879, a constable procured, as there provided, several samples of milk. In each case of procurement he acted as purchaser, and the appellant as seller." Proceeding upon this he holds that there might be a prosecution in respect of each sample taken. I consider that this is not a sound interpretation of the Acts, and arises from mixing up section 3 of the 1879 Act with section 13 of the 1875 Act. Under section 13 it is provided that an inspector "may procure any sample of food or drugs, and if he suspects the same to have been sold to him contrary to any provision of this Act" shall take the proceedings thereafter narrated.

It is quite clear that this applies to purchases made by inspectors for the purpose of procuring samples of foods or drugs. But section 3 of the Act of 1879 is in wholly different terms. Not a word is said about selling to or buying by an inspector. On the contrary, it only authorises him to procure at the place of delivery any sample of any milk in course of delivery to the purchaser, who plainly is not the inspector himself, and although it provides that proceedings shall be taken and penalties enforced in like manner as if the inspector had purchased the sample himself, yet that does not assimilate his taking as many samples as he might think necessary to the case of a number of purchases made by him from ordinary retail sellers of foods. It is noticeable that apparently the Act contemplates not many samples, but one sample of milk in a case of this description.

Accordingly I am of opinion that though, perhaps, for the sake of testing the milk it might be lawful for an inspector to take several samples, yet the wording of section 3 of the Act plainly shews that it never contemplated the delivery of adulterated milk at the same time and place and under the same contract as anything else than one and not many offences against the statute. To hold anything else would be to put it in the power of any inspector to multiply unnecessarily and unjustly prosecutions for what was one and the same act.

I am accordingly of opinion that we should answer this question as I have suggested, and quash the conviction.

With regard to the fourth question on which we heard a discussion, I am of opinion that the form of conviction being taken from the Schedule of the Summary Procedure Act of 1864, although it contains some surplus-

¹ [1891] 2 Q. B. 304.

July 16, 1908. age, is protected in so far as it does so by the provisions of section 34 of the same Act.
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LORD LOW.—I concur.

LORD JUSTICE-CLERK.—I agree, and only desire to add one word, as the judgment proposed is not in accordance with a decision in England which was quoted to us. I fully recognise the general principle that it is desirable that the interpretation of an Act of Parliament applying to the whole kingdom should, where possible, be uniform, and that principle should not be departed from unless the case be strong for doing so. In this case the grounds for declining to accept as a ruling decision the case quoted to us are irresistible. The judgment of Mr Justice Day seems to me to be quite erroneous, on the grounds stated by Lord Ardwall.

THE COURT answered the second question in the negative, and the fourth in the affirmative, and found it unnecessary to answer the remaining questions.

ERSKINE DODS & RHIND, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 23.

HIS MAJESTY'S ADVOCATE, Appellant.—*Sol.-Gen. Ure—*

W. Thomson, A.-D.—Lyon Mackenzie.

July 16, 1908.

BENJAMIN JACOB, Respondent.—*Hunter, K.C.—R. S. Horne.*

H. M. Advocate v. Jacob.

Trade Marks—Trade Description—"Scotch Tweed, All Wool"—Applying Description—Merchandise Marks Act, 1887 (50 and 51 Vict. cap. 28), secs. 2 (2), 3 (1), 5 (1) (d).—The Merchandise Marks Act, 1887, enacts—Sec. 2 (1). "Every person who (a) forges a trade-mark; (b) falsely applies to goods any trade-mark . . . (d) applies any false trade description to goods . . . shall, subject to the provisions of this Act, and unless he proves" no intent to defraud "be guilty of an offence . . ."

Sec. 2 (2). "Every person who sells, or exposes for or has in his possession for sale or any purpose of trade or manufacture, any goods or things to which any forged trade-mark or false trade description is applied, or to which any trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves" that he acted innocently, "be guilty of an offence against this Act."

Sec. 3 (1). "The expression 'trade description' means any description, statement, or other indication, direct or indirect . . . (d) as to the material of which any goods are composed . . ."

Sec. 5 (1). "A person shall be deemed to apply a . . . trade description to goods who . . . (d) uses a trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that . . . trade description."

A tailor, having received a letter from a person who stated that he wanted "a suit of Scotch tweeds," and asked for "patterns of good stuff—all wool," sent certain patterns of cloth, some of which were Scotch tweed all wool and some of which were not, enclosed in a letter, which stated—"Enclosed please find patterns as desired." The customer chose two patterns, and from the cloth chosen, to which they referred, the tailor made him a suit of clothes. The cloth did not conform to the description "Scotch Tweed, All Wool," as defined by the trade.

Held that, even assuming that sec. 2 (2) applies to a false trade description not affixed to the goods by a stamp or label, no false description had been "applied" by the seller in this case.

Question whether the application of sec. 2 (2) is not limited to cases where

a person sells, or exposes for or has in his possession for sale, goods on which a false description is stamped or attached by label. July 16, 1908.

See *H. M. Advocate v. Suits, Limited*, S. C., 1908, p. 1163.

H. M. Advocate v. Jacob.

A COMPLAINT at the instance of the Lord Advocate on behalf of the Board of Trade set forth:—"That Benjamin Jacob, trading under the firm of The Great London Clothiers Company, 11 Trongate, Glasgow, did, between 17th November and 19th December 1907, in his warehouse at 11 Trongate, Glasgow, sell to Thomas Steven, clerk, 39 Fort Street, Ayr, a suit of clothes to which the false trade description 'Scotch Tweeds, All Wool' was applied, contrary to the Merchandise Marks Act, 1887,* and particularly section 2, subsection (2), whereby the said Benjamin Jacob, trading as The Great London Clothiers Company, is guilty of an offence against said Act."

HIGH COURT.
Lord Justice-Clerk.
Lord Low.
Lord Ardwall.

At the trial on the complaint in the Sheriff Court at Glasgow Benjamin Jacob pleaded not guilty. Proof was led, and thereafter the Sheriff-substitute (Glegg) assolzied him from the complaint. The Lord Advocate appealed, and a case was stated.

* The Merchandise Marks Act, 1887, enacts:—

Sec. 2 (1). "Every person who

"(a) forges a trade-mark;

"(b) falsely applies to goods any trade-mark; . . .

"(d) applies any false trade description to goods . . . shall, subject to the provisions of this Act, and unless he proves" no intent to defraud, "be guilty of an offence . . ."

Sec. 2 (2). "Every person who sells, or exposes for or has in his possession for sale or any purpose of trade or manufacture, any goods or things to which any forged trade-mark or false trade description is applied, or to which any trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves—

"(a) that having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade-mark, mark, or trade description;

"(b) that on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

"(c) that otherwise he had acted innocently;

be guilty of an offence against this Act."

Sec. 3 (1). "The expression 'trade description' means any description, statement, or other indication, direct or indirect,

"(d) as to the material of which any goods are composed, and the use of any figure, word, or mark, which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act.

"The expression 'false trade description' means a trade description which is false in a material respect as regards the goods to which it is applied.

"The expression 'goods' means anything which is the subject of trade, manufacture, or merchandise."

Sec. 5 (1). "A person shall be deemed to apply a . . . trade description to goods who

"(d) uses a . . . trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that . . . trade description."

July 16, 1908. The stated case set forth that at the proof the following facts were established:—

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"The communications between the parties were conducted entirely by writing. Throughout the whole proceedings Steven was acting at the instigation and under the direction of the Procurator-fiscal at Ayr. The respondent knew nothing of the matter personally, the transaction on his side being conducted by his servants.

"On 18th November 1907 Steven wrote to respondent:—'I want a suit of Scotch tweeds, and have been referred to you. I suppose you can give me directions for self-measurement, so that I would not require to go into Glasgow. Would you please send me patterns of good stuff—all wool—as I wish a suit that will wear well. If I order a suit I will pay cash on delivery. P.S.—Please state prices.'

"On 20th November 1907 respondent replied:—'Enclosed please find patterns as desired. Trusting some of them will suit.' These enclosures consisted partly of patterns which were Scotch tweed all wool, and partly of pieces which were not. There were no markings on the patterns except the prices.

"On 27th November 1907 Steven replied:—'I duly received yours of 20th, sending patterns of Scotch tweed as asked for in my letter of 18th.

"'I have fixed on the two patterns enclosed. I want jacket and vest of one pattern and trousers of the other.

"'Enclosed measurement form filled up. Please send suit soon.'

"The patterns selected were those which, upon examination, appeared to Steven and his advisers not to be Scotch tweed all wool. The suit afterwards supplied was made out of a cloth of which the patterns sent were portions, the jacket and vest being made out of one kind and the trousers of another.

"On 5th December 1907 respondent wrote:—'We have put your suit in hands, and expect to have it finished by the end of this week. We will forward it on to you on receipt of postal order for the amount.'

"On 6th December 1907 Steven wrote:—'I have yours of 5th. If you send me now an account for the suit I will remit the amount.'

"On 9th December respondent sent this account:—'Suit to order, £2, 7s. 6d.'

"On 10th December Steven wrote:—'I enclose post-office order for £2, 7s. 6d. in payment of suit. Please send on suit with receipted account.'

"The suit was sent, and on 18th December 1907 Steven wrote:—'The suit I ordered from you has come to hand. You have, however, omitted to send me a receipt for the price. I therefore enclose a form of receipt, which please sign and return.'

"The enclosed form was:—'Received from Mr Thomas Steven, Fort Street, Ayr, Two pounds 7/6 in payment of suit of all wool Scotch Tweeds supplied.'

" Penny

" Stamp.

"On 19th December 1907 the respondent wrote:—'Enclosed please find a receipt as desired. Trust that this suit was all right for you.' The receipt granted bore:—'Suit to order, £2, 7s. 6d. By cash, £2, 7s. 6d.' The form sent by Steven was returned in the same letter unsigned.

"The expression 'Scotch Tweed,' as defined by the trade, requires

that the material of which it is composed should be spun and woven in Scotland, and be all wool. This does not exclude a small proportion, about 2 per cent, of silk or mercerised cotton, introduced for decorative purposes. The expression 'all wool' is used in the trade to describe an article composed wholly of wool, subject to the same exception as to the presence of a small proportion of foreign matter.

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"The jacket, vest, and trousers supplied to Steven were made of material consisting of cotton to the extent respectively of 21·14 per cent, 21·20 per cent, and 16·66 per cent. The cotton was not introduced for decorative purposes, but made up part of the fabric."

The case stated that the Sheriff-substitute found on the above facts "that (1) 'Scotch Tweed All Wool' was a trade description; (2) the suit supplied was not Scotch tweed all wool; (3) it was not proved that the respondent sold to Steven a suit to which the trade description 'Scotch Tweed All Wool' was applied within the meaning of the Merchandise Marks Act, 1887, section 2, subsection (2)."

The questions of law for the opinion of the Court were, *inter alia*, as follows:—"(1) Did the respondent sell to Steven a suit to which the trade description 'Scotch Tweed All Wool' was applied within the meaning of and contrary to section 2, subsection (2), of the Merchandise Marks Act, 1887? (2) Was the trade description 'Scotch Tweed All Wool' applied to the suit sold by the respondent to Steven, within the meaning of section 2, subsection (2), of the Merchandise Marks Act, 1887?"

Argued for the appellant;—The facts found were sufficient for a conviction, and the Sheriff-substitute was bound on these facts to convict. The accused had applied a false trade description, and had sold goods to which a false trade description was applied. He was asked for patterns of Scotch tweed all wool, and he supplied patterns "as desired." He sold a suit made of cloth to which he had applied a false trade description. The words "as desired" were the important words; they were an averment that the cloth was what had been asked for, viz., Scotch Tweed—All Wool. What was meant by applying a false trade description was in this case defined by section 5 (1) (d). If it were said that the trade description was applied by Steven, that application was indorsed by the accused in the words "as desired," and in any case he used the trade description as described in section 5 (1) (d). All the requisites for conviction were present.¹ It was not necessary that the application should be in writing; but, if necessary, it was in writing here. Physical attachment to the goods was not required.² There was nothing in section 2, subsection (2), to limit its application to cases where the trade description was attached to or stamped on the goods; and such a contention received no countenance from the English cases quoted. The accused had not acted innocently in the sense of the statute.³

Argued for the respondent;—The complaint was brought under a wrong subsection. Section 2 (1) referred to a person himself applying a false trade description to goods. Section 2 (2) referred to a person selling goods to which someone else had applied a false trade descrip-

¹ Burns v. Turner, Dec. 17, 1897, 25 R. (J.) 38, 2 Adam, 450.

² Cameron v. Wiggins, L. R., [1901] 1 Q. B. 1; Coppen v. Moore (No. 1), L. R., [1898] 2 Q. B. 300; Turnbull v. H. M. Advocate, March 20, 1908, *supra*, p. 47, 5 Adam, 498; Budd v. Lucas, L. R., [1891] 1 Q. B. 408; Fowler v. Cripps, L. R., [1906] 1 K. B. 16.

³ Christie, Manson, & Woods v. Cooper, L. R., [1900] 2 Q. B. 522.

July 16, 1908. **H. M. Advocate v. Jacob.** tion. And section 5 (1) (*d*) had no application to the present case, because that subsection referred only to cases where the accused used a trade description affixed to the goods. In the present case the accused had not applied any trade description to the goods at all. If there had been an application of a trade description it had been by Steven; but there had been no application even by him. He merely sent a letter which was ambiguous in its terms. It did not clearly and unambiguously specify goods falling under the trade description of Scotch Tweed All Wool. The letter sent in reply did not profess to supply goods only of that description. Further, in the case of a "trap" order such as this the Court would scrutinise the purchaser's actings with great care, and would not convict unless the accused had himself applied a false trade description in circumstances which rendered his guilt manifest.¹ The refusal of the accused to sign the receipt which Steven had sent to him amounted to an assertion on his part that the tweed was not of the description stated therein. In previous cases there had always been a trade description in writing by the accused, but that was wanting in this case. Writing was essential to a conviction under this subsection, and it must be unequivocally referable to the goods in question.²

LORD LOW.—The complaint against the appellant is that he sold to one Thomas Steven "a suit of clothes to which the false trade description 'Scotch Tweed, All Wool' was applied, contrary to the Merchandise Marks Act, 1887, and particularly section 2, subsection (2)."

Section 2 (2) of the Act provides that every person who sells any goods to which a false trade description is applied shall be guilty of an offence against the Act, and by section 5 (1) it is provided that a person shall be deemed to apply a trade description to goods who (*d*) uses a trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are described by that trade description.

It was argued with much force that the latter enactment is not applicable to cases falling under section 2 (2). My impression is that that argument is not well founded, but I do not think that it is necessary to express any decided opinion on the point, because the Sheriff-substitute rightly assoilzied the respondent, even assuming that a false trade description may be applied to goods within the meaning of section 2 (2) if it be used in connection with those goods in a manner calculated to lead to the belief that the goods are described by that trade description.

In the first place, as matter of fact, there was no trade description of any kind used by the respondent or any of his servants in regard to the suit of clothes, which was the only thing which was sold to Steven. But it is said that a false trade description—Scotch Tweed, all wool—was impliedly used in connection with the material of which the suit was made. What happened was this:—Steven wrote to the respondent saying that he wanted a suit of Scotch tweeds, and had been referred to the respondent. He

¹ Carr & Sons v. Crisp & Co., Limited, July 17, 1902, 19 Rep. Pat. Cas. 497; Ripley v. Griffiths, Nov. 4, 1902, 19 Rep. Pat. Cas. 590; H. P. Truefitt, Limited, v. Ednie, Feb. 13, 1903, 2 Pat. Cas. 321.

² Coppen v. Moore (No. 1) *cit. supra*; Langley v. Bombay Tea Co., L. R., [1908] 2 K. B. 460.

then asked for directions for self-measurement, so that he would not require July 16, 1908. to go to Glasgow, and then he continued,—“Would you please send me patterns of good stuff—all wool—as I wish a suit that will wear well.”

H. M. Advocate v. Jacob.

In reference to that letter someone in the respondent's employment sent to Steven a number of patterns of tweeds, some of them being “Scotch Tweed, all wool,” and some of them being goods which did not answer to that description, because they contained a considerable percentage of silk or mercerised cotton. Along with the patterns a note was sent in these terms:—“Enclosed please find patterns as desired. Trusting some of them will suit.”

Lord Low.

Now I think that Steven's letter, if carefully read, shewed clearly enough that what he wanted was a suit made of “Scotch Tweed, all wool,” and that what he asked to be sent to him were patterns of cloth of that description and no other. Further, I think that the note sent with the patterns—“please find patterns *as desired*”—may be read as meaning that the patterns asked for, and no other, were sent.

At the same time, Steven's letter did not state categorically that “Scotch Tweed, all wool” and nothing else, was the material of which the suit must be made, because “Scotch Tweed” is first mentioned, and then in a subsequent part of the letter the words “all wool” are introduced incidentally in a sentence in which the writer says that he wants good stuff, and a suit that will wear well. Now, when in answer to such a letter, a shop assistant sent not only patterns of “Scotch Tweed, all wool,” but also (for the purpose, it may be supposed, of giving Steven a greater variety to choose from) patterns of cloth which did not precisely answer that description, I do not think that in a question whether or not a statutory offence, involving large penalties, was committed, it can be held to be proved that the shop assistant applied to all the patterns sent the description “Scotch Tweed, all wool,” merely because he did not explain that some of them were not all wool, and simply said that he sent patterns as desired.

I am therefore of opinion that the appellant failed to prove his case, and that the Sheriff-substitute rightly assoilzied the respondent.

LORD ARDWALL.—I agree with Lord Low with this difference, that I desire to reserve my opinion whether this complaint has been competently brought under section 2, subsection 2, of the Merchandise Marks Act, 1887. I think there is a great deal to be said for the contention that that subsection only deals with goods to which a trade description is applied in the primary sense of that term, viz., by being stamped on the goods, or affixed thereto by a label, because I notice that the subsection deals, *inter alia*, with goods in possession of the person, and the exceptions provided seem to me to refer to goods marked or labelled with a false trade description by some person other than the accused. I am disposed to think that this complaint should have been brought under section 2, subsection 1 (*d*), of the said Act, taken along with section 5, subsection 1 (*d*), of the same Act.

The LORD JUSTICE-CLERK.—I am of the same opinion.

THE COURT answered the first and second questions in the negative.

CASES

DECIDED IN

THE COURT OF SESSION, &c., 1907-1908.

WINTER SESSION.

JOHN M'GREGOR, Petitioner.—*A. A. Fraser.* No. 1.
THE BALLACHULISH SLATE QUARRIES COMPANY, LIMITED, AND ANOTHER, —
Respondents.—*J. A. T. Robertson.* Oct. 16, 1907.

Expenses—Taxation—Party and Party or Agent and Client—Company— M'Gregor v.
Liquidation—Petitioning Creditor's Expenses—"Expenses as taxed."—In a Ballachulish
petition at the instance of a creditor for the compulsory winding-up of a Slate Quarries
limited company, answers were lodged by the company, together with a Co., Limited.
note stating that the shareholders had resolved upon a voluntary winding-up, and had appointed a liquidator, and asking that the liquidation be continued under the supervision of the Court. The Court refused the petition for compulsory winding-up, pronounced a supervision order, and found the petitioner and the respondents entitled "to their expenses as these may be taxed by the Auditor."

Held, on the motion for approval of the Auditor's report, that under the above finding the petitioning creditor was entitled to have his expenses taxed as between agent and client.

On 13th August 1907 a petition was presented at the instance of 1st Division.
John M'Gregor, colliery agent, Dunblane, for the winding-up by the Court of the Ballachulish Slate Quarries Company, Limited, the petitioner stating that he was a creditor of the Company.

On 17th August answers were lodged by the Company and the liquidator appointed by the shareholders, in which it was stated that at an extraordinary general meeting of the shareholders held on 13th August it was resolved that the Company be wound up voluntarily, and a liquidator was appointed.

On the same date on which the answers were lodged, a note in the petition was lodged by the Company and the liquidator craving to have the voluntary winding-up of the Company continued subject to the supervision of the Court. They also presented a petition to the same effect. Answers to this note were lodged by the petitioning creditor on 23d August.

On 29th August parties were heard before the Lord Ordinary on the Bills (Lord Kinnear), who, in M'Gregor's petition, pronounced this interlocutor:—"Having considered the petition and answers, together with the note and answers, orders that the voluntary winding-up of the Ballachulish Slate Quarries Company, Limited, resolved on at an extraordinary general meeting held on 13th August 1907, be continued, but subject to the supervision of the Court, in

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Oct. 16, 1907. **terms of the Companies Acts, 1862 to 1890, as craved in said note, No. 9 of process: Refuses the prayer of the petition; and decerns: Finds the petitioner and the respondents entitled to their expenses as these may be taxed by the Auditor, to whom remits for taxation, and directs these expenses to be expenses in the liquidation."**

**M'Gregor v.
Ballachulish
Slate Quarries
Co., Limited.**

The Lord Ordinary found it unnecessary to dispose of the Company's petition.

On the motion for approval of the Auditor's report on the petitioner's account of expenses, the respondents objected to the report in respect that the Auditor had taxed the petitioner's account as between agent and client, instead of as between party and party, and they specified the items which they maintained should have been disallowed.

Argued for the respondents;—When the Court intended that a party should get his expenses taxed as between agent and client, the interlocutor always contained an express statement to that effect.¹ In the present instance, as the interlocutor of 29th August contained no such statement, the petitioner was only entitled to his expenses taxed as between party and party.

Counsel for the petitioner was not called upon.

LORD PRESIDENT.—In the general case an award of expenses in such terms as the present would certainly mean that the scale of taxation was to be as between party and party. But I am informed by the Clerks of Court that in such cases as this the universal practice is to allow parties their expenses taxed as between agent and client. We shall communicate with the Auditor before giving our decision.

At advising,—

LORD PRESIDENT.—This is a case in which a petition was presented for the compulsory winding-up of the Ballachulish Slate Quarries Company, Limited. Upon the same day as that petition was presented a meeting was held at which an extraordinary resolution was passed by which the Company was to be wound up voluntarily and a liquidator appointed, and the liquidator was directed to present a petition for the continuation of the voluntary winding-up under the supervision of the Court. These two petitions with cross answers which were lodged came to depend before Lord Kinnear, the Lord Ordinary on the Bills in vacation, and his Lordship, after hearing parties, pronounced an order in the compulsory winding-up petition for the continuation of the voluntary winding-up subject to the supervision of the Court, refused the prayer, and found the petitioner and the liquidator entitled to expenses out of the estate.

That is a perfectly ordinary proceeding and the usual interlocutor, and the reason of it is of course plain enough, that even although the Court in its discretion may hold that the better form of winding-up is not a compulsory winding-up, but a winding-up under the supervision of the Court, the Court is still entitled, indeed bound in proper cases, to give the petitioner who comes into Court with a petition for compulsory winding-up his expenses, as having brought the matter into Court, the view being that the

¹ *Pattisons, Limited, v. Kinnear*, Feb. 4, 1899, 1 F. 551, at p. 559; *Elsmie & Son v. The Tomatin Spey District Distillery, Limited*, Jan. 30, 1906, 8 F. 434, at p. 438.

whole parties concerned have the benefit of his initial proceedings in the Oct. 16, 1907.
liquidation which is then instituted.

Now, the expenses were taxed, and they were taxed by the Auditor upon the scale of agent and client, and the present question has arisen upon the objection taken by the liquidator that, inasmuch as the interlocutor does not in terms mention agent and client, the expenses ought to be taxed as between party and party. As to the general rule in ordinary actions upon this matter there can be no doubt. "Expenses" without any more being said means taxation upon the scale of party against party, and anyone who wishes taxation on another scale must take care that it is mentioned in the interlocutor. As to that there is no doubt. But upon inquiry there seems to be as little doubt as to the rule in the present case. The finding of expenses here really means taxation as between agent and client, because there is in the proper sense of the word no question of party against party. The petitioner here was not found entitled to expenses because he had been in any sense successful against his only opponent the liquidator. As a matter of fact so far from being successful he was really unsuccessful, because while he contended that the order should be for compulsory winding-up, the liquidator contended, and with success, that it should be a supervision order. He was not found entitled to expenses as having been the victor in a litigation against another party. He was found entitled to expenses because it was his petition that initiated the whole matter and really formed the true basis of the liquidation.

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Co., Limited.
—
Ld. President.

Now, in this case the truth is there is no question of party against party to whom the rule is to apply. Accordingly I think the Auditor here has done according to the ordinary practice, and according to the right practice, in allowing this petitioner the expenses he has incurred so far as reasonable,—that is, his expenses taxed as between agent and client.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

THE COURT repelled the objection, &c.

WILLIAM CALDER, Solicitor—INGLIS, ORR, & BRUCE, W.S.—Agents.

JOHN MACKENZIE BOW AND OTHERS (Ranken's Trustees),
First Parties.—*Chree*.

No. 2.

THOMAS RANKEN, Second Party.—*Lyon Mackenzie*.

Oct. 17, 1907.

ROBERT LIMOND RANKEN AND OTHERS, Third Parties.—*Cochran Patrick*.

Ranken's
Trustees v.
Ranken.

Succession—Fee and Liferent—Mines and Minerals—Rent of mineral field opened after testator's death—Accumulations—Thellusson Act (39 and 40 Gen. III. cap. 98).—The proprietor of the estate of W., who died in 1848, by his trust-disposition and settlement directed his trustees to divide the annual income of his whole estates, heritable and moveable, among certain of his relatives, and their issue in succession, with further substitutions, and on the death of all these beneficiaries to convey the fee of his whole estates to the person who should then be the heir-male of his, the testator's, father.

The estate of W. contained coal, which down to the date of the testator's death had never been worked, and his trust-disposition and settlement did not contain any reference to coal.

Oct. 17, 1907. In 1907 the trustees let the coal in W. for a fixed rent or lordships. The mineral tenants did not at first begin operations for opening up the coal-field, and in consequence they paid the fixed rent to the trustees.

Ranken's Trustees v. Ranken.

In a special case, *held* (1) that the fixed rent or lordships, whether the coal was being worked or not, represented part of the *corpus* of the estate, and being thus capital and not income, did not fall to be paid to the beneficiaries in right of the income; (2) that for the same reason the Thellusson Act did not apply; and (3) that the fixed rent or lordships fell to be retained by the trustees for behoof of the person ultimately found to be entitled to a conveyance of the fee of the estate.

Campbell v. Campbell's Trustees, 10 R. (H. L.) 65, *followed*.

2D DIVISION. JAMES RANKEN, of Glenlogan and Whitehill, Ayrshire, died in 1848, leaving a trust-disposition and settlement, dated 12th December 1845, by which he conveyed his whole property, heritable and moveable, to trustees, and, *inter alia*, directed them to "divide the clear annual income of my whole estate before conveyed into ten equal shares, and that half-yearly as the same shall be realised" among certain of his brothers and sisters and their issue in succession, with further substitutions as therein specified, "and on the failure by death of all the parties to whom I have directed a share or shares of the income of my property to be paid, I direct my trustees to convey and pay over the fee of my whole property, heritable and moveable, to the person who shall on that event taking place be heir-male of George Ranken, of Whitehill, my father, and to his heirs and assignees whomsoever."

In March 1907 a special case was presented by (1) the trustees acting under the trust-disposition and settlement, first parties; (2) Thomas Ranken, second party, who (as the case bore) "is at present heir-male of the said George Ranken of Whitehill. He is also heir-at-law of the testator. He is also . . . at present in receipt of certain shares of the income of the testator's estate"; and (3) Robert Limond Ranken and others, third parties, "the persons by whom the remaining shares of income are at present enjoyed."

The case set forth:—

"4. The trust-estate under the management of the first parties consists of two landed properties—Glenlogan and Whitehill—which are situated about fifteen miles apart. Both of these estates contain coal of considerable value. At the date of the testator's death the coal in the estate of Glenlogan was being worked, and it has continued to be worked ever since. The coal in the estate of Whitehill had not been worked or let before the testator's death. It was recently let by the first parties for a fixed rent of £200 or royalties, and the said fixed rent is now being paid to the first parties. The said coal has not yet been worked by the tenants. They are also tenants of an adjoining property, upon which they have a pit, through which they propose to work the coal in Whitehill. It is not expected, however, that they will begin to work said coal for a considerable time to come.

"5. In these circumstances a question has arisen as to the disposal of the mineral rents and lordships of Whitehill. The parties of the first and second part maintain that as the minerals of Whitehill had never been worked prior to the death of the testator, and as his trust-disposition and settlement contains no direction to work them, the rents and lordships payable therefor do not fall to be paid over to the parties entitled to the income. The parties of the first part maintain

further that said rents and lordships, being the proceeds of the *corpus* of the estate, are in their nature capital, and fall to be retained by them with a view to being paid over to the person ultimately entitled to conveyance of the estate. The party of the second part further maintains that said shares of income derived from the rents and lordships payable in respect of the minerals of Whitehill are not disposed of by the testator in the circumstances which have occurred, and have fallen into intestacy, and that he, as heir-at-law of the testator for the time being, is meantime entitled thereto. The parties of the third part maintain that said mineral rents and lordships are income of the estate, and fall to be divided and paid over to them and the second party accordingly. *Separatim*, they contend that so long as the coal in Whitehill remains unworked they are entitled to the fixed rent paid by the tenants in respect of the tenancy of said minerals."

Oct. 17, 1907.

Ranken's
Trustees v.
Ranken.

The questions of law were:—"1. Are the mineral rents and lordships payable from Whitehill income of the trust, and do they fall to be paid over to the second and third parties accordingly? Or 2. Are said mineral rents payable to the second and third parties, as income of the trust, only so long as the said minerals are not worked? Or 3. Do said mineral rents and lordships form part of the *corpus* of the estate, and do they accordingly fall to be retained by the first parties for the purpose of being ultimately paid over to the person entitled to a conveyance of the estate? Or 4. Is the accumulation of said rents and lordships struck at by the Thellusson Act, and do they accordingly fall to be paid over in the meantime to the second party as possessing for the time the character of heir-at-law of the testator, and heir of George Ranken entitled to conveyance of the estate?"

Argued for the first parties;—Minerals were *partes soli*, and so-called mineral rent was not truly rent, but was the price paid for part of the *corpus* of the estate.¹ Mineral rents being thus capital, not income, mineral rents ought not, in strictness, to fall under an ordinary gift of the income of an estate. An exception was recognised in the case of minerals which had been worked in the lifetime of the testator; the rents of such minerals were carried by an ordinary gift of the income of the estate, but it was otherwise where the minerals had not been worked in the lifetime of the testator,² which was the case here with respect to the minerals of Whitehill. That estate was fifteen miles distant from Glenlogan, so that the minerals in the two estates could not be regarded as a *unum quid*. It made no difference that the minerals in Whitehill were not at present being worked, the fixed rent of £200 a year paid by the mineral tenants was capital, not income. That being so, the Thellusson Act³ did not apply, for it struck at the accumulation of income only. The fixed rents or lordships paid for the minerals in Whitehill ought to be retained by the first parties for behoof of the person ultimately entitled to a conveyance of the estate.

Argued for the second party;—(1) In any view, in accordance with the rule established in the case of *Campbell*,² the third parties were

¹ *Gowans v. Christie*, Feb. 14, 1873, 11 Macph. (H. L.) 1, *per* Lord Cairns, at p. 12.

² *Campbell's Trustees v. Campbell*, March 15, 1882, 10 R. (H. L.) 65.

³ 39 and 40 Geo. III. cap. 98.

Oct. 18, 1907.

Don Fran-
cesco v. De
Meo.

(Cond. 2) "For some time prior to June 1904 the defender carried on business in the premises now occupied by the pursuer, and the pursuer about that time entered into negotiations with the defender for the purchase of that business." (Ans. 2) "Admitted."

(Cond. 3) "On 13th June 1904 a verbal agreement was come to between the parties whereby the defender agreed to sell, and the pursuer agreed to purchase, the stock-in-trade, fittings, and goodwill of the said business at the price of £150 (the stock in trade and fittings being valued at £50, and the goodwill at £100), said price to be paid within two years by instalments of £2 per week during the summer months, and £1 or so per week during the winter season, the sum to be paid during the winter season being dependent on the income from the business, and in respect of said price the defender undertook not to compete with the pursuer in business in Peebles under a penalty of £150." (Ans. 3) "Admitted that defender agreed to sell on the date here mentioned the business as then carried on by him in shop at 25 Northgate, Peebles, including the whole moveable property therein, and pertaining thereto, to pursuer at the price of £150, which was subsequently paid in terms of the documents referred to in the following answer. *Quoad ultra* denied."

(Cond. 4) "Said verbal agreement was repeated in the presence of witnesses at a meeting between the parties in Edinburgh on 26th August 1904, and was reduced to writing and signed by the parties on that date before said witnesses. Both pursuer and defender are Italians, and the document was executed in the Italian language, and is herewith produced." * (Ans. 4) "Admitted that the pursuer and

* The pursuer lodged in process the following:—

"Translation by Pursuer of Document No. 3 of Process.

"Edinburgh, 26th August 1904.

"I, the undersigned, Onofrio De Meo, do agree to sell my shop to Francesco Don Francesco for £150, which is situated at 25 Northgate, Peebles, such sum must be paid by instalments as follows:—That in two years' time Francesco Benigno will pay to Onofrio De Meo two pounds each week during the summer season and one pound or so each week during the winter season, according to the income of business. The said shop was handed over to Francesco Don Francesco on 13th June 1904, the vendor to receive full payment in two years' time from that date.

"I, Onofrio De Meo, bind myself not to serve in any other ice-cream shop in Peebles, and should I do so, Francesco Don Francesco is entitled to all the money he paid to me for said property. We leave the following space for anything to be added to the above contract.

Stamp 6d.

"ONOFRIO DE MEO.

"FRANCESCO DON FRANCESCO.

"BORDONE ACHILLE, *testimone*.

"PASQUALO MARANDOLA.

"ALPHONSO VETRAINIO."

"Translation by Pursuer of Document No. 6 of Process.

"Edinburgh, the day 26 August 1904.

"I here undersigned Francesco Donfrancesco myself declare of being debtor with Mr Onofrio Demeo for the sum of £ sterling 150. Say One hundred and fifty paid £ sterling 42 say pounds for having bought one of his shop situated at No. 25 Northgate, Peebles.

"I Francesco Donfrancesco have the full responsibility of paying the said Onofrio Demeo the said sum of £ sterling 2 say two in the summer

defender are both Italians, and that on 26th August 1904 they reduced the terms of the sale and purchase of said business to writing in their own language as after explained. *Quoad ultra* denied. Explained that the agreement between the parties was contained in two documents each signed by them, one containing an offer or agreement by defender to sell said business to pursuer for £150 on certain conditions as regards payment of the purchase price, which was delivered to pursuer, and the other containing an acknowledgment by pursuer that he had bought said business (the signing by him of the first mentioned document being held by the parties as an acceptance by him of said offer), and agreeing to fulfil the defender's conditions under certain penalties therein expressed, if incurred, which was delivered to the defender, said two documents together forming the contract of sale between the parties and shewing exactly its terms. A copy of said last mentioned document with English translation thereof interlined in red is herewith produced and referred to. Further explained and averred that said first mentioned document did not contain the last paragraph appearing in the writing No. 3 of process, lodged by pursuer, the accurate translation of which into English is:—'I, Onofrio De Meo, bind myself not to serve in any other ice-cream shop in Peebles, and if I do so the party is entitled to all the money paid. This space remains for anything to be put afterwards.'"

Oct. 18, 1907.
Don Francesco v. De Meo.

(Cond. 5) "Notwithstanding the obligation undertaken by defender and contained in said agreement of sale, the defender did, in or about the month of June 1906, open premises at No. 34 High Street, Peebles, under the name of N. De Meo, where he still continues to carry on business for the sale of confectionery and ice-cream contrary to the terms of said agreement." (Ans. 5) "Admitted that defender in the month of June 1906 commenced and still carries on the business of a confectioner and ice-cream merchant at 34 High Street, Peebles. *Quoad ultra* denied."

The defender pleaded, *inter alia*;—(1) Said writing, forming No. 3 of process, being insufficiently stamped in terms of law, pursuer ought to be called upon to implement the provision contained in the Stamp Act of 1891 (54 and 55 Vict. cap. 39), sec. 14, anent the production of insufficiently stamped deeds in judicial proceedings, and failing such implement the action should be dismissed, with expenses.*

months from 15 May to 15 November 1905 in the winter at one pounds per week or what I am able to. I Donfrancesco myself guarantee to pay all the sum for £50 sterling from 13 June 1904 to 13 June 1906 say June nineteen six and every time I pay the said Onofrio above the sum of two pounds he is obliged to put on a stamp.

"Refusing to pay the said sum the way written the said Onofrio he can retake the present shop and satisfy me with what the law will allow.

"If the Donfrancesco does not pay the witness have no responsibility or interest in the consequence.

Stamp 6d.

"FRANCESCO DONFRANCESCO DI DEMENICO.

"Accetto ONOFRIO DEMEO.

"BORDONE ACHILLE, *testimone*.

"PASQUALO MARNANDOLA.

"ALPHONSO VETRAINO.

Testimoni."

* The Stamp Act, 1891 (54 and 55 Vict. cap. 39), enacts:—

Sec. 14. "(1) Upon the production of an instrument chargeable with any

Oct. 18, 1907.

Don Francisco v. De Meo.

On 27th December 1906 the Sheriff-substitute (Orphoot) granted decree against the defender for payment of £150, with interest.

On 18th January 1907 the Sheriff (Maconochie) on appeal pronounced this interlocutor:—"Finds that the defender has failed to set forth any relevant defence to the action: Therefore dismisses the appeal, and of new grants decree against the defender, ordaining him to pay to the pursuer the sum sued for, with interest as craved."

The defender appealed, and argued;—No. 3 of process ought to have been stamped with an *ad valorem* stamp. It was not a mere agreement. It was an agreement for the sale, within the meaning of section 59, subsection (1), of the Stamp Act, 1891, of the goodwill of the defender's business, and it required to be stamped as such.¹ Until it had been stamped it could not be received in evidence.²

Argued for the pursuer;—The sale of the defender's business to the pursuer took place on 13th June; the defender admitted that in Ans. 3. The document No. 3 of process, which was dated 26th August, was a mere memorandum of an already concluded contract, which had been in part implemented. In any view, No. 3 of process did not require a stamp, for it was at the most an offer of which No. 6 of process was the acceptance, and the proper place for the stamp was the acceptance. It might be that the acceptance No. 6 of

duty as evidence in any Court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the Judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the Court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of £1, be received in evidence, saving all just exceptions on other grounds."

"(4) Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

Sec. 54. "For the purposes of this Act the expression 'conveyance on sale,' includes every instrument . . . whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction."

Sec. 59. "(1) Any contract or agreement . . . made in Scotland, with or without any clause of registration, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, or goods, wares, or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

¹ Potter v. Commissioners of Inland Revenue, 1854, 10 Excheq. (Hur. & Gord.) 147; Benjamin Brooke, Limited, v. Commissioners of Inland Revenue, L. R., [1896] 2 Q. B. 356; West London Syndicate, Limited, v. Commissioners of Inland Revenue, L. R., [1898] 2 Q. B. 507.

² Stamp Act, 1891, sec. 14.

process was insufficiently stamped, but it was not necessary to look at No. 6 of process, because the defender admitted that his offer had been accepted. In the English cases on which the defender founded the goodwill was specifically conveyed; there was nothing of that kind here. Oct. 18, 1907
Don Francisco v. De Meo.

At advising,—

LORD ARDWALL.—This action arises out of the sale of an ice-cream business by the defender to the pursuer, and the pursuer asks that the defender should be ordained to pay a sum of £150 sterling, being the penalty agreed to be paid in case of the defender breaking his agreement not to carry on business in any other ice-cream shop in Peebles.

The defender states as a preliminary objection to the document founded on by the pursuer that it is not properly stamped, inasmuch as it is stamped only with a sixpenny agreement stamp and not with an *ad valorem* stamp, as provided for by section 59 (1) of the Stamp Act, 1891, and the section of the Stamp Act founded on as excluding the document from the cognisance of the Court is section 14, subsection (1), of the said Stamp Act, which provides that notice shall be taken by Judges “of any omission or insufficiency of the stamp” on any instrument produced as evidence. Now, this is not a provision compelling Judges to raise test cases or try doubtful questions regarding the stamping of instruments. I think that they are only bound to intervene to protect the Revenue where there is an undoubted case of insufficient stamping or an attempted evasion of the Stamp Act. Now, in my opinion there is no such case here. The document in question was stamped with a sixpenny stamp, which is the proper and appropriate stamp for any ordinary agreement; but it is pleaded for the defender that this document was not only an agreement, but was an agreement for the conveyance and sale of the stock and fittings and goodwill of the shop mentioned in the document. In my opinion this is far from being clear, for the document itself sets forth, and it is matter of common ground on the record, that the agreement for the sale of the business was, as set forth in Cond. 3 and answer thereto, a verbal agreement, and was concluded on 13th June 1904, and on the same date the shop was handed over to the pursuer, the price of the business being then also fixed at £150. This being so, it appears to me that so far as the sale of the business was concerned, No. 3 of process was not the instrument under which that sale took place, although it refers to and recites the sale, but was merely an agreement (1) as to the mode of payment of the price, and (2) as to the obligation on the defender not to carry on another similar business in Peebles under penalty of paying back all the money paid for the business; and it falls to be observed that it is only as evidence of the second point that the document is now produced, and for that purpose undoubtedly it is sufficiently stamped.

I accordingly think that this is not a case in which there is any duty on the Court to order this document to be stamped with an *ad valorem* stamp either *proprio motu* or on the motion of one of the parties.

The LORD JUSTICE-CLERK and LORD LOW concurred.

Oct. 18, 1907. but as regards the merits I have no doubt. In using a drift net or in using a net as a drift net the defender was plainly acting contrary to the interdict whether interim or perpetual.

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Lord Justice-Clerk.

There remains, however, the question whether the judgment can stand notwithstanding the fact that the interlocutor which declared the interdict perpetual was pronounced in a process which had fallen asleep. At the time at which the Sheriff disposed of the case I think he was probably right and could not have considered the regularity of the former decree, but we are in a different position, for we have the former process before us and can see that it had gone to sleep. That being so, it is, I think, safer to revert to the judgment of the Sheriff-substitute. But it was strongly pleaded that the interim interdict was no longer standing, because it had been brought to an end by the fact that the defenders had lodged answers, and in support of this the opinion of Lord President Inglis—then Lord Justice-Clerk—in *Hamilton v. Allan*¹ was referred to. Now, to read the opinion of Lord President Inglis in that way is to make it inconsistent with itself, and it must, moreover, be considered as having some relation to practice. There is no practice which suggests that the lodging of answers can take away the effect of a judgment of a competent Court. On the contrary, the practice is that, where interim interdict has been granted *de plano*, the Lord Ordinary after answers have been lodged and parties heard either passes the note to try the question and continues the interim interdict or refuses the note and recalls the interdict. Now, either to continue or to recall an interdict that has previously come to an end is impossible.

I see that the late Mr Antonio, who had, of course, great experience in such matters, gives in his book the procedure as—"Intimation ordered and interim interdict granted. Answers lodged and parties heard. Note passed and interdict continued." The practice without doubt being so, and commending itself to common sense, it follows that an interdict is not set aside merely because answers are lodged. Accordingly, I am of opinion that the interim interdict was standing at the time of the fishing in question.

I think we should recall the interlocutor of the Sheriff and revert to that of the Sheriff-substitute both as to his findings in fact and in law.

LORD LOW.—I am of the same opinion. As regards the merits, the evidence appears to me to be perfectly clear and to justify the interlocutors of the learned Sheriffs. The only matter of any difficulty in the case arises in consequence of certain *dicta* of the late Lord Justice-Clerk Inglis in the case of *Hamilton v. Allan*.¹ I cannot help thinking that the report incorrectly sets forth what the learned Lord Justice-Clerk really said. The main question in that case was as to whether an interim interdict granted in the Bill-Chamber upon presentation of the note and before answers were lodged, continued in force notwithstanding that the action had been allowed to go to sleep, and it seems to have been argued on behalf of the respondent that it would be a great hardship to him to have an interim interdict

¹ 23 D. at p. 591.

one or more of them, for salmon or fish of the salmon kind in any part of the river or estuary of the Forth, with the nets known as drift nets or hang' nets, or from placing or setting nets of that description in any part of the said river or estuary; (2) that on said 18th August 1902 interim interdict as craved was granted; (3) that appearance was entered and defences lodged by the respondent; (4) that said interim interdict has not been recalled; (5) that on 17th July 1906 the respondent fished for salmon or fish of the salmon kind in the River Forth between Kelliebank, North Alloa, and Alloa Inch, in the parish of Alloa and county of Clackmannan, with a drift or hang net in the manner interdicted: Therefore finds that the respondent has broken the interim interdict granted on 18th August 1902: Fines," &c.

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On appeal the Sheriff (Lees) pronounced this interlocutor:—"Refuses the appeal, but recalls the interlocutor of the Sheriff-substitute of 28th November 1906: Finds in fact (1) that on 18th August 1902 interim interdict was granted in this Court prohibiting the defender from fishing for salmon or fish of the salmon kind in any part of the river or estuary of the Forth with the nets known as drift nets or hang nets, or from placing or setting nets of that description in any part of the said river or estuary, and that on 21st October 1903 perpetual interdict to this effect was thereafter granted; and (2) that on 17th July 1906 the defender in breach of this interdict fished for salmon or fish of the salmon kind in the River Forth within this county with a net which he and those with him used in the manner forbidden by said interdict: Finds in law that the defender has in these circumstances been guilty of a contempt of the authority of this Court: Therefore fines," &c.*

The defender appealed, and argued;—(1) As no step had been taken in the action for interdict between 3d October 1902 and 7th October 1903, the process had fallen asleep,¹ and consequently the interlocutor of 21st October 1903 declaring the interdict to be perpetual was inept, and breach of it could not be complained of.² (2) Neither could breach of the interim interdict granted on 18th August 1902 be complained of, for that interdict fell *ipso facto* when the defences were put in.³

The undernoted authorities were cited by the pursuers at the hearing.⁴

LORD JUSTICE-CLERK.—This case stands in a somewhat peculiar position,

* "NOTE.—It is not doubtful that the defender disobeyed the interdict that was granted. But it was urged that the final decree of interdict was incompetent—that the cause had fallen asleep. I am afraid I cannot enter on any question of this kind. This is not the process in which to impugn the regularity of the former decree. I must assume it to be good. . . ."

¹ Sheriff Courts (Scotland) Act, 1876 (39 and 40 Vict. cap. 70), sec. 49.

² Clark v. Stirling, June 14, 1839, 1 D. 955, *per* Lord Cockburn at p. 984.

³ Hamilton v. Allan, Feb. 16, 1861, 23 D. 589, *per* Lord Justice-Clerk Inglis, at p. 591.

⁴ Neil v. M'Nair, June 7, 1901, 3 F. (J. C.) 85; Clippens Oil Co., Limited, v. Edinburgh and District Water Trust, March 20, 1906, 8 F. 731; Henderson v. M'Lellan, May 23, 1874, 1 R. 920.

Oct. 18, 1907. answers is the proceeding which gives him a *locus standi* to discuss the question and to get rid of the interim interdict.

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Lord Ardwall. President in the *Clippens Oil Company's* case.¹ He points out that the practice in the Bill-Chamber as to the subsistence of interim interdicts was always the same as we now understand it, although procedure by note has been substituted for procedure by bill. Further, in an excellent work by the late Mr Antonio, Clerk of the Bills, on the practice of the Bill-Chamber, it is set forth as the usual procedure that on the note being passed the interim interdict is continued. That implies that at the time when the note is passed there is a subsisting interdict, because it would be absurd and futile to issue an interlocutor continuing an interdict if the interdict had fallen the moment answers were lodged, for in that case there would be no existing interdict capable of being continued. Accordingly I have no doubt that when interim interdict has once been granted, it subsists until it is recalled by a competent Court or Judge.

LORD STORMONTH-DARLING was absent.

THE COURT sustained the appeal, and recalled the interlocutor appealed against; found in fact in terms of the five findings in fact in the interlocutor of 28th November 1906; found that the defender had broken the interim interdict granted on 18th August 1902, and remitted to the Sheriff to fine the defender and to proceed thereafter as accords.

DUNDAS & WILSON, C.S.—LINDSAY COOK & DICKSON, Solicitors—Agents.

No. 5.

THE NORTH BRITISH RAILWAY COMPANY AND ANOTHER, Pursuers (Respondents),—*Hunter, K.C.—Macmillan.*

Oct. 18, 1907.

THE CALEDONIAN RAILWAY COMPANY, Defenders (Reclaimers).—*Clyde, K.C.—Hon. W. Watson.*

North British
Railway Co.
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Railway—Siding—Renewal of Siding—Identity of Subject—Running Powers—Caledonian and General Terminus Railways Amalgamation Act, 1865 (28 and 29 Vict. cap. clxvii.), sec. 15.—The Caledonian and General Terminus Railways Amalgamation Act, 1865, conferred on certain railway companies running powers over the sidings of the railways vested by the Act in the Caledonian Railway, “constructed at the time of the commencement of this Act, or any renewals thereof.”

Circumstances connected with the construction of a siding, in which *held* (aff. judgment of Lord Ardwall) that the siding in question was a renewal of a siding in existence at the commencement of the Act.

1st Division.
Lord Ardwall.

By the Caledonian and General Terminus Railways Amalgamation Act, 1865 (28 and 29 Vict. cap. clxvii.), sec. 15, it was provided that, *inter alios*, the Glasgow and South-Western Railway Company, the City of Glasgow Union Railway Company, the Edinburgh and Glasgow Railway Company, and the Monkland Railway Company “may so run over and use all or any of the stations, sidings, or branches” of the railways vested by the Act in the Caledonian Railway Com-

pany "constructed at the time of the commencement of this Act, or Oct. 18, 1907. any renewals thereof," on payment of certain tolls.

This action was raised at the instance of the North British Railway Company (who had acquired the rights conferred by the Act on the Edinburgh and Glasgow Railway Company and the Monkland Railway Company), and of the Glasgow and South-Western Railway Company, against the Caledonian Railway Company, for declarator that the pursuers were entitled to run over and use a siding situated on the defenders' branch line to the Terminus Quay, Glasgow, and running therefrom into the bonded store belonging to Slater, Roger, & Company, Limited, on payment of the tolls specified in the Act.

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The following history of the siding is taken substantially from the opinion of the Lord Ordinary:—In 1857 the General Terminus and Glasgow Harbour Railway Company entered into a feu-contract with William Sim, by which they conveyed to him the steading of ground subsequently occupied by the bonded store belonging to Slater, Roger, & Company, and referred to in the summons, and obliged themselves to lay suitable rails from the existing branch of their railway to the boundary line of the piece of ground conveyed. At the date of the passing of the Amalgamation Act in 1865 the siding had been constructed, and ran along the southern boundary of the ground, terminating at its western extremity. It formed a branch siding from another siding leading from the General Terminus branch to Vermont Street, and known as the Vermont Street Siding. The siding admittedly belonged to one of the railways vested by the Act in the Caledonian Railway Company, and was accordingly one to which the provisions of sec. 15 applied.

The steading of ground was disposed of by Mr Sim to a Mr Robson, and by him to Messrs Slater, Roger, & Company. In Mr Sim's time it was occupied as a granite work, and the siding to it came to be called the "Granite Siding." It was subsequently leased by him to the Birkenshaw Coal Company, who used it as a coal depot, and who in 1895 arranged with the Caledonian Railway Company that the Granite Siding, instead of being carried along the southern boundary of the ground, should enter it at its south-east corner, and similarly that what was before the Vermont Street siding should be carried into the steading at its south-west corner, both branches being prolonged for some distance into the depot, and the extended portions of the siding being laid by the Birkenshaw Coal Company. In the course of these operations a considerable difference was made in the direction of the Granite Siding, and the rails were taken up for some length and relaid in a different position. The occupancy of the Birkenshaw Coal Company ceased in 1901, when they took up and removed the rails of both branches of the sidings so far as belonging to them, the effect of which was to remove the sidings altogether for a short distance to the south of the steading of ground.

On the acquisition of the ground by Messrs Slater, Roger, & Company they erected a bonded warehouse, and applied to the Caledonian Railway Company for siding accommodation, and the Company laid down the siding now in dispute, which differed from the original Granite Siding in the following respects—it was laid in a different position and direction, the divergence being 10 feet at the widest point; it was on a different level, being about 5 feet lower at the point where it entered the steading of ground; instead of running along the southern boundary of the ground it entered into it at the south-east corner, and ran for

Oct. 18, 1907. a considerable distance through it, and the Vermont Street branch of the siding was removed, the approach being by a single line of rails.
 North British Railway Co. The pursuers or their predecessors exercised running powers over
 v. Caledonian Railway Co. the siding in virtue of the Act at least from 1879 until the removal of the siding by the Birkenshaw Coal Company.

In these circumstances the question arose whether the siding as it now existed was a renewal of a siding in existence at the time of the commencement of the Amalgamation Act, and this action was raised to determine the matter.

The pursuers pleaded, *inter alia* ;—(2) The siding in question being a renewal of a siding existing at the time of the commencement of the Caledonian and General Terminus Railways Amalgamation Act, 1865, the pursuers are entitled in virtue of that Act to run over and use the same.

The defenders pleaded, *inter alia* ;—(2) The siding in question not being a siding constructed and existing at the time of the commencement of the said Caledonian and General Terminus Railways Amalgamation Act, 1865, or a renewal thereof, but being a new, independent, and separate siding, the defenders are entitled to absolvitor.

On 30th October 1906 the Lord Ordinary (Ardwall), after a proof, found the pursuers entitled to use the siding, so far as the same was situated on land belonging to the defenders, in terms of the declaratory conclusion of the summons.*

* "OPINION.—In this action the pursuers ask for a declarator that under the 15th section of the Caledonian and General Terminus Railways Amalgamation Act, 1865, they are entitled to running powers over the siding which leads from a branch of the defenders' General Terminus Railway to the steading of ground now occupied by a bonded store belonging to Messrs Slater, Roger, & Company—at least that is what they now ask for, although as I read the summons their claim as there set forth includes a continuation of the lines of rail beyond the siding for some 70 feet into the said bonded store. It is clear that I am not entitled in this action to deal with that 70 feet at all, because it belongs to Slater, Roger, & Company, who are not called as parties to this action, and who certainly are under no obligation to give running powers over the said 70 feet of siding. I have accordingly limited my decree to that part of the siding which is situated on land belonging to the defenders, for it is to it alone that this action can by any possibility be supposed to apply. . . .

"(After a narrative of the facts)—These facts, the defenders say, constitute this a wholly different siding, and should preclude the Court from holding that it is either the original siding or a renewal thereof. I am unable to adopt this view. A siding, like any other piece of railway line, is intended to constitute a way for the transit of goods or passengers from one point to another, and it seems to me that the identity of the present siding with the old 'Granite Siding' must be judged of by the test whether it fulfils the same purposes as the old siding did. It appears to me to be a matter of indifference whether it is laid on precisely the same route as the old siding, or deviates a few feet to one side or another, or whether the levels of the rails have been altered a few feet up or down, provided it is laid in such a way as to serve the purpose of a means of transit between the same subjects as the siding formerly existing at that place served. In the present case it is not open to doubt that the siding as now existing serves as a means of transit between the identical steading of ground which the Granite Siding served and the same branch of the General Terminus Railway, and this being so, I do not think it matters in the least what alterations have been made either in its direction or levels; and in my opinion it would be absurd to hold that

The defenders reclaimed.

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LORD PRESIDENT.—The dispute in question has arisen over a certain siding, and the history of that siding seems to be this: Originally there was a long siding going to a place called Vermont Street, and from that there was a branch siding which went to serve some works that at that time—I am now speaking of the time which ended in 1865, the date of the Amalgamation Act—belonged to a gentleman of the name of Sim. Subsequently Vermont Street really went out of existence, being superseded by a large depot known as the Kinning Park Depot, and accordingly part of the siding that went to Vermont Street was entirely abandoned, and the portion that went into Sim's works was still continued, although the actual direction of the rails was a little altered, in particular, instead of being only one branch it was bifurcated and made into two branches, and these two branches were prolonged into the works themselves, Sim having been succeeded by the Birkenshaw Coal Company. That was the state of affairs in 1895. In 1901 the Birkenshaw Company left the ground, and they were eventually succeeded by Messrs Slater, Roger, & Company, who seem to have taken possession in 1903, and who are the present possessors of the ground. During the period after the Birkenshaw people left and Slater, Roger, & Company came in, the siding was so far altered. The Birkenshaw Company took away the rails in so far as they were within their own ground, and the siding became a sort of bifurcated end which approached the ground without actually entering into it. There seemed to be a little dispute between the parties as to whether this bifurcated end was actually used for the purpose of taking goods which went into the ground, or taking anything away from the ground, but in the view I take of it it really does not make any difference.

I think the whole question is whether there really is identity of subject. I think it is perfectly clear that the question of who the private person was who used the siding is neither here nor there. All sorts of people would use the sidings on the General Terminus system, and the running powers were not given merely so long as these sidings were used by the same people; they were given so long as there was identity of subject. I come to the conclusion without any difficulty that here there is in the fair meaning of the words identity of subject. I do not think that the fact, if it be a fact, that for a short period the siding was, so to speak, disused, really alters the question. The siding now is what it originally was, namely, a siding for the use of those particular works connecting with the Caledonian Railway system at that point. I do not think it has lost its proper identity

the pursuers could lawfully be deprived of statutory running powers over a siding leading to a particular place or piece of ground merely because the defenders and the present owners of the ground, for the convenience of the latter, make alterations on the levels and position of the siding as compared with the siding as it existed at the passing of the Act of 1865.

“On these grounds I consider the pursuers are entitled to the declarator they ask, subject to the qualification I have inserted in the decree. I am of opinion that the siding in question is a renewal of the siding which existed at the same place and substantially in the same position in 1865.”

Oct. 18, 1907. at all, and, accordingly, I think the conclusion the Lord Ordinary has come to is right.

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LORD M'LAREN.—I am of the same opinion, and have nothing to add.

LORD KINNEAR.—I quite agree. I agree with the final sentence of the Lord Ordinary's opinion in which he says the siding in question is in his judgment a renewal of the siding which existed in the same place and substantially in the same position in 1865.

LORD PEARSON.—I am of the same opinion.

THE COURT adhered.

JAMES WATSON, S.S.C.—HOPE, TODD & KIRK, W.S.—Agents.

No. 6. JAMES KIRKWOOD & SONS, Pursuers (Appellants).—*Hunter, K.C.—Sandeman.*

Oct. 15, 1907. THE CLYDESDALE BANK, LIMITED, Defenders (Respondents).—*Sol.-Gen. Ure—King.*

Kirkwood &
Sons v.
Clydesdale
Bank.

ROBERT PATERSON (Moffatt's Judicial Factor), Defender (Respondent).—*D.-F. Campbell—Macmillan.*

Bank—Cheque—Bill of Exchange—Death of Drawer before presentment—Assignment of Funds in hands of Bank—Credit balance on current account—Debit balances on other accounts—Bills of Exchange Act, 1882 (45 and 46 Vict. cap. 61), secs. 53 (2), 73, 75.—A bank having refused payment of a cheque on the ground that it had received notice of the death of the drawer, the holder of the cheque in an action against the bank claimed payment of the amount on the ground that to that extent the cheque operated as an assignment of a sum standing at the drawer's credit on his account current in the hands of the bank.

In a proof the bank books shewed a balance due to the drawer on his account current more than sufficient to pay the cheque, but they also shewed that on his other accounts the drawer was due to the bank for advances a larger sum than that standing at his credit on the current account. For these advances the bank held securities.

Held (1) that the cheque, as a cheque, having lapsed at the death of the drawer, the pursuer could not avail himself of the rule by which a bank, which is in the habit of honouring a customer's cheques on a current account, is not entitled without notice to refuse payment because on a balance of all accounts the customer is a debtor to the bank; and (2) that the cheque did not operate as an assignment, in respect that at the time when it was presented to the defenders there were not in their hands any "funds available for the payment thereof" within the meaning of section 53 (2) of the Bills of Exchange Act, 1882.

1ST DIVISION. ON 15th December 1904 Messrs J. & G. Moffatt, stockbrokers, Glasgow, of which George Moffatt was the sole partner, for value, delivered to Messrs James Kirkwood & Sons, also stockbrokers there, a cheque for £1588, 8s. 7d., drawn by them in favour of Messrs Kirkwood upon the Clydesdale Bank, Glasgow. The cheque was presented to the Bank on 16th December 1904, but payment was refused on the ground that the Bank had received notice that Mr George Moffatt had died that morning.

Thereafter an action was raised in the Sheriff Court at Glasgow by

Messrs Kirkwood against the Clydesdale Bank, concluding for payment of the sum of £1588, 8s. 7d. Oct. 15, 1907.

On 4th January 1906 the Sheriff-substitute (Balfour) assoilzied the defenders.

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The pursuers appealed to the Court of Session.

On 7th December 1906 the Court appointed the appellants to intimate the dependence of the action to the judicial factor who had been appointed on the estate of the deceased George Moffatt, and ordained him, if so advised, to compare in the cause. Thereafter the judicial factor appeared, and lodged defences. The record was reopened, and an amended record made up and closed.

The pursuers averred that the cheque founded on was drawn by Messrs Moffatt's clerk, Mr D. H. Penman, who was authorised to draw upon their current account, and on that account only; that on 16th December 1904, when the cheque was presented, there was a sufficient sum at the credit of that account; that Messrs Moffatt had been in the habit of drawing upon that account irrespective of the state of the balance on various loan accounts which they had open, and that the cheques were duly honoured.

The pursuers pleaded;—(1) In respect that the cheque founded on was granted for value, and that when it was presented to the Bank the Bank held cash belonging to the drawers, or otherwise had placed at the credit of the account on which said cheque was drawn a sum exceeding the amount thereof, and in respect that the presentation of said cheque operated as an assignation of the funds standing at the credit of said account belonging to Messrs Moffatt in the hands of said Bank to the extent of the sum for which it was drawn from the time when so presented, the pursuers are entitled to decree as craved, with expenses. (2) It having been part of the course of dealing between the Bank and the said firm of Messrs Moffatt that cheques drawn on the said working account should be honoured so long as there were funds in that account, and that irrespective of the state of balance of other accounts open between the parties, the Bank were not entitled to strike a general balance and dishonour cheques drawn by the said Messrs Moffatt without having first given them notice of their intention so to do. (3) No notice having been given by the Bank of their intention to close the said working account prior to the drawing of the said cheque, they are not now entitled to transfer the amount at the credit of the said working account to the said other accounts, to the prejudice of the pursuers. (4) The sums at the credit of the said working account having, as at the said 15th December 1904, been specially appropriated to meet the said cheque in the pursuers' favour, they are entitled to decree as craved.

The following pleas were stated on behalf of the defenders the Clydesdale Bank;—(3) In respect that when said cheque was presented to these defenders they held no funds of Messrs Moffatt which could be assigned to the pursuers, these defenders should be assoilzied, with expenses. (4) The authority by Messrs Moffatt and the said George Moffatt to these defenders to honour all cheques drawn on their account signed by Mr David Hedderwick Penman of their office having fallen by the death of the said George Moffatt, absolvitor should be pronounced, with expenses. (5) *Separatim*, notice of the death of the said George Moffatt having been given to these defenders before the presentation of said cheque, these defen-

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ders were, in terms of subsection 2 of section 75 of the Bills of Exchange Act, 1882,¹ warranted in refusing payment of same, and they are accordingly entitled to absolvitor, with expenses. (6) There having been no arrangement between Messrs Moffatt and these defenders that cheques drawn by Messrs Moffatt should be honoured irrespective of the balance due by Messrs Moffatt to the Bank, these defenders should be assoilzied, with expenses. (7) These defenders being entitled at any time without notice to treat all the accounts between Messrs Moffatt and the Bank as one account, and to apply the credit balance on any account towards meeting the debit balances on the other accounts, absolvitor should be pronounced, with expenses.

Similar pleas were stated on behalf of the defender the judicial factor.

On 16th May 1907 a proof was allowed, which was led before Lord Pearson.

The following facts were admitted or proved:—At the time of the presentation of the cheque the Messrs Moffatt had various accounts open with the Bank—a current account, at the credit of which there was then standing a balance of about £3000; a loan account; and several cash accounts—on all of which together there was a debit balance against the firm much greater than the sum at the credit of the current account. Against this debit balance the Bank held securities of various kinds. The cheque in favour of Messrs Kirkwood was in ordinary form, and did not bear to be drawn upon any particular account, but it was signed by D. H. Penman, a clerk in the employment of Messrs Moffatt who had authority to operate only upon the current account, and there was no doubt that it was intended to be drawn upon that account. It was part of the course of dealing between Messrs Moffatt and the Bank that cheques drawn on the current account were honoured so long as there were funds in that account, irrespective of the state of balance of the other accounts open between the parties.

Argued for the pursuers;—The cheque operated as an assignment of the balance at the credit of Messrs Moffatt's current account with the bank at the time when it was presented, to the amount for which the cheque was drawn.² The cheque was drawn upon the current account, and the admitted balance at the credit of that account was a fund in the hands of the bank "available for the payment thereof," within the meaning of section 53 (2) of the Bills of Exchange Act, 1882.³ It was immaterial that on a balance of all the accounts open between Messrs Moffatt and the bank, Messrs Moffatt were debtors to them, for a banker who was in the habit (as in this case) of honouring his customer's cheques upon his current account so long as there were funds there, was not entitled, without notice, to refuse to honour such a cheque, merely because on a balance of all accounts the customer was found to be owing money to the bank.⁴ The pursuers being holders of the cheque for value, had a *jus quæsitum* to enforce this

¹ Quoted in the Lord President's opinion at p. 23.

² Bryce v. Young's Executors, Jan. 20, 1866, 4 Macph. 312; British Linen Co. Bank v. Carruthers and Ferguson, June 6, 1883, 10 R. 923; Bills of Exchange Act, 1882, secs. 53 (2), 73.

³ Quoted in the Lord President's opinion at p. 24.

⁴ Cumming v. Shand, 1860, 5 Hurl. & Nor. 95; Buckingham & Co. v. The London and Midland Bank, Limited, 1895, 12 T. L. R. 70; King v. British Linen Co., June 15, 1899, 1 F. 928.

rule even after the death of the drawer. In any event, it was not the case that Messrs Moffatt were debtors to the bank, for their overdrafts were admittedly secured to an extent larger than the amount advanced. The bank could not be considered creditors of Messrs Moffatt until they had realised their securities and found them insufficient.

Oct. 15, 1907.
Kirkwood &
Sons v.
Clydesdale
Bank.

Argued for the defender, the judicial factor;—The rule as to honouring cheques founded on the course of dealing between Messrs Moffatt and the bank had no application to the case, because such a rule could only operate when there was a cheque regarding which the question could arise, and this cheque had ceased to exist as a cheque after Mr Moffatt's death.¹ Whatever force the plea might have had if stated during Mr Moffatt's lifetime, there was no authority for holding that it was available to third parties after his death. The pursuers were in no better position if they founded on the cheque as an assignment in their favour, because at the time when it was presented there was nothing to assign. The bank was entitled to mass all the accounts kept by Messrs Moffatt, and to set off the debit balance on the loan and cash accounts against the credit balance on the current account,² the effect of which was to shew that Messrs Moffatt were debtors to the bank. They were none the less debtors because their debt was secured, seeing that *ex hypothesi* a security implied the existence of a debt which required to be secured, and the securities could only be realised after the funds of the debtor had been exhausted.

Counsel for the Clydesdale Bank adopted the argument for the judicial factor.

LORD PRESIDENT.—The pursuers in this action are stockbrokers in Glasgow. In order to oblige a certain Mr Moffatt, now deceased, who wished a sum of money in London, and who had not himself got a bank account there, they gave Mr Moffatt a cheque upon a bank in London, and by that means put in Mr Moffatt's hands a document by which he could get the money in London. They were paid for that by taking from Mr Moffatt a cheque upon his Scottish Bank, the Clydesdale Bank, with its office in Glasgow.

The pursuers unfortunately did not present that cheque at the moment, and before they did present the cheque Mr Moffatt had died his death being sudden. The result of that was that naturally enough the Clydesdale Bank refused to pay the cheque when presented; and the present action is directed by the Messrs Kirkwood against the Clydesdale Bank for payment of the cheque. Now, the pursuers cannot deny that, so far as the ordinary operation of the cheque was concerned, the Clydesdale Bank were perfectly within their rights, and it was according to their duty to refuse payment of the cheque, because section 75 of the Bills of Exchange Act, 1882, says perfectly clearly that "the duty and authority of a banker to pay a cheque drawn on him by his customer are determined by (1) countermand of payment, and (2) notice of the customer's death." It is not denied that at the time the cheque was presented the Clydesdale Bank had notice of the customer's death.

But the pursuers rely upon the second subsection of the 53d section which

¹ Bills of Exchange Act, 1882, sec. 75 (2).

² Thomas v. Howell, 1874, L. R. 18 Eq. 198.

Oct. 15, 1907. says :—" In Scotland where the drawee of a bill has in his hands funds available for the payment thereof the bill operates as an assignment of the sum for which it was drawn from the time when the bill is presented to the drawee." The pursuers say that the Clydesdale Bank had funds in their hands belonging to Mr Moffatt, and that accordingly this cheque being an intimated assignation of these funds they are bound to make the same forthcoming. This statement of having funds in their hands belonging to Mr Moffatt the Clydesdale Bank deny ; but the state of the facts as elucidated by the proof is this Mr Moffatt, in accordance with a common practice, kept several accounts, and, using the nomenclature that is common in Scottish banking, these accounts may be described as Current Account, Loan Account, and various Cash Accounts. Now, the Current Account is, as its name indicates, an account on which the ordinary transactions from day to day are made ; and there is no question that this cheque was intended to be drawn upon that Current Account. In point of fact it was drawn not by Mr Moffatt himself but by a gentleman connected with his firm who had right to draw upon this account, and upon no other. The state of affairs as at the death of Mr Moffatt was that in the Bank's books there was on that Current Account a credit balance in favour of the customer. But there were other accounts—namely, the Loan Account and various Cash Accounts ; and in all of these, as was natural, there was a debit balance against the customer. There is no question whatever that the sum of these debit balances against the customer amounted to a sum much greater than the credit balance upon the Current Account.

It is quite true that against these debit balances upon the Loan and Cash Accounts the Bank held various securities partly consisting of stock and shares belonging to the debtor himself, and partly consisting of guarantees by various third parties, which guarantees for the purposes of the argument may be assumed to be good guarantees—that is to say, guarantees given by persons who if called upon are equal to meet the amounts. Now, the argument therefore really has come to this—In the circumstances is the Bank's answer that it has no funds of Mr Moffatt a true one or not ?

I am of opinion that it is a true one. It seems to me that the state of affairs between a banker and his customer as at any given time must be taken to be the state of affairs upon all accounts ; and the state of affairs on all accounts shews perfectly clearly that the Bank did not owe the customer, but the customer owed the Bank money. I do not think that fact is disturbed by either of the two considerations which have been pressed upon us by the counsel for the pursuers. One consideration is the question of what security the Bank holds. That is a matter of very great moment for the Bank, but none the less it does not seem to me to alter the relation of debtor and creditor as between the Bank and its customer. That becomes very clear if you look at the security such as is given by an outsider—by a cautioner or by a guarantor. What is caution ? It is not to pay money that you owe yourself, but it is to pay money that is owed by somebody else. In other words the very hypothesis of a cautioner being called upon is that the customer is truly in the relation to the Bank of a debtor and not a creditor. As little I think is the fact I have mentioned affected by the rule in support of which reference was made to the English cases of *Buck-*

ingham,¹ and of *Cumming v. Shand*.² That is the rule which lays down Oct. 15, 1907. that a banker who is in the habit of honouring his customer's cheques to the extent to which he has funds at that customer's credit upon a Current Account is not entitled, without notice, at any moment, to turn round and refuse to honour these cheques because as a matter of fact there are other Loan and Cash Accounts, and because as a matter of fact if all the accounts were massed the customer would be found to be a debtor and not a creditor. That seems to be common-sense, and really it is a rule without which the ordinary banking practice with customers would be impossible. Cash Accounts generally and Loan Accounts always have from their birth a debit balance against the customer, and a customer who happened to have a Loan Account or a Cash Account as well as a Current Account, would never be in security to work on a Current Account at all, because he might never know at any moment when a cheque might be dishonoured upon presentment. But that does not affect this question. The question here as upon a question of honouring a cheque is gone, because the cheque as a cheque was countermanded by death, and the whole question is what is the right which is given by the section of the statute which says that a cheque shall operate as an assignation. It seems to me quite clear that the expression "where the drawee of a bill has in his hands funds available for the payment thereof," must mean funds as upon a true state of the accounts between the two parties concerned. As I have already pointed out upon a true accounting between the parties concerned there were no funds in the hands of the Clydesdale Bank belonging to this gentleman at this time, and I am accordingly of opinion that the result which the Sheriff has come to is right, and his judgment ought to be affirmed.

Kirkwood &
Sons v.
Clydesdale
Bank.

Ld. President.

LORD KINNEAR, LORD M'LAREN, and LORD PEARSON concurred.

THE COURT affirmed the interlocutor appealed against.

J. MULLO WEIR, S.S.C.—RONALD & RITCHIE, S.S.C.—CAMPBELL & SMITH, S.S.C.—
Agents.

JAMES ADAM PATTULLO, Petitioner.—*C. D. Murray—Lyon Mackenzie.* No. 7.

CAITHNESS FLAGSTONE COMPANY, LIMITED, AND LIQUIDATOR,

Respondents.—*Hunter, K.C.—D. Anderson.*

Oct. 22, 1907.

Expenses—Company—Winding-up—Creditor's petition for judicial winding-up—Supervision order pronounced on company's petition—Creditor's expenses.—One of the creditors of a company presented a petition for the judicial winding-up of the company. Thereafter the company, having passed an extraordinary resolution for voluntary winding-up and having appointed D. as liquidator, petitioned for a supervision order, and lodged answers to the creditor's petition. The creditor also lodged answers to the company's petition. At the hearing the parties agreed that a supervision order should be pronounced, but the creditor moved that D. should be superseded as liquidator. The Court pronounced a supervision order in the company's petition and continued D. as liquidator. The creditor moved that his expenses in his petition for judicial winding-up should be expenses in the liquidation. The company opposed.

Pattullo v.
Caithness
Flagstone Co.,
Limited (in
Liquidation).

The Court held that the creditor's expenses prior to the date of the peti-

¹ 12 T. L. R. 70.

² 5 Hurl. & Nor. 95.

Oct. 22, 1907. tion for a supervision order were expenses in the liquidation, and *quoad ultra* refused the motion.

Pattullo v.
Caithness

Flagstone Co.,
Limited (in
Liquidation).

2D DIVISION.

ON 29th July 1907 James Adam Pattullo, S.S.C., Edinburgh, presented a petition praying that the Caithness Flagstone Company, Limited, be wound up by the Court. The petitioner was a creditor of the Company, as the registered holder of debenture bonds by the Company for £500.

On 30th July 1907 an extraordinary general meeting of the Company passed an extraordinary resolution that the Company be wound up voluntarily. The meeting also passed a resolution appointing Thomas Dingwall to be the liquidator, and further resolved that the voluntary liquidation should be continued subject to the supervision of the Court.

On 12th August 1907 the Company and Dingwall, as liquidator, presented a petition praying that the voluntary liquidation be continued subject to the supervision of the Court.

Answers were lodged to each petition.

At the hearing the parties concurred in stating that they were agreed that the voluntary liquidation should be continued subject to the supervision of the Court, but the petitioner Pattullo moved that the appointment of Dingwall as liquidator should be superseded by the appointment of another person as liquidator.

The Court having held that Dingwall's appointment should not be superseded, Pattullo moved that the expenses of his petition for a winding-up order should be expenses in the liquidation. He cited the undernoted authorities.¹

The Company and its liquidator opposed the motion.

LORD JUSTICE-CLERK.—We allow the expenses of initiating the petition for a judicial winding-up, but not of any after proceedings.

LORD STORMONTH-DARLING and LORD LOW concurred.

LORD ARDWALL was sitting in the Extra Division.

THE COURT refused the prayer of the petitioner Pattullo's petition, found him entitled to expenses up to 12th August 1907, and found that these expenses formed expenses in the winding-up.

A supervision order was pronounced in the Company's petition.

M'NEILL & SIME, S.S.C.—JOHN C. BRODIE & SONS, W.S.—Agents.

No. 8.

JOHN HIRST SELKIRK, Pursuer (Reclamer).—*Crabb Watt, K.C.*—*R. S. Brown.*

Oct. 24, 1907. ALEXANDER FERGUSON, Defender (Respondent).—*M'Kechnie—Laing.*

Selkirk v.
Ferguson.

Contract—Essential Error—Error as to stipulations in deed signed—Error as to contents not induced by one of the parties—Signature of contract in ignorance of alteration on draft.—F. signed a contract with S. without reading it over, in the belief that no material alteration had been made on a draft revised by him. F. subsequently refused to implement the con-

¹ *Drysdale & Gilmour v. Liquidator of International Exhibition of Electrical Engineering and Inventions*, Nov. 13, 1890, 18 R. 98; *Pattisons, Limited, v. Kinnear*, Feb. 4, 1899, 1 F. 551; *Elsmie & Son v. Tomatin Spey District Distillery, Limited*, Jan. 30, 1906, 8 F. 434; *M'Gregor v. Ballachulish Slate Quarries Co., Limited*, *supra*, p. 1.

tract on the ground that a material alteration had been made in one of the clauses, of which he had not been made aware. S. brought an action of damages against F. for breach of contract. Oct. 24, 1907.
Selkirk v.
Ferguson.

After a proof, *held* (rev. judgment of Lord Johnston) (1) that when F. signed the deed he was under no error as to its nature, (2) that his error as to one of the clauses was not induced by S., and (3) that accordingly F. was bound by his signature.

JOHN H. SELKIRK, London, raised this action of damages for breach of contract against Alexander Ferguson, Glasgow, in the following circumstances. 1st Division.
Ld. Johnston.

Alexander Ferguson, Glasgow, having acquired the patent rights in an advertising machine called the "Animated Poster," entered into an agreement with John Hirst Selkirk, advertising contractor, London, under which Ferguson bound himself to defray the costs of providing the machines and to pay a salary to Selkirk; and Selkirk, on the other hand, bound himself to manage the business, to endeavour to procure sites for the machines, and to provide advertisements. A deed embodying the terms of this agreement was drawn up by Mr Slark, the agent of a Mr Cohen, who was financially interested in the enterprise, and submitted to the parties in draft. As originally drafted, the 8th article of the deed provided that Ferguson should have right to assign his interest in the patents to a company having a working capital of not less than £10,000, and upon his doing so, that Selkirk should accept such company in place of Ferguson for the purposes of the agreement, "and upon such assignment being carried into effect, the said A. Ferguson shall not be under any further liability hereunder." This article was altered by Selkirk, who deleted the last clause, and when the drafts were being revised by the parties, substituted the provision that, "notwithstanding any such assignment the liability of the said Alexander Ferguson under this agreement shall remain and have effect," and the deed, with this alteration, was signed by the parties. When he signed the contract, Ferguson knew that alterations had been made by Selkirk upon the original draft, but he did not know what they were. He had an opportunity of reading the deed before signing it, of which he did not avail himself, being satisfied with a statement by Mr Slark, who was acting in the interest of neither party, but of Mr Cohen, that the alterations were not material.

Subsequently on discovering the difference between the terms of the deed which he had signed and the terms of the deed as revised by him in draft, Ferguson repudiated the agreement, and the present action was raised.

The pursuer pleaded, *inter alia*;—3. The defender being in breach of and having broken his contract with the pursuer, is liable in damages to the pursuer therefor.

The defender pleaded, *inter alia*;—4. The defender should be assoilzied, with expenses, in respect that (1) the said agreement was entered into by defender, under essential error induced by pursuer; (2) said essential error was induced by fraudulent misrepresentations and concealment on the part of the pursuer; and (3) said agreement is not binding on defender, but is null and void.

A proof was taken, which established the facts above narrated, and on 1st December 1906 the Lord Ordinary (Johnston) assoilzied the defender.*

* "OPINION.—(After a narrative of the facts)—But however one must

Oct. 24, 1907. obtained as to what is error *in essentialibus* in this branch of law is that it applies where a man has signed a document of some sort thinking it is another sort of document. Mr Bell in his Principles (sec. 11) gives in so many words an illustration,—“As, for example, if one sign a conveyance believing it to be a bond or security or a testamentary deed,” and there is a very well-known leading case in England where a person signed a deed, being told it was a release of rents, whereas it was a release of all claims.¹ There there was a mistake as to the document, not so here. If the matter can be treated as the Lord Ordinary has done, in every case where there has been an alteration of any materiality it could be said that it is not the document. It is the same document with an alteration upon it. I think the Lord Ordinary has imported into his judgment something which has to do with a different class of case from this.

Selkirk v.
Ferguson.

Ld. President.

I should like to say also that I cannot agree with what the Lord Ordinary says, that there cannot be two opinions as to the materiality of the alteration. I think there is room for a difference on the matter, and that it was perfectly possible for one to form an opinion that it was not material. On paper it was a decided alteration. But practically it probably was not. It was not a term of the contract which would necessarily come into operation, for the company might never be formed. And if it was formed, the security of the company, with £10,000 paid up, was practically ample to protect Ferguson for a liability for a salary of £10 a week for three years.

I do not think the Lord Ordinary's judgment can stand. But that leaves the case which is quite well set forth in the defences, that the error in which the defender was, as to the actual difference in the documents, was induced by the misrepresentations of the other party to the contract. The defender cannot object to his own account of what passed being taken, and that account seems to me to negative any idea that there was any representation by the other party which led the defender to sign. By that account he referred the question to Slark, and he was content to abide by Slark's opinion. He knew that there were alterations. He chose to be guided by Slark's view that these were not material—a view which, as I have already pointed out, might, I think, be quite an honest one. And then, though having the opportunity of reading for himself, he did not do so. In such circumstances I think the defender was not entitled to repudiate the contract.

LORD KINNEAR.—I entirely concur, and I have the less hesitation in concurring because I think that on the question of fact the Lord Ordinary has not arrived at any different conclusion from that which we have formed, and that if he had held that the true issue was whether the defender had been induced to enter into the contract which he signed by the representations of the pursuer, he would have given the same verdict as your Lordship has proposed. The view which he takes of the defender's conduct is even more unfavourable than that which your Lordship has expressed, for after examining the whole proceedings at the meeting, he says,—“It is impossible to account for or excuse the folly and neglect of Ferguson.” In a later passage he refers to his “inexcusable conduct at the signing of the

¹ Thoroughgood v. Cole, 1582, 2 Co. Rep. 9, b.

agreement," and on that account refuses to award him expenses in spite of Oct. 24, 1907. his success in the action. The Lord Ordinary cannot have meant to decide ^{Selkirk v.} that the defender's signature was obtained by the pursuer's representations, ^{Ferguson.} since he finds that his conduct in signing was inexcusable. The judgment ^{Lord Kinnear.} of the Lord Ordinary therefore comes to rest upon the opinion in law which he expresses when he says,—“However one must condemn Ferguson's conduct at this stage, it is impossible to come to any other conclusion than that he signed a document in terms materially differing from those of the document which he believed he was signing. It is no question of the misunderstanding of the import and effect of the document, it was error as to the document itself, and I cannot, therefore, hold Ferguson to be bound by his signature.” I understand this to mean that the contract actually signed by Ferguson was not his deed, because he believed he was signing an instrument of a different character. Now, there is authority to the effect that when a man signs one document thinking it to be another and different document, he is not bound by his signature. The early English case to which the Lord President referred—*Thoroughgood's case*¹—is an excellent illustration. There may be an element of fraud in such cases, but in the more recent decision of *Foster v. Mackinnon*,² the law is expounded in a sense which seems to coincide with the Lord Ordinary's view, for it is said that an instrument, executed in the belief that it is one thing while in fact it is another, is invalid, not only on the ground of fraud, but on the ground that the mind of the signer does not accompany the signature, or in other words, that he never intended to sign, and in contemplation of law never did sign the contract to which his name is appended. But this is quite a different case. The defender knew the contract that he was signing. He knew that alterations had been made on the draft, and that the document which he was asked to sign was the deed so altered. He did not know what the alterations were, but he asked if they were material, and on being told by Mr Slark that they were not, he thereupon signed the deed. In these circumstances to say that he signed a totally different deed from the one which he thought he was signing, appears to me to be out of the question. The deed he signed was exactly the deed which he thought he was signing—to wit, a contract in the terms of the draft he had seen, but with alterations the nature and importance of which he did not know, but which he was content to accept in reliance on the opinion of Mr Slark. The true issue is whether the error under which he signed was induced by the other party to the contract, and on that issue the judgment of the Court must be for the pursuer.

LORD DUNDAS concurred.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

THE COURT recalled the interlocutor reclaimed against, and decerned against the defender for payment to the pursuer of the sum of £250.

JOHN ROBERTSON, Solicitor—DAVID PHILIP, S.S.C.—Agents.

¹ *Thoroughgood v. Cole*, 1582, 2 Co. Rep. 9, b.

² 1869, L. R., 4 C. P. 704.

No. 9. JOHN STUART GOWANS (Sime, Sullivan, & Dickson's Trustee),
 Pursuer (Respondent).—*D. M. Wilson.*
 Oct. 25, 1907. MRS ISABELLA MOIR OR ADAM AND ANOTHER,¹Defenders
 (Reclaimers).

Sime,
 Sullivan, and
 Dickson's
 Trustee v.
 Adam.

Administration of Justice—Law-agent—Disclosure of former client's address.—Where an agent has ceased to act for a party to a cause, it is his duty to furnish the opposite party's agent with his former client's address, if it is known to him, so as to enable that party to move the Court to proceed if further attendance is not made.

1ST DIVISION. IN an action for payment at the instance of John Stuart Gowans, C.A., trustee under a trust-deed granted by Sime, Sullivan, & Dickson, stockbrokers, against Mrs Isabella Moir or Adam and her husband, decree was pronounced in favour of the pursuer, with expenses.

The defenders reclaimed.

When the case was called in the Short Roll on 23d October, no appearance was made for the reclaimers.

Counsel for the respondent stated that the reclaimers' agents had informed the respondent's agents that they no longer acted for the reclaimers, but that they had intimated to their former clients that the case was put out for hearing. He further stated that the respondent's agents had requested the reclaimers' agents to supply them with the address of the reclaimers, in order that they might themselves give them intimation of the hearing, but that the address had not been supplied.

The Court continued the case till the 25th October, and directed the Clerk of Court to write to the former agents for the reclaimers, requiring them to attend at the bar at 10 o'clock on the 25th in order to explain their failure to supply the respondent with the reclaimers' address.

On 25th October a statement was made at the bar by counsel on behalf of the former agents of the reclaimers.

LORD PRESIDENT.—We are satisfied with the explanation which has been given.

I only wish to add that I should like it to be clearly understood by agents practising in the Court that, in every case in which they cease to act for a party, it is their duty to furnish the agent for the opposite party with the address of their former client, if it is known to them, so as to enable that party to move the Court to proceed if further attendance is not made. For the Court will not deal with the case as if all parties had been properly convened when no appearance is made for one of the parties, and the Court is told that the only intimation he has received of the hearing is intimation from his former agents; the intimation must be given to him by his opponent.

The other Judges present were LORD KINNEAR and LORD DUNDAS.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

Thereafter intimation was duly given to the reclaimers.

The case was called on 30th October, when, there being no appearance for the reclaimers, the reclaiming note was refused, with additional expenses.

FRASER & DAVIDSON, W.S., Agents.

Oct. 25, 1907.

Sime,
Sullivan, &
Dickson's
Trustee v.
Adam.

THE ALLGEMEINE DEUTSCHE CREDIT ANSTALT AND OTHERS, Pursuers (Reclaimers).—*Morison, K.C.—Jameson.* No. 10.

THE SCOTTISH AMICABLE LIFE ASSURANCE SOCIETY, Defenders (Respondents).—*D.-F. Campbell—Spens.* Oct. 26, 1907.

Insurance—Life Policy—Process—Declarator ab ante—Declarator of right to unmatured policy.—Assignees of an unsurrendered policy of life insurance raised an action of declarator during the lifetime of the insured, in which they called as defenders (1) the insurance company, and (2) former holders of the policy. The action concluded for declarator (1) that the pursuers were in right of the policy, and (2) that the insurance company were bound, on the sums contained in the policy falling due, to make payment thereof to the pursuers, or the persons deriving right from them. The insurance company alone lodged defences.

Held (aff. judgment of Lord Ardwall) that the action so far as directed against the company was incompetent and premature, and should be dismissed, in respect that, until the policy matured, it was impossible to say to whom the proceeds would be payable, and that the insurance company were not the proper contradictors in a question as to whom the policy in the meantime belonged.

On 22d August 1884, a policy of insurance for £2000 was granted by the Scottish Amicable Life Assurance Society on the life of Oscar Philipp, in favour of Gustav von Portheim, merchant, Austria. By various assignments, into the details of which it is unnecessary to enter, the policy passed into the hands of the Allgemeine Deutsche Credit Anstalt and Erttel Freyberg & Company, both carrying on business as bankers at Leipzig, Germany, who thereafter wrote to the Scottish Amicable Society, asking that they should admit that the Credit Anstalt and Freyberg & Company were the persons in right of the policy. The Society replied that they could express no opinion as to the validity of the title until they were called on to make a payment under the policy.

The Credit Anstalt and Freyberg & Company then raised the present action of declarator, in which they called as defenders (1) the persons to whom at various times the policy had belonged, and (2) the Scottish Amicable Life Assurance Society. The summons concluded for declarator (1) that the pursuers had a good title to the policy in question, "and the contents and proceeds thereof"; (2) that the defenders, other than the Scottish Amicable Life Assurance Society, had no title to the policy; and (3) "that the defenders, the said Scottish Amicable Life Assurance Society, are bound, on the sums contained in the said policy becoming due and payable, to make payment thereof to the pursuers, or to any person or persons who may have derived right from them in and to the said certificate or policy, contents and proceeds thereof."

At the date when the action was raised, Oscar Philipp was alive, the policy had not been surrendered, and the premiums payable thereunder had all been duly paid.

After narrating the steps by which they had acquired the policy, the pursuers averred:—(Cond. 10) "In virtue of these assignments

1ST DIVISION.
Lord Ardwall.

Oct. 26, 1907. the pursuers are now in right of the said policy, but the defenders, the Scottish Amicable Life Assurance Society, have refused to acknowledge the right of the pursuers, or to go into the question of title until the sum contained in the said policy shall become payable. The pursuers desire to be in a position to deal with the said policy and to sell, assign, or surrender it should they so decide, and to exercise the lawful privileges of a duly qualified assignee recognised under the Society's deed of association. In consequence of the attitude adopted by the defenders to the pursuers it is necessary that their right and title should be judicially declared while the parties to the several transactions above narrated are still alive and their evidence is available."

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Allgemeine
Deutsche
Credit Anstalt
v. Scottish
Amicable Life
Assurance
Society.

Two of the defenders did not compear, and decree in absence was pronounced against them. Two of the other defenders lodged minutes consenting to decree in terms of the declaratory conclusions of the summons, and decree was pronounced against them accordingly. The remaining defenders, the Scottish Amicable Society, lodged defences, and pleaded, *inter alia*;—(4) The action as laid is incompetent, in respect that the pursuers have no right to demand a declarator in the circumstances condescended on. (5) The action as laid is premature. (6) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons, in respect that they do not disclose any right in the pursuers to maintain this action against these defenders in respect of a policy which has not yet become a claim.

On 2d February 1907 the Lord Ordinary (Ardwall) pronounced this interlocutor:—"Sustains the 4th, 5th, and 6th pleas in law stated for the defenders, dismisses the action so far as the same is directed against the defenders the Scottish Amicable Life Assurance Society, and decerns."*

* "OPINION.—In this case two firms of bankers in Leipzig, Germany, bring an action against the Scottish Amicable Life Assurance Society, and several persons who have at one time or other been interested in the policy libelled, for the purpose of having it declared that the pursuers have good and undoubted right and title to the extent of one-half each of the policy Number 34,186, dated 22d August 1884, and granted by the said Assurance Society on the life of the defender Oscar Philipp; that the other defenders have no right or title to the policy or to the contents or proceeds thereof, 'or to demand payment of the sums due thereunder when the same may become due by the death of the said Oscar Philipp or otherwise,' and—then follows the important conclusion directed against the Assurance Society alone—for the purpose of having it declared that the Society are bound 'on the sums contained in the said policy becoming due and payable, to make payment thereof to the pursuers, or to any person or persons who may have derived right through them in and to the policy.'

"By the policy the said Oscar Philipp becomes a contributor to the society, and undertakes payment of the premiums, and on that being done the policy provides as follows:—'then Gustav von Portheim, merchant, Prague, Austria, his executors, administrators, or assigns, shall be entitled to receive out of the stock and funds of the said society, after the death of the contributor, on proof of said death being made to the ordinary Committee of Management, the sum of £2000.'

"Since the policy was entered into it has had a somewhat complicated history, as will be seen from the notices set forth in answers 2 to 9 of the defences. A glance at these notices shews that questions of very considerable difficulty, and among these possibly questions as to the law of foreign countries, would require to be investigated if the defenders, the Assurance

The pursuers reclaimed, and argued ;—An action of declarator was competent at the instance of any person in whom a right had vested, and who desired to have the validity of his title established.¹ It was not necessary that his title should in point of fact be disputed, and in any case a proper contradictor was before the Court in the person of the Scottish Amicable Society. The great benefit of this form of action was that it provided a means of determining questions of title while parties were alive and while their evidence was accessible,² and this consideration was peculiarly applicable to the present case, where the transactions connected with the assignments of the policy had been so complicated. All the parties who could have a claim to the policy had been called as defenders. In any event, the pursuers were entitled to decree in terms of the first two declaratory conclusions of the summons.

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Reference was also made to the Policies of Assurance Act, 1867 (30 and 31 Vict. cap. 144).

Society, were to determine now who is in right of the policy, and accordingly when the pursuers wrote them in 1904 asking that they should admit that the pursuers were the persons in right of the policy, the Society wrote the letter of 17th March 1904, in which they say that they can express no opinion as to the effect or validity of the pursuers' title until they were called on to make a payment under the policy, when the whole title would require to be examined and reported on by the Society's solicitors. The Society having thus refused to pronounce any judgment on the question of title, the present action was brought for the purpose of having the pursuers' title to the policy declared, and the question to be determined now is whether the pursuers were entitled to make the request they did, and whether the present is a competent action against the Assurance Society. No further notice need be taken of the other defenders ; two of them have put in consents to decree in terms of the declaratory conclusions of the summons, but none of them are subject to the jurisdiction of this Court, and therefore I propose to consider this action as one directed solely against the Scottish Amicable Life Assurance Society. It appears to me that upon the contract embodied in the policy of assurance, and having regard to the law and customs regarding such contracts, the present action is incompetent as directed against the Assurance Society. What they contract to do is to pay a certain sum on proof of death of the contributor, and they are compelled by Act of Parliament to record all notices of assignments and other documents of change of title to the policy, of which notice may be given to them. This they have regularly done. But there is nothing in the contract entitling any person who may acquire right to the policy to come to the Society before the sums in the policy fall due, and demand from them an acknowledgment of the validity of the title. The onerous nature of the demand thus made upon the defenders is obvious. The pursuers make no secret in the correspondence or on the record that the object of obtaining an acknowledgment or certificate of validity from the defenders is in order that they may realise or otherwise deal with the policy. Now, supposing the defenders to grant an acknowledgment of the validity of the pursuers' title, if the pursuers were thereafter to sell or assign the policy on the faith of that acknowledgment, the purchaser from them would be in a position at

¹ Mackenzie's Trustees v. Mackenzie's Tutors, July 1, 1846, 8 D. 964 ; Harveys v. Harvey's Trustees, June 28, 1860, 22 D. 1310, *per* Lord President Inglis, p. 1326 ; Chaplin's Trustees v. Hoile, Oct. 30, 1890, 18 R. 27 ; Cairns' Trustees v. Cairns, 1907, S. C. 117.

² Earl of Mansfield v. Stewart, July 3, 1846, 5 Bell's App. 139, *per* Lord Brougham, p. 160.

Oct. 26, 1907. Counsel for the respondents was not called upon.

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LORD PRESIDENT.—In this case I think the judgment of the Lord Ordinary is clearly right. The matter arises in this way. A policy of insurance was taken out with the Scottish Amicable Life Assurance Society in favour of a certain gentleman called Oscar Philipp. The pursuers, who are bankers in Germany, raised an action in which they called certain persons, who have, at different times, according to them, been in right of the policy, and they also called the Scottish Amicable Life Assurance Society. They asked for declarator that the pursuers have good and undoubted right and title to the extent of one-half each—for there are two pursuers—in the policy; and they put in the conclusion that the defenders, the Scottish Amicable Life Assurance Society, are bound, on the sums contained in the said policy

the death of the contributor to come forward and demand the proceeds of the policy, and the defenders would be barred from refusing to pay by their acknowledgment, even supposing it ultimately turned out that someone else had somehow or other got a better title. But it was suggested that when the action was raised the defenders ought to have allowed decree to go out against them in absence; but if they had done so I think they would have been in very much the same position as if they had granted an acknowledgment, for it might be said when the time for payment arrived that by allowing decree in absence to go out against them, they had misled some person or persons into purchasing the policy, and, on the other hand, if they defend the action, and have a decree go out against them notwithstanding their defence, it might afterwards be pleaded against them, when the policy came to be paid, that they did not put forward a proper defence. In short whatever way the matter is looked at it comes to this, that what the pursuers demanded from the defenders by letter and now demand by action, amounts to little less than a guarantee of the validity of their title. Now, I think a contract binding an insurance company at any time to give such a guarantee would need to be in very precise terms, and the fact that the Legislature imposes on them a duty of recording notices, and of giving to the persons making the notices an acknowledgment in writing that such notices have been received, seems to imply that they have nothing to do with the validity or invalidity of the notices sent in for registration. (See 30 and 31 Vict. cap. 144, secs. 1, 3, and 6.)

“But when the last conclusion which I have above alluded to is looked at I think it will be seen at once that this action is quite incompetent under the policy, because the obligation in the policy is to pay the sum insured to Gustav von Portheim and his assignees, whereas the present summons concludes for declarator that the Society shall be bound to make payment of these sums to the pursuers, or any person who may derive right from them, thus really substituting a new contract for that contained in the policy. I therefore am of opinion that the action is incompetent and premature.

“An ingenious argument was, however, submitted to me for the pursuers, upon the authorities, to the effect that the right to this policy being, on the pursuers’ averments, vested in them, they are entitled now to have that right declared, it being of importance to them that that should be done in order to enable them to realise the policy. Now, undoubtedly in the case of *Mackenzie*, 8 D. 964, and *Provan*, 2 D. 298, similar actions were entertained, but as I read these and other cases in the light of the opinion of Lord Justice-Clerk Inglis in the case of *Harvey v. Harvey’s Trustees*, 22 D. 1310, it is evident that such actions can only be allowed where the Court can be certiorated that all the persons who have or can have an interest in the fund in question are made parties to the action, so that they will be

becoming due and payable, to make payment thereof to the pursuers, or to any person or persons who may have derived right from them. They base that demand upon a statement in which they set forth a large number of transferences to different people, with a certain amount of bankruptcy proceedings as part of the story, and they say they are now the persons in right of the policy.

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Now, the only contradictors the pursuers can get are either the original persons to whom the policy belonged, or some of the people in the chain of transmissions which is set forth. The Insurance Company, of course, have no interest in the matter as to whom the policy belongs. Their interest is this, that if the policy matures and becomes a claim, then they will have to pay the proper person. If the pursuers had left out the conclusion which is directed against the Scottish Amicable Life Assurance Society, then, of course, the Scottish Amicable Life Assurance Society would not, I take it, have entered appearance in the action, because no decree that would have been pronounced could possibly have bound them, there being no reference to them in the only conclusion which would then have remained. Whether the action would have gone on or not would have depended upon whether any of those who are called would have come forward, for if they did not, there would have been decree in absence against them; if they did, it would have been upon such grounds of defence as they set forth. But the Insurance Company would not have been here. When the pursuers put in their claim against the Insurance Company, they put in something which in my judgment they were not entitled to ask, because no one can tell whether the Scottish Amicable Life Assurance Society will ever be bound to make payment to the pursuers. No one knows who will be the claimants when the time comes for the policy to mature, or when it has been turned into a claim by means of a surrender. Therefore to entertain a declarator *ab ante* against the Insurance Company seems out of the question. A very good test of the competency is this—could the Insurance

—
Ld. President.

bound by the decree in it, and further, it is necessary that in such actions the persons against whom they are brought are proper contradictors of the declarator concluded for. In the present case both these elements are wanting. In the first place, it is impossible to say who may turn up when the policy falls due to claim the proceeds. The original contributor, Oscar Philipp, or his trustee in bankruptcy, may have more rights in it either by way of reversion, or if there are flaws in transmissions of it, and it is quite uncertain, who, at the time when the sum becomes payable, will be the holder of the policy. Further, it may happen that the whole of the present proceedings may be rendered nugatory by the policy lapsing on account of some breach of the conditions, or in consequence of non-payment of the premiums, but above all there is not here a proper contradictor, if the defenders against whom there is no jurisdiction are excepted. The Scottish Amicable Society have no pecuniary interest in the question as to whom the proceeds of the policy shall be paid. When the time comes when they have to make such payment they will then have to determine on the best advice they can get, and after thorough investigation of the title, to whom payment should be made; or if there are competing claims they may, as is the usual course, lay the proceeds of the policy on the table of the Court, and let those who have the real interest in the question of the title dispute their rights *inter se*."

Oct. 26, 1907. Company have raised an action of multiplepoinding at this time upon such a question? Clearly they could not.

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Counsel for the pursuers here have said that they would be quite content if decree was not given in terms of that conclusion. But that simply turns out their action upon another ground, because then it is perfectly clear that the Scottish Amicable Life Assurance Society ought not to be here at all, and they are entitled to have the action dismissed as against them.

Ld. President. To these observations I only add that I am perfectly satisfied with the manner in which the Lord Ordinary has expressed his opinion. I have never known, and counsel have been unable to produce to us, any action of declarator where the Court gave a declarator as to a right without there being a proper contradictor present. It seems to me that the whole argument we have listened to this morning was vitiated by an assumption as to who the contradictor in this case is. The Insurance Company is not the contradictor as in the question of whom the insurance policy belongs to. The contradictor must be found among the ranks of the parties to whom at various times the policy belonged, and depends upon the question of whether these various steps or links of the chain of title are or are not correct. The Insurance Company have no interest whatever, except simply to pay the policy when it becomes a proper claim. Therefore it seems to me that the whole of the cases where declarators have been obtained have really no application to the case before us. I propose to your Lordships that we adhere.

LORD KINNEAR.—I am of the same opinion, and I only add, that my reasons are stated very clearly by the Lord Ordinary in the last paragraph of his opinion, and I agree in all that his Lordship has said.

LORD DUNDAS.—I agree with the Lord Ordinary, and with your Lordships. I confess that I think the case a very clear one. There is no proper contradictor here, and no actual *lis*. As your Lordship has pointed out, it is clear that a multiplepoinding cannot at this time be competently raised, and that, I think, is a conclusive test of the situation.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

THE COURT adhered.

F. J. MARTIN, W.S.—THOMSON, DICKSON, & SHAW, W.S.—Agents.

No. 11.

PETER BEGG AND OTHERS (Anderson's Trustees), Compearers
(Reclaimers).—*Watt, K.C.—C. H. Brown.*

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JAMES DONALDSON & COMPANY, LIMITED, AND LIQUIDATOR,
Respondents.—*Constable.*

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Company—Winding-up by the Court—Preference—Action by superior for sequestration for feu-duty after Liquidation—Companies Act, 1862 (25 and 26 Vict. cap. 89), sec. 163.—The Companies Act, 1862, sec. 163, enacts:—“Where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents.”

Held that an action by a superior against his vassal, a limited company in liquidation, for sequestration of the moveables on the feu for arrears of

feu-duty, was not an "attachment, sequestration, distress, or execution" within the meaning of this enactment, in respect that it was not a proceeding for the purpose of creating a security, but was a proceeding for the purpose of making effectual a real security already existing in virtue of the superior's infeftment. Oct. 26, 1907.
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Athole Hydropathic Company, Limited, in Liquidation, 13 R. 818, explained and followed.

Allan v. Cowan, 20 R. 36, distinguished.

ON 1st June 1907 an order was pronounced by the Second Division of the Court for the winding up of James Donaldson & Company, Limited, incorporated under the Companies Acts, 1862 to 1900, and having its registered office at 157 Great Junction Street, Leith, and appointing James Maxtone Graham, C.A., Edinburgh, to be liquidator. 2D DIVISION.
Lord Mac-
kenzie.

On 4th June 1907 the testamentary trustees of James Anderson, manufacturing chemist, Edinburgh, raised an action in the Sheriff Court at Edinburgh against James Donaldson & Company, Limited, in liquidation, praying for sequestration of the whole moveables on an area of ground in Ballantyne Place, Leith, of which area of ground Anderson's trustees were the superiors, and James Donaldson & Company, Limited, may (for the purposes of this report) be taken to be the vassals.

On 4th June 1907 warrant to cite and sequester was granted, and on 5th June the petition and deliverance thereon having been served, the moveables were inventoried by the sheriff-officer.

Anderson's trustees had not obtained leave, under sec. 87 of the Companies Act, 1862,* to commence this action, but in July 1907 they presented a note in the liquidation, under sec. 87, praying for leave to proceed with the action.

The compearers averred :—

"The compearers are the superiors of the area of ground referred to, and as the liquidator declines to pay the half year's feu-duty of £107, 10s. due at Whitsunday last, and to give security for the current year's feu-duty of £215, it is necessary, in order to give effect to the superiors' hypothec upon the moveables on the ground, to proceed with the said sequestration. At the time when said action was raised the compearers did not know whether the Limited Company claimed any interest in the goods attached, but in a letter by the liquidator's agents to the compearers' agents on 12th June 1907, the present liquidator expressly claimed that the whole goods attached are the property of the Company.

"In these circumstances, the compearers submit that leave should be granted to them by the Court to proceed with the said action . . . no offer having been made by the liquidator to give the compearers the same relief in the winding-up as they would obtain in the action."

* The Companies Act, 1862 (25 and 26 Vict. cap. 89), enacts :—

Sec. 87. "When an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose."

Sec. 163. "Where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents."

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The Company and its liquidator lodged answers in which they stated:—"Admitted that the compearers are the superiors of the area of ground in Ballantyne Place, Leith, referred to; that the feu-duty payable under the feu-contract relating thereto is £215 per annum, payable half-yearly at the terms of Whitsunday and Martinmas, and that no feu-duty was paid at Whitsunday 1907. . . . Admitted that the respondent claims that all the moveables on the ground belong to the Company.

"The respondent submits (1) that, under and in terms of section 163 of the Companies Act, 1862, the application for sequestration already presented by the compearers is null and void, and that the compearers are not entitled to constitute any preference for feu-duties past due or current over the property of the Company by applying to the Court, under section 87 of the said Act, for leave to proceed with the said application; (2) in any case, the respondent submits that it is not necessary to follow out the said proceedings in order to test the question whether the compearers are entitled to a preference. If the compearers will lodge a claim in the liquidation, the respondent is prepared to deal with the matter on the footing that the compearers had in due time made an application to the Court for leave to proceed, and if the compearers are dissatisfied with the ranking given to them, they can object to the ranking in the ordinary way."

On 25th July 1907 the Lord Ordinary on the Bills (Mackenzie) refused the prayer of the note.

The compearers, Anderson's trustees, reclaimed, and argued;—The Lord Ordinary's interlocutor ought to be recalled, and leave to proceed with the action ought to be granted. In England it had been held that section 163 of the Companies Act of 1862, was controlled by section 87, so that the Court had power to grant leave under section 87 to proceed even in cases which fell under section 163, but the reclaimers admitted that the contrary had been decided in Scotland,¹ and consequently leave to proceed could not be granted here if the case fell under section 163. The present case did not fall under section 163. The case was ruled by the case of the *Athole Hydropathic*,² which decided that a poinding of the ground at the instance of a heritable creditor was not an "attachment, sequestration, distress, or execution" within the meaning of section 163. The principle of that decision was, that a heritable creditor in bringing a poinding of the ground was not seeking to acquire a preference, but was merely seeking to make effectual a real security which he already had. A superior had an even higher security for his feu-duty in virtue of the hypothec over the moveables on the feu which he acquired by his infestment.³ The *Athole Hydropathic* case² had been followed,⁴ and it was not inconsistent with *Allan v. Cowan*,⁵ which decided that a poinding by a rate collector, who had by statute a preference for the rates, was ineffectual after the commencement of the winding-up. The *ratio* of that judgment was, that while a rate collector had a statutory preference he had no security

¹ *Allan v. Cowan*, Nov. 15, 1892, 20 R. 36; *Radford & Bright, Limited, v. D. M. Stevenson & Co.*, Feb. 20, 1904, 6 F. 429.

² *Athole Hydropathic, Limited, v. Scottish Provincial Assurance Co.*, March 19, 1886, 13 R. 818.

³ *Yuille v. Lawrie & Douglas*, Jan. 24, 1823, 2 S. 140; *Bell's Comms.*, Vol. II., pp. 26 and 27.

⁴ *Holmes Oil Co.*, Jan. 18, 1901, 8 S. L. T. 360.

⁵ *Allan v. Cowan*, 20 R. 36.

over any specific portion of the Company's estate, and consequently that his preference was a preference in ranking merely, to be worked out through the liquidator.¹ The word "sequestration" in section 163 did not include sequestration for rent or feu-duty, which was a distinct species of sequestration,² and when the Legislature meant to include it, it did so *per expressum*.³ It was true that in the Bankruptcy Acts certain rights and remedies of superiors and heritable creditors were expressly reserved, whereas the Companies Acts did not contain any such reservation; but that was explained by the vesting clause of the Bankruptcy Act, which made an express reservation necessary, while the Companies Acts did not contain any such vesting clause. It might be that section 87 of the Act of 1862, read strictly, did not cover the case of an action commenced without leave after the commencement of the winding-up, but the Court would grant leave in such a case.⁴

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Argued for the respondents;—Section 87 of the Act of 1862 contemplated two cases, and two only, namely, leave to proceed with an action commenced before the date of the liquidation, and leave to commence an action after the date of the liquidation; it did not contemplate the case of leave to proceed with an action commenced without leave after the date of the liquidation. It might be that in the case of an ordinary action the Court would grant leave to proceed although the action had been commenced without leave after the date of the liquidation, the leave being held to draw back to the date of the raising of the action. *Stevenson v. Radford & Bright*,⁴ on which the compearers founded, was a case of that sort; but the question here was a question of diligence, which was *strictissimi juris*, and the Court would not validate retrospectively proceedings for diligence commenced in breach of the Act. Apart from that, this was a case in which the Court had no power to grant leave. The compearers admitted that if the case fell under section 163 of the Act of 1862 the Court had no power to grant leave under section 87. Section 163 in terms prohibited "sequestration" against the estate and effects of the Company after the commencement of the liquidation. The compearers attempted to get out of that by saying that "sequestration" did not include sequestration for feu-duty. The contrary had been held in England on the evidence of Scots counsel.⁵ But even if the word sequestration was open to the construction put upon it by the compearers, the language of section 163 was so wide as to include every kind of diligence. The compearers' only real support was the case of the *Athole Hydropathic*.⁶ That case was distinguishable from the present. It was a case of poinding of the ground, and proceeded on the principle that the heritable creditor in such an action did not seek to acquire a preference, but merely to make available a preference already existing; whereas a superior's hypothec was not truly a pre-existing right of security depending wholly on his infestment, but was a right which required the diligence of sequestration in order to be made real.⁷ In truth, however, the case of the *Athole Hydropathic*⁶

¹ Allan v. Cowan, 20 R. 36, *per* Lord Kinnear, at pp. 40-41.

² Bell's Dictionary, p. 976.

³ Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), secs. 3, 7, 107.

⁴ D. M. Stevenson & Co. v. Radford & Bright, Limited, June 4, 1902, 10 S. L. T. 82.

⁵ *In re Wanzer, Limited*, L. R., [1891] 1 Ch. 305.

⁶ 13 R. 818.

⁷ Ersk. ii., 6, 56, and 62.

Oct. 26, 1907. could not stand along with *Allan v. Cowan*,¹ which was the sound judgment. No good reason could be suggested for putting a heritable creditor or a superior in a more favourable position than a creditor with a statutory preference. Further, subsection (3) of section 3 of the Companies Act of 1886, while it incorporated various sections of the Bankruptcy Act, 1856, did not incorporate section 119, which reserved the landlord's right of hypothec, nor did the Act of 1886 contain any such reservation of the rights of superiors as was contained in section 102 of the Bankruptcy Act.

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At advising,—

LORD LOW.—I am of opinion that the interlocutor of the Lord Ordinary on the Bills must be recalled. I think the only question is, whether the present case is ruled by the judgment in the *Athole Hydropathic* case² or by that in the case of *Allan*.¹ I think it is conceded that there is no substantial difference between the position of the creditor here and the creditor in the *Athole Hydropathic* case.² There the creditor was a heritable creditor infeft in the lands, who was seeking, by the diligence of poinding, to make good the security which he had over the moveables upon the land. In this case the creditor is the superior, who is seeking to make good, by the diligence of sequestration, the security which he has over the moveables upon the land for arrears of feu-duty. It seems to me that for the purposes of this question the position of these two creditors was identical, because both of them had a right of security in regard to certain moveables, and in both cases what they were attempting to do was to make that right of security effectual by attaching the moveables. In the *Athole Hydropathic* case² it was found that such a proceeding did not fall within the meaning of the 163d section of the Companies Act of 1862. I recognise that the question raised in that case was one of very considerable difficulty, upon which different views might very well be held. But the case was fully argued in the First Division, and the judgment that was given was a considered judgment of Lord President Inglis, of Lord Shand, and of Lord Adam—a tribunal of unquestionably high authority—and the view which they took has been held to rule the law ever since its date, some twenty years ago.

It is said, however, that the more recent decision of the same Division in the case of *Allan*¹ really is not consistent with the view which was taken in the *Athole Hydropathic* case.² As it happened, I was the Lord Ordinary in the case of *Allan*,¹ and it seemed to me that it was ruled by the case of the *Athole Hydropathic*.² But a different view was taken, and I am now satisfied was rightly taken, by the First Division, because the creditor in the case of *Allan*¹ was the collector of the county assessments, and he founded upon a statutory provision to the effect that the debt for the assessments should be a preferable debt. I think that I was perhaps misled to some extent by the way the case had been put in the *Athole Hydropathic* case,² when it was said that the creditor was only seeking to make effectual a preference which he already had. But, as I have indicated, when that case is examined, the ground of judgment was that he was seeking to make effectual, not a preference in the sense of having a preferable debt, but a

¹ 20 R. 36.

² 13 R. 818.

reference in the sense of having a security for his debt. Now, in the case of *Allan*¹ the creditor had no security for his debt whatever. He had merely a statutory declaration that in the event of bankruptcy his debt should be dealt with as a preferable debt. I am therefore satisfied that the First Division were quite right in holding that the case of *Allan*¹ was not ruled by the previous case of the *Athole Hydropathic*.²

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I therefore think that the interlocutor reclaimed against should be recalled, and leave granted to the superior to proceed with the sequestration notwithstanding the liquidation of the debtors.

LORD STORMONTH-DARLING.—I entirely agree. I think that this case is precisely ruled by the judgment twenty years ago of the First Division in the *Athole Hydropathic* case.²

LORD JUSTICE-CLERK.—I am of the same opinion. I must say that no two cases could be nearer to one another than the *Athole* case² and this case. I think the one is practically the same as the other. And as regards the case of *Allan*,¹ it distinguishes very clearly between such a case as we have at present and the case with which the Court were then dealing. It does so absolutely, and the decision in *Allan's* case¹ in no way affects the decision of the First Division in the case of the *Athole Hydropathic*.²

Mr Constable stated a very ingenious argument to the effect that if the decision to be given in this case was to be in accordance with the case of the *Athole Hydropathic*,² certain logical consequences would follow in other cases. I do not know whether that is so or not, nor do I think it necessarily follows. But if it be true that certain logical consequences would follow, that is a matter for the Legislature to deal with and not for this Court. Therefore, although the argument of Mr Constable was very ingenious we cannot go behind the case of the *Athole Hydropathic*.²

LORD ARDWALL was sitting in the Extra Division.

THE COURT pronounced the following interlocutor:—"Having heard counsel for the parties on the reclaiming note against the interlocutor of Lord Mackenzie, dated 25th July 1907, recall the same: Find the sequestration at the instance of the reclaimers competent: Authorise them to proceed therewith, and decern," &c.

W. & T. P. MANUEL, W.S.—DAVIDSON & SYME, W.S.—Agents.

MRS CATHERINE GILLIES OR DENHOLM AND OTHERS (John Denholm's Trustees), First Parties.—*C. H. Brown*. No. 12.

MRS CATHERINE GILLIES OR DENHOLM, Second Party.—*C. H. Brown*. Oct. 29, 1907.

THOMAS DENHOLM AND OTHERS, Third Parties.—*Valentine*.

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Succession—Testament—Construction—Ademption—"Carriage"—Motor-Car.—The proprietor of an estate died in January 1907 leaving a trust-disposition and settlement dated in 1890. In it he directed his trus-

¹ 20 R. 36.

² 13 R. 818.

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At the date of his settlement the testator had carriages and horses, but subsequently he sold these and bought two motor-cars, which he possessed at the time of his death.

Held that the bequest of carriages included the motor-cars.

1ST DIVISION. JOHN DENHOLM, of Eastwoodmains, Renfrewshire, died on 3d January 1907, leaving a trust-disposition and settlement dated 22d October 1890, by which he conveyed to trustees, for the purposes therein mentioned, his whole estate, heritable and moveable. The purposes were as follows:—“(First) for payment of all my just and lawful debts and sickbed and funeral expenses; (secondly) I direct my trustees to make payment to the said James Ferguson of a legacy of £250 free of legacy-duty; (thirdly) I direct my trustees to deliver to my brother Thomas my gold watch, breechloading gun, and all my body clothing, together with all articles of every description belonging to me that are at Greenhill at the time of my decease; (fourthly) I direct my trustees to make over to my said wife Kate Gillies or Denholm my whole other furniture and plenishing, including books, plate, pictures, jewellery, ornaments, and bed and table linen, and also my horses and carriages, live stock, plants, and garden and stable implements; (fifthly) I direct my trustees to make over to my said wife Kate Gillies or Denholm my lands and estate of Eastwoodmains. . . .” He directed one half of the residue to be given to his wife, and the other half to be divided among his brother’s children and a sister’s children.

A question having arisen regarding the construction of the deed, this special case was presented, to which the parties were (1) the trustees, (2) the testator’s widow, and (3) the other residuary legatees.

The case stated:—“3. Mr Denholm resided at The Mains, a small residential estate near Giffnock, about five miles south of Glasgow on the Kilmarnock Road. That estate adjoins and is surrounded on three sides by his estate of Eastwoodmains. He left estate amounting to about £53,000. For many years Mr Denholm kept a brougham and a wagonette and one carriage horse, and occasionally a riding horse; but about four years ago he bought a 10 H.P. Argyle open motor-car, and got his coachman trained to drive it. Shortly thereafter he sold his wagonette and horses but retained his brougham, for which he occasionally got a horse on hire. About a year before his death he bought another motor-car—a 16 H.P. Argyle brougham motor-car—and he then sold his brougham. These motor-cars were in his possession at his death, and they are valued for Government duty purposes at £75 and £450 respectively. Deceased’s furniture and plenishing, live stock, plants, and garden and stable implements, other than the effects bequeathed to Thomas Denholm, are valued at £474. A question has arisen as to whether the bequest in favour of the second party contained in the above recited fourth purpose of the said trust-disposition and settlement carries the motor-cars to the second party or not.”

The second party contended that the motor-cars in question were bequeathed to her. The third parties contended that they formed part of the residue of the trust-estate.

The questions of law were:—“(1) Is the second party entitled to

the said motor-cars in virtue of the bequest in her favour contained in the said fourth purpose of the said trust-disposition and settlement? or (2) Do the said motor-cars fall to be included in the residue of the testator's estate under the last purpose of the said trust-disposition and settlement?"

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Argued for the second party;—It was the intention of the testator that the motor-cars in question should go to his wife. The scheme of his settlement was to bequeath to her his estate of Eastwoodmains, with all the plenishing required for her enjoyment of the same, including the means of locomotion which he was using himself at the date of his death. There was nothing in the word "carriage" to prevent it including motor-cars. Under the Revenue Statutes, for the purpose of Excise duties, the term "carriage" included any vehicle whether drawn by horses or propelled by mechanical power. The case of *In re Platt*¹ was distinguishable on the grounds that there was there no general bequest of plenishing, that the references to "harness and saddlery" shewed that only horse carriages were meant, and that the testator in that case owned both horse and motor-carriages when he died. In the present case, it was immaterial that the testator had no knowledge of motor-cars at the time when he executed his will. It was enough that he owned motors at his death, and that he had left a will in terms which could fairly be held to include motor-cars.

Argued for the third parties;—The second party could take no benefit from the word "plenishing," which was only intended to include articles of the nature of those specified in the first part of the list, namely, from "books" to "table linen." The collocation of the words "horses" and "carriage" shewed that what the testator intended to convey were horse carriages. The bequest to the widow was a specific bequest, and accordingly the time for ascertaining the extent of the bequest was the date of the execution of the will, not the date of the testator's death. There could be no doubt that when the will was executed, it was horse carriages which the testator had in his mind. These carriages having been sold, and the subject specifically bequeathed having thus ceased to exist at the testator's death, the legacy to the widow had been adeemed.²

At advising,—

LORD PRESIDENT.—The parties in this special case are on the one hand the trustees and the residuary legatees of the late Mr John Denholm, and on the other the truster's widow; and the question arises on the interpretation of a clause in his trust-disposition and settlement. That trust-disposition and settlement was dated in 1890, but Mr Denholm did not die until 1907. He thereby made over all his property, heritable and moveable, to trustees, and then he proceeded to state the trust purposes. The first direction to his trustees was to pay a legacy to a certain gentleman, and the second was to deliver to his brother Thomas certain specific articles, which may be described as articles particularly appropriate to a man. Then he proceeded in the fourth purpose to direct his trustees "to make over to my

¹ *In re Platt*, "The Times," April 20, 1907, *per* Kekewich J.

² *White & Tudor's Equity Cases*, 7th ed., vol. i., pp. 808, 812, 819; *Dean v. Gibson*, 1867, L. R., 2 Eq. 713; *Ashburner v. Macguire*, 1786, 2 Bro. Ch. 108.

Oct. 29, 1907. said wife my whole other furniture and plenishing, including books, plate, pictures, jewellery, ornaments, and bed and table linen, and also my horses and carriages, live stock, plants, and garden and stable implements." He next bequeathed to his wife the lands and estate of Eastwoodmains, and finally gave directions as to his residue.

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Now, the point is whether under the bequest in this fourth purpose the wife has, or has not, right to two motor-cars, which were in the premises of the deceased at the time of his death. At the time of the execution of the will in 1890 the testator was not in possession of any motor-cars. That was not much to be wondered at, because, although motor-cars had as a matter of fact been invented in 1890, there were very few indeed of them in the United Kingdom at that time. But as time went on motor-cars became common, and the deceased Mr Denholm first bought one motor-car, and relinquished part of his stable establishment, and afterwards got a second motor-car, and gave up keeping horses altogether, so that at the time of his death he did not have any means of locomotion except motor-cars, one being an open car, and the other a brougham or landaulette. The whole point is whether these motor-cars fall within the expression which I have read.

Of course, this is a matter of intention, and the first observation I have to make is that one cannot read the testator's settlement without seeing that he wanted—speaking generally—his wife to have the whole moveable property that was connected with the enjoyment of his house, all except those special articles, which would not have been appropriate to a lady, namely, the breechloading gun and body clothing, which he gave to his brother Thomas. That being the testator's intention, the only question which remains is whether the words he used were sufficient to give effect to that intention, and that depends upon whether the word "carriage" can be held to include motor-cars. I think one is entitled to construe the word "carriages" in the will of the testator in the light of what the testator himself had done, and I think that the testator when alive shewed that he had come to consider these motor-cars as his carriages. The word "carriage" itself is certainly wide enough to cover any form of vehicle in which you are carried, though it has secondary significations which vary according to the context. It may be admitted that the ordinary sense of the word "carriage" is a carriage drawn by horses, but to shew how its meaning varies, I may take this illustration. I do not suppose that anyone would doubt that a dog-cart would fall under the designation of "carriages," and yet there is as little doubt that if a person who kept a dog-cart and a landau or barouche, sent round to his stable and said, "I want the carriage," that would be regarded as equivalent to an order to send the barouche or landau, and not the dog-cart. I accordingly think that the word "carriage" is a term sufficiently elastic to include motor-cars, and that when this gentleman allowed his will to remain unaltered, knowing that he had actually replaced his horse carriages by motor carriages, he intended the bequest of his carriages to include his motor-cars. I am therefore for answering the first question in the affirmative and the second in the negative.

LORD KINNEAR.—I am of the same opinion. The first point that was

taken by the residuary legatees was that the testator had no motor-cars in his possession at the time of making his will, and that what he meant by the word "carriages" must be ascertained by reference to his actual possession at that date. If that were sound, it would, as a logical consequence, prevent the widow from receiving any of the other articles, which were left to her in the same sentence, except on condition of shewing that they belonged to the testator at the time of making the will. But the contention appears to me to be entirely without foundation. I do not come to that conclusion upon any rule of law as to the date at which a will should be held to speak, but as mere matter of construction of the plain meaning of the words used in this particular will. We cannot construe a particular clause in a will disjoined from the rest, but we must take in the whole deed in order to see what the testator really means; and the first thing that strikes one in this settlement is that the testator clearly intends to dispose, not of the property, which he had at the time, because he might have changed it considerably before his death, but of the whole real and personal property of every kind and description which should belong to him at the time of his death. That is the description, at the outset, of the property he means to dispose of. When he comes to deal with the particular kind of property with which we are concerned now, he begins, in the first place, by leaving certain things to his brother Thomas, and he says that the trustees are to deliver to his brother Thomas "my gold watch, breechloading gun, and all my body clothing, together with all articles of every description belonging to me that are at Greenhill at the time of my decease." I understand that Greenhill was the house where his brother lived. Well, then, he was to have all the articles that are at Greenhill "at the time of my decease." Then he goes on to make the provision in question for his wife. He says that she is to have all the other furniture and plenishing, including certain specified things. Now, it seems to me plain on the collocation of these two sentences that the time he had in view in both was the same time. My brother is to get all the things at the time of my death that are in Greenhill, but as for the other things, my wife is to have them. What other things? The other things at the time of my death besides the articles and furniture and so on which are at Greenhill, and which go to my brother. Therefore, it seems to me that the only question that really requires consideration is whether the words in which he bequeaths to his widow his "carriages" are wide enough to cover the only kind of carriage which he had at the time of his death, that is, motor-cars. I have no hesitation in agreeing with your Lordship that, according to the ordinary use of language, a "motor-car" is a "carriage," because a "carriage" is, as your Lordship said, simply a vehicle for carrying persons.

It is perfectly true, and I entirely agree with the observation of your Lordship, that in ordinary language people very often do use the term "carriage" to describe a particular kind of vehicle in order to distinguish it from some other kind, which nevertheless also falls within the general signification of the word "carriage"; as in the instance your Lordship stated, it is perfectly common and natural that a man should describe a barouche or a landau as a carriage in order to distinguish it from a wagonette or a dog-cart. But when he uses the term not for the purpose

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Oct. 29, 1907. of distinguishing between particular articles, which may fall within the meaning of the general word, but for describing all the articles which might possibly be described by it, then it must receive its most comprehensive meaning. I have no doubt at all that it ought to receive its comprehensive meaning in this case, both because I think that is the plain meaning of the words used, and also because when you read the will, as it is right we should read the will, with reference to the statement before us as to the things possessed by the testator at the time of his death, we find that the carriages that he himself was using at the time, and the only carriages, were motor-cars. That the intention of the testator was to put his widow in the same kind of enjoyment of his house and furniture and means of locomotion as he himself had enjoyed during his life seems to me to be plain upon a fair construction of the will. I therefore agree with your Lordship's proposal as to the way in which the questions should be answered.

LORD DUNDAS.—I am of the same opinion. It seems clear that the testator, when he subscribed his settlement in 1890, intended to bequeath to his widow the whole accessories, both indoors and out of doors, requisite to her comfortable enjoyment of the landed estate she was to possess. In the latter category were included "my horses and carriages." Mr Denholm owned at that time a horse or horses, and also a brougham and a wagonette. But when he died in January 1907 he had parted with his horses, his brougham, and his wagonette, and had acquired in their stead two motor-cars. It is, to my mind, impossible to suppose that Mr Denholm, though he altered his style of private locomotion in accordance with the march of modern times, intended to alter, and indeed to delete, the bequest to his wife of a comfortable, though not absolutely necessary, item of her enjoyment of the estate which he bequeathed to her. Nor do I think that, looking to the admitted circumstances of his establishment as regards the modes of vehicular conveyance successively employed by him, we shall in the slightest degree strain the language of his settlement if we decide, as your Lordships propose to do, that the motor-cars fall within the expression of his bequest of "carriages." It seems to me therefore that the first question put to us should be answered in the affirmative, and the second in the negative.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

THE COURT answered the first question in the affirmative and the second in the negative.

SMITH & WATT, W.S.—HENRY SMITH, W.S.—Agents.

No. 13. JOHN TOAL, Pursuer (Appellant).—*J. A. Christie.*
 THE NORTH BRITISH RAILWAY COMPANY, Defenders (Respondents).—
 Oct. 31, 1907. *Sol.-Gen. Ure—Grierson.*

Toal v. North British Rail-
 way Co. *Reparation—Negligence—Railway—Failure of railway servants to close carriage doors before setting train in motion.*—An action of damages for personal injuries brought against a railway company by a passenger who had been knocked down by an open carriage door as a train was leaving a

station, *dismissed* as irrelevant, where the only averment of negligence against the railway company was that they had failed to close the carriage doors before setting the train in motion.

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Sheriff of
Lanarkshire.

JOHN TOAL, craneman, Springburn, Glasgow, brought an action in the Sheriff Court of Lanarkshire, at Glasgow, against the North British Railway Company for damages for personal injuries. He averred that on 17th November 1906 he was a passenger by one of the defenders' trains which stopped at College Street Station, Glasgow, where the pursuer alighted. "While he was standing on the platform he was struck and knocked down by an open carriage door, and his leg slipped down between the platform and the train. The train was in motion at the time pursuer was struck, and after it had passed the pursuer fell on to the rails" and received certain injuries.

The pursuer further averred:—"The said accident to the pursuer was due to the fault and negligence of defenders' servants, for whom defenders are responsible. When said train was stopped at said platform there were no porters or officials on the platform to see that the doors of the carriages were closed before the train was restarted. It is the duty of defenders, and is the invariable practice of railway companies, to close the doors of compartments before a train is allowed to leave the station, but this the defenders and their servants culpably and negligently failed to do on the occasion of this accident to pursuer. The defenders and their said servants were also negligent in respect that they set said train in motion without closing said door. If the guard of said train or any of defenders' porters had been on said station and had paid attention to their duty, they would have closed the door which struck pursuer before the train was allowed to restart from said station, and the said accident would have thus been avoided. The pursuer believes and avers that the guard of said train was negligent, and did not come to the platform at said station, and failed to have regard for the safety of pursuer and others on said platform by having said door shut."

The defenders, *inter alia*, pleaded;—(1) The pursuer's averments are irrelevant. (3 b) The said accident was caused by the pursuer's own fault or negligence, or the pursuer's own fault or negligence materially contributed thereto.

On 24th July 1907 the Sheriff-substitute (Boyd) allowed a proof.

The pursuer appealed to the Court of Session for jury trial.

The defenders, in support of the pleas above given, argued;—This accident might have occurred in the manner alleged although all the doors were closed by the time the train left the platform. The cause of the accident founded on must therefore be that the doors were not closed before the train was started. But there was no duty on a railway company to close the doors before starting the train—if it were so, it would render the punctual working of the railway traffic at many stations quite impossible. The action, therefore, as laid was irrelevant. Further, the pursuer's record in itself disclosed a case of contributory negligence. There was no averment that pursuer had not had time, or was for any other reason unable, to step clear of the carriage doors before the train started, and in the absence of any such averment he must be held in fault for having failed to take that very obvious and necessary precaution.

Argued for the pursuer and appellant;—The action was relevant. The platform was provided for passengers, and to start a train with

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LORD PRESIDENT.—I am unable to find in this record a relevant averment of negligence against the defenders. The pursuer sets forth that on a certain date he travelled in a train which stopped at College Street Station. He alighted. He then says that while he was standing on the platform—he does not tell us how long he had been standing there—he was struck and knocked down by an open carriage door, and his leg slipped down between the platform and the train. The train was in motion at the time the pursuer was struck, and after it had passed the pursuer fell on to the rails. Now, the only facts that are there given to us are that the pursuer got out of the train, that he stood upon the platform, and that while there he was knocked down by an open carriage door. He must, of course, necessarily have been so close to the edge of the platform as to permit of the door knocking him down. The only averment of negligence that is made in these circumstances against the Company is this:—"It is the duty of the defenders, and is the invariable practice of railway companies, to close the doors of compartments before a train is allowed to leave the station." I say in passing that this "leaving the station" is rather an ambiguous phrase, and I rather fancy that the writer of the sentence, which I have just read, meant by "leaving the station," really the starting of the train. The only doubt raised in my mind as to that is that in the next sentence he says this:—"The defenders and their said servants were also negligent in respect that they set said train in motion without closing said door." However that may be, I take the last averment as being the substance of the negligence averred, viz., that there was negligence in respect that the train was set in motion without the doors being closed.

I think that is an impossible averment of negligence to go to a jury, seeing that it is common knowledge, from the practice of railway companies, and indeed from the necessities of the case, that a great deal of the service of suburban trains would be practically impossible, if it were absolutely necessary to close every door before the train was allowed to start. That it is quite a proper precaution for railway servants to close the doors, so far as they can, before the train starts, I do not doubt, but that is a perfectly different thing from saying that, if a door is not closed before the train is allowed to move, there is negligence on the part of the railway company. There is no averment that the train was started so quickly as to give no proper opportunity to alight. All that is said is that it is negligence because the train was started while a door was still open. I do not think that is common-sense. I think therefore your Lordships should dismiss this

¹ Metropolitan Railway Co. v. Jackson, (1877), L. R., 3 App. Cas. 193, Lord Cairns, at p. 198.

² Wakelin v. London and South-Western Railway Co., (1887), L. R., 12 App. Cas. 41, Lord Watson, at p. 47.

action, as being wanting in relevancy of averments against the Railway Company. Oct. 31, 1907.

I think that is a safer ground to go upon than what was also urged on us—the disclosure of contributory negligence on the part of the pursuer in bar, because, although no doubt I do think the chances, so to speak, are all in favour of it being the man's own fault that he allowed himself to be struck by the door of a railway carriage while on the platform, still that is not a universal proposition. There may have been circumstances in which he was not able to get away, and the proof of contributory negligence must, of course, lie upon the person who is alleging it—namely, the defender. But before the defender is put to any such proof there must be a case of negligence against him. It is there I think that this case fails, and I am therefore for dismissing the action.

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LORD KINNEAR.—I agree. I only add that I do not find any averment that the defenders did not give the pursuer time to alight, and that he was knocked down before he had time to step from the carriage to a safe place. There is no averment of that kind, and in the absence of an averment of that kind, I think the case rests exactly as your Lordship has put it.

LORD DUNDAS.—I also agree. I only add that to my mind the case is an extremely plain one.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

THE COURT dismissed the action.

St CLAIR SWANSON & MANSON, W.S.—JAMES WATSON, S.S.C.—Agents.

COLIN MACANDREW, Petitioner (Appellant).—*Chree—Macmillan.* No. 14.

JOHN DODS, Respondent.—*Hunter, K.C.—A. M. Mackay.*

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Burgh—Dean of Guild—Jurisdiction—Declinature of Jurisdiction—Disputed question of fact—Sist of cause to enable Court of Session action to be brought—Discretion of Dean of Guild.—A petition having been presented to the Dean of Guild for warrant to erect certain buildings, answers were lodged thereto objecting that the proposed buildings were in contravention of certain building restrictions. No proper competition of heritable right was involved, but the matter depended on the construction of certain documents and on evidence as to the precise position of a plot "A" marked on a certain plan which had been lost. The Dean of Guild sisted the petition to enable the petitioner to establish his alleged rights in the Court of Session. Against this interlocutor the petitioner appealed, maintaining that the Dean of Guild should not have declined jurisdiction, but ought to consider and determine the matter himself.

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The Court *held* that, in the circumstances, it was not expedient to disturb the discretion of the Dean of Guild, and *affirmed* his interlocutor.

ON 1st June 1907, Colin Macandrew, builder, Edinburgh, presented a petition to the Lord Dean of Guild of the city of Edinburgh, applying for warrant to erect an office building on ground of which he was the proprietor, situated at No. 13 Lauriston Gardens, Edinburgh. Answers to this petition were lodged by John Dods, an adjoining proprietor, who objected to the proposed building on the

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ground that it would contravene certain building restrictions which, as he alleged, were binding on the petitioner.

The petitioner's ground and the respondent's ground formed part of the lands of Lauriston Lodge, and were held under titles derived from a common author. The petitioner's ground was held by him under a disposition, dated March and April 1889, granted in his favour by Mrs Beattie, widow of the deceased George Beattie, and others, as trustees therein mentioned. That disposition contained the following provision :—" Declaring that the said Colin Macandrew and his foresaids shall be bound, as by acceptance hereof he binds and obliges himself and his foresaids, not to feu the piece of ground hereby disposed except for the building of villas, unless with the consent of the feuars in Lauriston Gardens, to whom we or our predecessors in office, as trustees foresaid, have undertaken the like obligation in the feu-rights granted by us or our foresaids, and also that in so far as we are or may be held to be under any obligation ourselves not to erect on the said piece of ground any other buildings than villas, unless with consent foresaid, the said Colin Macandrew and his foresaids shall be under the same obligation, it not being intended to impose on them any obligation against themselves erecting other buildings than villas unless such obligation already exists upon us, in which case the same obligation shall continue to exist, and shall be binding on them ; which burden, obligation, and declaration hereinbefore contained are hereby created and declared to be real servitudes and burdens upon and affecting the piece of ground before disposed, and as such are appointed to be recorded in the Register of Sasines as part of these presents, and inserted or validly referred to in any notarial instrument to follow hereon, and in all future transmissions and investitures of the said piece of ground, or any part or portion thereof, under pain of nullity of the deed, writ, or instrument from which the same shall be omitted."

The respondent's title was based on a feu-contract, dated September 1863, entered into between George Beattie and others, as trustees therein mentioned, of the first part, and the respondent's author, William Gibson, of the second part. The ground feued was described with reference to a feuing-plan of the lands of Lauriston Lodge, made out by James Lorimer, civil engineer in Edinburgh, and the feu-contract contained this provision :—" The said feuing-plan being referred to for no other purpose whatever than as shewing the position of the ground hereby feued, the said parties of the first part reserving right to themselves and their successors to deviate therefrom as they shall think proper in regard to the unfeued ground, except that the said feuing ground shall only be feued for the erection of villas, but declaring that the house of Lauriston Lodge and grounds surrounding the same as shewn on said plan which have now been feued shall not be used for such purposes as shall be a nuisance to the said William Gibson and the other feuars, and declaring that no buildings shall be erected by the said parties of the first part, or by their feuars, on the ground of Lauriston Lodge southward of the plot of ground marked A on the said feuing-plan feued to Adam Beattie to the extent of the breadth of that plot on the south side thereof, and to the south boundary of the ground of Lauriston Lodge, of greater height than the boundary wall of the back ground of the houses, being six feet high, with the exception of summer-houses which may be erected of a greater height, and the

said parties of the first part shall take the feuars from them bound to this effect, and to submit to them the plans of any contemplated summer-houses, and to obtain the approval of the party of the second part or his foresaids before erection thereof." Oct. 31, 1907.
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The petitioner averred that no part of the proposed building would occupy the ground, or a part of the ground, southward of the plot marked "A" on the said plan; while the respondent averred that part of the proposed building would occupy ground southward of that plot.

The petitioner pleaded;—(2) As the erection of the proposed buildings involves no violation of any conditions in the petitioner's or respondent's title, warrant therefor should be granted.

The respondent pleaded;—(3) The operations proposed by the petitioner being in direct violation and contravention of the conditions and restrictions contained in his title-deeds, he is not entitled to warrant as craved, and the same ought to be refused. (4) The respondent having right in virtue of the obligations in his favour contained in his title-deeds to object to the operations proposed, and the respondent having so objected, the warrant craved by the petitioner ought to be refused.

In 1899 the petitioner had made a similar application to the Dean of Guild Court, and on that occasion the then Dean of Guild sisted the petition to enable the rights of parties to be established in the competent Court, but no further steps were taken.

In the present proceedings the respondent admitted that the feuing-plan prepared by James Lorimer had been lost, but proposed to lead evidence to establish the position of the plot of ground that had been marked "A" on that plan.

On 8th August 1907 the Dean of Guild, without taking evidence, pronounced this interlocutor:—"Having heard counsel for the parties and considered the whole cause, sists the petition to enable the petitioner to establish his alleged rights in the Court of Session, and decerns." *

The petitioner appealed to the Court of Session, and argued;—No question of heritable right was involved here, but merely a question of the construction of certain documents. (1) *The petitioner's title*—Neither in the petitioner's title itself nor as devolving upon him from his authors was there any prohibition of the erection of other buildings than villas. All that was prohibited was feuing for the erection of other buildings than villas. The petitioner's authors had not feued to him, they had dispoed, and the petitioner did not propose to feu to anybody. Therefore, strictly read, the titles imported no restriction on the petitioner from erecting the buildings he

* The concluding paragraph of the note annexed by the Dean of Guild to his interlocutor was as follows:—"In 1899 the petitioner made a similar application to this Court, and the respondent avers that that application was for warrant for a building on the same land as the petitioner now proposes to build on. The application in 1899 was opposed by the then owner of the respondent's feu. This Court sisted the petition in 1899 to enable the rights of parties to be established in the competent Court. The petitioner did not proceed after this Court's judgment in 1899 to establish his alleged rights. The Dean of Guild sees no reason for going back on the judgment of the Court in 1899, and therefore he again sists the petitioner's application, and for the reasons expressed in his opinion in 1899 he thinks that it lies on the petitioner to establish his rights."

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proposed to erect.¹ (2) *The respondent's title*—The provisions in favour of the respondent created no known servitude over the petitioner's property, but only a building restriction, and therefore were not binding on the petitioner, as they were not contained in nor had been imported into the petitioner's title.² Consequently the position of the plot "A" on the lost plan was immaterial, and no inquiry was necessary. Both these points could be competently disposed of by the Dean of Guild, and should have been disposed of by him, and it was not right that the petitioner should be subjected to the delay and expense of a Court of Session action. The case should therefore be sent back to the Dean of Guild to be disposed of, or, as it was now competently before this Court, it might be disposed of by them. Even if an inquiry were found to be necessary, it should take place before the Dean of Guild.

Argued for the respondent;—The questions involved here were difficult and complicated, and in addition an inquiry was necessary, and it was within the discretion of the Dean of Guild to sist the cause and allow the matter to be determined in a Court of Session action. (1) *The petitioner's title*—This title, fairly read, clearly implied a prohibition against the erection of buildings other than villas.³ (2) *The respondent's title*—The provisions therein contained created a known servitude—that of *altius non tollendi*—and were therefore binding on the petitioner without entering his titles.⁴ Consequently an inquiry into the position of plot "A" on the lost plan was necessary. It was more expedient that such an inquiry should take place in the Court of Session, and therefore the Dean of Guild had wisely exercised his discretion in not allowing that inquiry to take place, and these difficult questions of construction to be settled, in a Dean of Guild process.

LORD PRESIDENT.—This case is not one that comes under quite ordinary circumstances. The proprietor of ground in Edinburgh wished some years ago to put up certain buildings. He was then opposed upon grounds which depended upon rights as shewn in the title both of the opponent and of himself, and at that time the Dean of Guild pronounced an interlocutor sisting the case, because he considered that the matter had better be determined in an action at law, and not by pronouncing an interlocutor upon the merits of the case in the Dean of Guild Court. The proprietor at that time acquiesced in that view, and did nothing. He gave up for the time his proposal to build, and he did not raise an action. He now comes back again to the Dean of Guild Court, and he repeats his crave to have a decree of lining granted, and the Dean of Guild of the present time has repeated the interlocutor of his predecessor. An appeal has been taken against that interlocutor by the person who wants to build. His counsel has urged

¹ Assets Co., Limited, v. Lamb & Gibson, March 6, 1896, 23 R. 569.

² Liddall v. Duncan, July 12, 1898, 25 R. 1119; Murray's Trustees v. St Margaret's Convent, July 20, 1906, 8 F. 1109, affd. 1907, S. C. (H. L.) 8; Morier v. Brownlie & Watson, Nov. 1, 1895, 23 R. 67.

³ Sandeman's Trustees v. Brown, Dec. 15, 1892, 20 R. 210; Assets Co., Limited, v. Ogilvie, Jan. 23, 1897, 24 R. 400.

⁴ Mearns v. Massie, Dec. 5, 1800, Hume, p. 736; More's Stair, note W, on Servitudes, p. ccxxi.; Gray v. Ferguson, Jan. 31, 1792, M. 14,513; Ersk. ii., 9, 35.

upon your Lordships that the Dean of Guild here has unduly withheld his own jurisdiction, and that the case ought to go back to him again with a behest from your Lordships that he should proceed to dispose of the merits of the case.

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Ld. President.

Now, I am exceedingly far from laying down the proposition that it is not proper for the Dean of Guild to take up questions of legal restriction, where there is no proper competition of heritable right, and where the questions are merely whether the restriction applies or not, however hard and difficult these questions may be. The books are full of cases where the Dean of Guild in the first instance has had to decide difficult legal questions, and his decisions have come up for review in this Court. If this case had been one where the whole question turned upon the construction of a legal document, and upon construction alone, then I think your Lordships would have been probably inclined, either to send it back to the Dean of Guild or, as has been urged by counsel, to have proceeded at once yourselves to a determination of the case. But when the particular restrictions that we have to deal with here are brought before our notice, it is abundantly made clear to me that there is one of them at least that cannot be finally determined without settling a disputed question of fact, and accordingly there has got to be an inquiry.

Now, I am certainly not going to start the idea that parties, who want an inquiry into these matters, are entitled to come to the Inner-House and to ask the Inner-House to have an inquiry before themselves. Accordingly the only form of inquiry that should be allowed is either to send the case back to the Dean of Guild for inquiry or allow the matter to be raised at law. I do not say that if the Dean of Guild had chosen to take up an inquiry any objection would have been made. But he did not. It was a question of discretion, and it was a question of discretion in circumstances where he found that his predecessor had pronounced an interlocutor to that effect some years before, and that no opportunity had been taken to give effect to that interlocutor. That being so, I do not think it is expedient, in the circumstances of this case, to disturb the discretion of the Dean of Guild. I think, therefore, that as there are difficult questions here of construction, and also one question resting upon the determination of fact, they had better be determined by an action at law; all the more that the question of fact seems to me to be a question of fact which really will turn upon questions of evidence rather than upon questions of a practical character, such as the Dean of Guild is specially entitled to determine. We are told here that the plan upon which this matter turns is lost. It is, therefore, not a question of simply going to the ground with a plan—that is to say, it is not a surveyor's question, where the Dean of Guild certainly would be a very good person to determine it. It really comes to be a question of evidence. What sort of evidence I do not quite know, but I suppose it will either be whether certain adminicles will do instead of the plan, or whether these adminicles have been so lost that, the plan also being lost, the restriction, such as it is, must be held *pro non scripto*. All these things depend upon legal and not upon surveying considerations. I therefore think that in the whole circumstances of the case, which I look upon as a peculiar one, the Dean of Guild was right, and your Lordships should affirm

Oct. 31, 1907. his interlocutor; the case, of course, being sisted in order that the petitioner may raise the question by appropriate action at law.
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LORD KINNEAR.—I agree with your Lordship.

LORD DUNDAS.—I also agree.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

THE COURT pronounced this interlocutor:—"Affirm the interlocutor of the Dean of Guild dated 8th August 1907, and remit the cause to him: Find the appellant liable to the respondent in the expenses of the appeal. . . ."

MENZIES, BRUCE-LOW, & THOMSON, W.S.—WAUGH & M'LACHLAN, W.S.—Agents.

No. 15.

ARTHUR MACFARLANE, Pursuer (Respondent).—*Hunter, K.C.—Lyon Mackenzie.*

Nov. 1, 1907.

WILLIAM NEWBY COLAM, Defender (Appellant).—*D.-F. Campbell—W. Thomson.*

Macfarlane v.
 Colam.

Reparation—Negligence—Duty to public—Road—Horses shying at motor-car left unattended—Breach of statutory provisions—Roads and Bridges (Scotland) Act, 1878 (41 and 42 Vict. cap. 51), sec. 123, incorporating the General Turnpike Act, 1831 (1 and 2 Will. IV. cap. 43), sec. 96.—The driver of a motor-car drew up his car at the side of the road, leaving ample room for traffic to pass, stopped the engine, and left the car there unattended, while he paid a visit of fifteen minutes to a house near by. While he was away the horses of a passing wagonette shied at the motor-car, and got out of control, and damage was done to the wagonette and to the horses. The owner of the wagonette having raised an action of damages against the owner of the motor-car, the Sheriff-substitute held that the driver of the car was in breach of section 96 of the General Turnpike Act, 1831, in leaving the car unattended, and that the accident had resulted therefrom, and awarded damages.

In an appeal, the Court *recalled* that interlocutor, and *assolized* the defender, on the ground that the accident had not resulted from the car being left unattended, but through the shying of the horses and the inability of the driver to control them.

1ST DIVISION.
 Sheriff of
 Inverness,
 Elgin, and
 Nairn.

ARTHUR MACFARLANE, horsehirer, Kingussie, brought an action in the Sheriff Court at Inverness against William Newby Colam, civil engineer, Newtonmore, praying for decree for £38, as reparation for damages sustained by a wagonette and two horses belonging to him. He averred that on 30th July 1906 the wagonette and the pair of horses were being driven from Glentruim to Kingussie; that at a point on the road between Newtonmore and Kingussie it approached a motor-car belonging to the defender, which had been left standing on the road without any person in charge*; and that "in consequence of

* The General Turnpike Act, 1831 (1 and 2 Will. IV. cap. 43), sec. 96, enacts, *inter alia*,—"If any person shall leave any waggon, cart, or other carriage whatever upon such road or upon the side or sides thereof without any proper person in the sole custody or care thereof longer than may be necessary to load or unload the same . . . or shall not place such waggon or other carriage during the time of loading or unloading the same, or of taking refreshments, as near to one side of the road as conveniently

the car being unattended, and occupying so much of the road, the horses on approaching the car took fright, ran against a stone wall, and upset the wagonette," whereby the damage in question was occasioned. Nov. 1, 1907.
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A proof was allowed and led. The facts established at the proof were thus set forth by the Sheriff-substitute (J. P. Grant) in his note :—

" The motor-car belonging to the defender in this case was left by his son upon the roadway of the public road between Kingussie and Newtonmore about 6 P.M. on the afternoon of 30th July 1906. No person was left in charge of the car, but Mr Colam junr. had stopped the machinery and disconnected it, in this complying with the Motor-Car Regulations on the point.

" A wagonette and a pair of horses belonging to the pursuer came from the direction of Newtonmore, and the horses taking fright at the motor-car, the wagonette was overturned and the horses and the wagonette damaged.

" The driver of the wagonette was a careful and experienced man, and in no way by his fault contributed to the accident.

" The available breadth of the roadway was a little more than 15 feet, of that the car occupied about one-third, leaving about 10 feet passage for the wagonette. There was a stone wall on the opposite side of the road to the car, so that there was no possibility of expanding the space by going on the verge.

" There was thus no absolute obstruction of the highway; ten feet of an opening are enough for the passage of a wagonette and pair, assuming the driver was of ordinary skill and the horses perfectly quiet.

" There was a grass verge to the road on the side on which the motor-car lay, but it was not a place where Mr Colam could have placed his car, having reasonable regard to its care, nor could he prudently have placed it on either of the approaches of the house which he was visiting, an unfinished house his father was building."

On 12th March 1907 the Sheriff-substitute pronounced the following interlocutor:—" Finds in fact that about 6 P.M. on 30th July 1906 the defender's motor-car was left by the defender's son upon the public road without any proper person in the sole custody or care thereof: That a pair of horses, the property of the pursuer, drawing a wagonette, also the property of the pursuer, took fright at the said motor-car and upset the wagonette, causing damage to themselves and the wagonette: and in law that there was no contributory negligence on the part of the pursuer or his servant driving the wagonette, and that the defender is liable to the pursuer for the damage

may be, either with or without any horse or beast of draught harnessed or yoked thereto," he shall be liable to a penalty not exceeding fifty shillings.

The Roads and Bridges (Scotland) Act, 1878 (41 and 42 Vict. cap. 51), sec. 123, enacts, *inter alia*, that the above enactment, in so far as the same is not inconsistent therewith, shall be and is incorporated with the Act, and in any county shall extend and apply to all the highways made or to be made within such county.

The Locomotives on Highways Act, 1896 (59 and 60 Vict. cap. 36), sec. 1 (b), enacts :—" A light locomotive shall be deemed to be a carriage within the meaning of any Act of Parliament, whether public general, or local, and of any rule, regulation, or bye-law made under any Act of Parliament"

Nov. 1, 1907. sustained, and assesses the same at £33, 10s. sterling, for which sum decerns against the defender: Finds the pursuer entitled to his expenses of process from the defender; allows," &c.*

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The defender appealed to the First Division. On counsel for the appellant opening the case he was stopped by the Court and counsel for the respondent was called on.

Argued for the respondent;—The driver of the car was in breach of a statutory enactment in leaving his car on the road unattended, and as that had caused or contributed to the accident, he must be held liable in reparation. Such use, too, as had here been made of the high road was an unwarrantable use, and rendered the defender liable for any accident caused thereby.¹

* "NOTE.—(After the narrative of the facts quoted *supra*)—There remains the one point on which *culpa* may be inferred on the part of young Mr Colam, whether he acted in breach of the statutory regulations under the Road Acts in leaving his car unattended on the highway. Section 96 of 1 and 2 William IV. cap. 43, as incorporated in the Roads and Bridges (Scotland) Act, 1878, section 123, *inter alia*, enacts—(The Sheriff-substitute quoted the sections printed *ante*).

"Mr R. L. Colam did leave the car in question on the road without any proper person in the sole custody or care thereof. I cannot doubt that the fact of the car being there was the immediate cause of the accident. The horses were skilfully driven; they had passed motors in motion eight times that day without becoming unmanageable, and no other cause can be suggested for this accident than this stationary and unattended motor-car placed where it ought not to be according to the Road Acts. There is thus, I consider, a direct relation between young Mr Colam's act and the damage that resulted.

"There remain to be considered the exceptions to the statute. During the time necessarily required for loading and unloading or for taking refreshments, a carriage may be left unattended if placed as near to one side of the road as conveniently may be, that is, on either side, not necessarily the proper side in passing. These particulars Mr Colam complied with. The car was practically close to the side on which his business lay. No allegation of 'refreshment' was raised, and all that is left is the question whether his absence was no longer than was requisite in 'unloading.' The object of his journey was to take some vases—fragile articles—to the new house; if that had been done expeditiously and he had returned to the car without delay, it might have been soundly maintained that this was 'unloading' in the sense of the Act, but the evidence shews, I think, that he stayed longer in the house than was absolutely requisite to deposit the vases. His return was occasioned by the accident itself—not actuated by the desire to return to his motor as soon as possible, and he admits having been ten minutes in the house, though the architect, Mr Cameron, puts it at a shorter period of time.

"I conclude, therefore, that the accident was occasioned by Mr R. L. Colam's breach of the statute, and that his father was responsible, as he was on his father's business. I think it is true, as some witnesses say, that horses are more ready to take fright on a country road than in a town street, where there are a variety of sounds and sights to distract their attention; but that does not enter into my reasons of judgment any more than what my private opinion may be as to the reasonableness of this section of the Act which I have to administer. I must hold that Mr R. L. Colam was in fault in leaving his car unattended, and the defender is liable for the direct consequences of his so doing."

¹ Harris v. Mobbs, (1878), L. R., 3 Ex. D. 268; Wilkins v. Day, (1883), L. R., 12 Q. B. D. 110.

LORD PRESIDENT.—In my view this is really a most preposterous case. Nov. 1, 1907. The driver of a motor-car, in order to go up to a house, leaves it on a road, Macfarlane v. and he leaves it in such a position that there is plenty of room for other Colam. vehicles to pass. He goes up to the house, leaving the car standing, and is absent for about fifteen minutes. He had stopped the car and the machinery was not running, and therefore it was not an object of terror to anything else on the road by means of noise. It merely stood there on the side of the road. Another man comes along driving a pair of horses, and when he gets beside the car the horses shy and he has not sufficient control of them to prevent them getting into the ditch, whereby the carriage is injured and one of the horses is injured. He then brings an action against the owner of the motor-car.

The only ground upon which the Sheriff-substitute has allowed the case is that he finds that under a well-known section of the Turnpike Act no vehicle must be left unattended on the roadway, for which there is a fifty shilling penalty, and then he finds that this car was left unattended, and goes on,—“I cannot doubt that the fact of the car being there was the immediate cause of the accident.” It was the immediate cause in the sense that it was the object at which the horses shied. The car being unattended was, in the Sheriff’s view, a contravention of the statute. All I can say is that if that were so there would be a great many convictions. I will assume, however, that there could have been a conviction under the statute. But the fact of the car being unattended did not make it something which became more terrifying than it otherwise would have been, for this good reason, that while it is quite true that the presence of a man, and especially if he use his voice, calms horses, the car might have been well attended with the man sitting behind the car and not visible. In the whole circumstances I think the case is quite irrelevant. It would have been a different thing if the car had been placed so as to cause an obstruction to the highway, but upon the facts, agreeing with the Sheriff, I do not think there was any obstruction. I advise your Lordships to recall the interlocutor, find in fact that the leaving of the car in the position described did not constitute an obstruction of the highway; find that the leaving of the car unattended had no relation to the accident, and that the same happened through the shying of the horses and the inability of the driver to control them; find in law that the defender is not liable to the pursuer in damages, and assoilzie him from the conclusions of the action.

LORD KINNEAR.—I concur.

LORD DUNDAS.—I also concur. I observe that the Sheriff-substitute does not in his interlocutor make any finding of fault on the part of the defender, but in his note he “concludes” that “the accident was occasioned by Mr R. L. Colam’s breach of the statute.” I am unable to see any relation of cause and effect between the breach of the statute (assuming there was a breach) and the accident to the pursuer’s horses and wagonette.

LORD M’LAREN and **LORD PEARSON** were sitting in the Extra Division.

THE COURT pronounced this interlocutor:—“Sustain the appeal:
Recall the interlocutor of the Sheriff-substitute dated 12th

Nov. 1, 1907.

Macfarlane v.
Colam.

March 1907: Find in fact (1) that the leaving of the car in the position described did not constitute an obstruction to the highway: (2) that the leaving of the car for the time without a person in attendance had no relation to the accident; and (3) that the same happened through the shying of the horses and the inability of the driver to control them: Therefore find in law that the defender is not liable in damages to the pursuer: Assolzie the defender from the conclusions of the action, and decern: Find the pursuer liable to the defender in expenses."

FLETCHER & BAILLIE, W.S.—PETER MACNAUGHTON, S.S.C.—Agents.

No. 16.

ANDREW KENNETH M'DOUALL, Complainer (Appellant).—*Chree—W. T. Watson.*

Nov. 2, 1907.

ARCHIBALD IRVINE, Respondent.—*Moncrieff.*

M'Douall v.
Irvine.

Game—Title to prosecute—Informer—Partridges Act, 1799 (39 Geo. III. cap. 34).—Held that the Partridges Act, 1799, did not give a title to a private individual, as informer, to prosecute for a penalty under the Act, and that the concurrence of the procurator-fiscal did not supply the defect in the instance.

Question whether the Procurator-fiscal would have had a title to prosecute.

EXTRA
DIVISION.
Sheriff of
Dumfries and
Galloway.

ANDREW KENNETH M'DOUALL, of Logan, with concurrence of John Marquis Rankin, solicitor, Procurator-fiscal of Court at Stranraer, for the public interest, brought a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887, in the Sheriff Court of Dumfries and Galloway, at Stranraer, against Archibald Irvine, labourer, Drummore.

The complaint set forth that the respondent did on 22d May 1907, on the public road leading from Stranraer to Drummore and on the seashore *ex adverso* of the said road, "kill and take a partridge in close time, that is to say, between 1st February and 1st September, both in the year 1907, contrary to the Partridges Act, 1799, section 3, whereby the respondent is liable to a penalty not exceeding £5." *

* The Partridges Act, 1799 (39 Geo. III. cap. 34), enacts:—Sec. 3. "And be it further enacted, that, from and after the passing of this Act, no person or persons shall, on any pretence whatsoever, take, kill, destroy, carry, sell, buy, or have in his, her, or their possession or use, any partridge within the kingdom of Great Britain, between the first day of February and the first day of September in any year; and if any person or persons shall transgress this Act in the case aforesaid, every such person shall be liable to the same penalty as, by the" Act 2 Geo. III. cap. 19, "is laid and imposed on any person or persons transgressing the same; such penalty to be imposed, inflicted, recovered, applied, and disposed of, in such and the same manner, and under such and the same rules, regulations, and restrictions, as in and by the said Act is provided and directed with respect to the penalty thereby imposed on persons transgressing the said Act."

The Act 2 Geo. III. cap. 19, enacts:—Sec. 4. "And be it further enacted by the authority aforesaid, that if any person or persons shall transgress this Act in any of the aforesaid cases, and shall be lawfully convicted thereof by the oath of one or more credible witness or witnesses, every such person shall, for every partridge, pheasant, heath fowl, or grouse, so taken, killed, destroyed, carried, sold, bought, or found, in his, her, or their possession or use, contrary to the true intent and meaning of this Act, forfeit and pay the sum of £5 to the person or persons who shall inform or sue for the same: And it shall and may be lawful to and for any person or persons to

When the complaint had been read in the Sheriff Court the agent Nov. 2, 1907.
for the respondent stated, *inter alia*, the following objections:—(1) *M'Douall v.*
No jurisdiction. (2) No title or interest on the part of the complainer, Irvine.
Andrew Kenneth M'Douall, to sue.

The Sheriff-substitute (Watson) sustained the second objection, and dismissed the complaint.

The complainer appealed from this decision by way of stated case. The question of law for the opinion of the Court was:—"Has the appellant, with concurrence of the Procurator-fiscal, sufficient title to prosecute the present complaint?"

Argued for the appellant;—The Act 2 Geo. III. cap. 19, and 39 Geo. III. cap. 34, read together, gave the appellant a title to prosecute this complaint. It was true that it was provided in the Act 2 Geo. III. cap. 19, that it should apply only to England, and the terms of section 4 thereof were applicable to English procedure and referred to actions in the Courts at Westminster, but the Act 39 Geo. III. cap. 34, brought in that section by reference, and, accordingly, it must be held as applying in Scotland; and as the Scottish Courts had jurisdiction the terms of the Act must be adapted to the procedure in these Courts, and could not be treated as confined to the Courts at Westminster. The Act 1 and 2 Will. IV. cap. 32, repealed the above-mentioned Acts, but only as to England.

Argued for the respondent;—The appellant founded on section 4 of the Act 2 Geo. III. cap. 19 as making an exception to the general rule that the public prosecutor has the sole title to prosecute in the public interest in Scotland. But that section was repealed by the Act 1 and 2 Will. IV. cap. 32, for although the repeal was limited to England, yet as the Act 2 Geo. III. cap. 19 applied only to England, the result was that the Act was wholly repealed. Accordingly the reference to section 4 of the Act 2 Geo. III. cap. 19, in the Partridges Act was of no effect. Even if the section were held not to be repealed, it was limited in its terms to the Courts at Westminster, and could not be held to extend to Scotland.¹ Unless the right to prosecute in the public interest was expressly given to a private person such person had no title to do so, and if the private person had himself no title, the concurrence of the Procurator-fiscal would not cure the defect.²

At advising,—

LORD M'LAREN.—In this case my opinion may be stated in a few words. The complaint charges the defender with taking partridges in close time

and prosecute for, and recover, the said penalty of £5, with full costs of suit, by action of debt, bill, plaint, or information, in any of His Majesty's Courts of Record at Westminster; and in such action or suit, no essoin, wager of law, or more than one imparlance, shall be allowed."

Sec. 3 of the Act provides that nothing contained in it shall extend to Scotland.

The Game Act, 1831 (1 and 2 Will. IV. cap. 32), sec. 48 of which provides that nothing in the Act contained shall extend to Scotland, by sec. 1 repeals "as to that part of the United Kingdom called England" the Acts 39 Geo. III. cap. 34, and 2 Geo. III. cap. 19.

¹ Hutcheson's Office of Justice of the Peace (3d ed.), vol. ii., p. 566, note (c); Ness's Game Laws of Scotland, p. 123.

² Duke of Bedford v. Kerr, May 22, 1893, 20 R. (J. C.) 65, *per* Lord Adam, at p. 67.

Nov. 2, 1907. **contrary to the Partridges Act, 1799, section 3, and lays claim to a penalty not exceeding £5. Now, on referring to this statute, we find that it prohibits the taking of partridges within a close time there defined, and prescribes that the penalty may be recovered under the powers of an earlier statute, 2 Geo. III. cap. 19.**

M'Douall v. Irvine.

Lord M'Laren.

The Partridges Act, 1799, applies to Scotland, but the Act of 2 Geo. III. cap. 19, makes no provision for the recovery of penalties in the Courts of Scotland, but only provides for the recovery of penalties in the King's Courts at Westminster. The reference to 2 Geo. III. cap. 19, is therefore ineffective so far as Scotland is concerned—at all events, in cases where the penalty is sued for by a private prosecutor; and in my opinion the Sheriff-substitute has rightly dismissed the complaint.

The ground of judgment is want of title to sue, and in the stated case this is the only point brought under review. If the Sheriff-substitute had found that he had no jurisdiction, I should have been disposed to affirm the judgment. But I think the preferable ground of decision is want of title; because it may be that without any special statutory title the Lord Advocate or the Procurator-fiscal has a title to prosecute wherever an illegal act is penalised and no provision is made for recovery of the penalty. By sustaining the plea of want of title on the part of a private prosecutor we keep this question open. I, of course, give no opinion as to whether taking partridges in close time may be the subject of a prosecution or complaint under any statute other than the Partridges Act, 1799.

We answer the question in the negative, and affirm the Sheriff-substitute's interlocutor.

LORD PEARSON.—I agree that this prosecution must fail; and I desire to explain very briefly the grounds of my opinion. The complainer is in the position of a common informer who has obtained the concurrence of the Procurator-fiscal. The complaint is laid upon what is now styled the Partridges Act, 1799 (39 Geo. III. cap. 34). That Act had for its main purpose to introduce a uniform close time for partridges in Great Britain, namely, from 1st February to 1st September. Unfortunately, in the matter of imposing and recovering the penalty, the Act referred to a statute of 1761 (2 Geo. III. cap. 19), which was a purely English statute providing for the recovery of the penalty "in any of His Majesty's Courts of Record at Westminster" by any person who might inform or sue for the same. That procedure, or whatever its modern equivalent may be, would obviously be futile at the instance of a common informer complaining of a contravention of the Act within Scotland; and I have not heard any suggestion as to the source from which a private informer in Scotland can derive a title to prosecute in any Scotch Court without express statutory authority. It is otherwise with the Public Prosecutor, who, as a general rule, can prosecute before the Sheriff Court for penalties which a statute has imposed without expressly enacting how the penalty is to be recovered.

I would not, however, be held as expressing any opinion as to whether a prosecution in the present case under the Act 1799 would have been competent in the Sheriff Court at the instance of the Procurator-fiscal himself. It may be that the express reference back to the Act of 1761 in the matter

of imposing and recovering the fine excludes any implied authority to the Nov. 2, 1907.
 Procurator-fiscal to take proceedings under the Act of 1799 in a Scottish ^{M'Donnell v.}
 Court. In determining that question which is not now before us, it would ^{Irvine.}
 be pertinent to consider whether there is any other remedy open; and in ^{Lord Pearson.}
 particular, whether the Act of 1773 (13 Geo. III. cap. 54) does not apply,
 notwithstanding its partial repeal in 1796 by an Act which was itself
 repealed without any saving clause in 1799—(36 Geo. III. cap. 54; 39
 Geo. III. cap. 34).

LORD ARDWALL.—I agree with both your Lordships. The complaint
 which initiated the proceedings giving rise to the appeal in the present case is
 founded solely upon the Partridges Act, 1799, 39 Geo. III. cap. 34, section
 3. *Inter alia*, the objection was taken that the complainer had no title or
 interest to sue, and this objection has been sustained by the Sheriff-substitute
 and he dismissed the complaint.

I am of opinion that the Sheriff-substitute's decision is right.

The leading Scotch Act relating to close time for game is 13 Geo. III.
 cap. 54, and under this statute the close time for partridges was fixed to be
 from 1st February till 1st September. Under that Act (section 8) it was
 provided that all offences under it might be tried before two or more Justices
 of the Peace or the Sheriff or Sheriff-substitute of the county, and that the
 prosecutions might proceed either at the instance of the fiscal of the Court
 at which the prosecution might be brought or by any other person who
 should inform or complain.

With respect to partridges, the period of close time formerly regulated by
 the above statute was altered by 36 Geo. III. cap. 54, which made it unlaw-
 ful to kill partridges between the 1st day of February and the 14th day of
 September in any year, and it provided that any person doing so in Scotland
 should incur the same penalties and forfeitures as by the Act of 13 Geo. III.
 cap. 54, and under the same rules.

Matters remained in this situation until the year 1799, when the Act 36
 Geo. III. cap. 54, was repealed by the Act 39 Geo. III. cap. 34. The com-
 mencement of the season for killing partridges was then altered from the
 14th to the 1st day of September, and this was declared to apply to the
 whole of the kingdom of Great Britain, and then the third section of the
 Partridges Act, 1799, proceeded to say that any person transgressing the Act
 should be liable to the same penalty, and to be recovered in the same way,
 as is provided by the Act of 2 Geo. III. cap. 19.

Referring now to the Act of 2 Geo. III. cap. 19, it does not appear that
 the penalty there prescribed is recoverable in any of the Courts in Scotland
 but only in any of the Courts of Record at Westminster. This view derives
 support from the observations of Mr Hutcheson in his work upon Justices
 of the Peace, volume ii., p. 566, note C, and a case was tried in the Sheriff
 Court of Dumfriesshire referred to in a Treatise on the Game Laws by
 John William Ness, 1818, p. 123, in which it was held that the statutory
 penalty of £5 could not be recovered in the Sheriff Court. It will be
 noticed that by the Act 2 Geo. III. cap. 19, it is declared that nothing
 therein "contained shall be construed to extend to that part of Great Britain
 called Scotland." I think it follows from these provisions of 2 Geo. III.

Nov. 2, 1907. **cap. 19, that the provision to the effect that an informer may prosecute for a penalty under the Act cannot be held to apply to Scotland, because such an informer is only authorised to prosecute for a penalty in the Courts at Westminster. Now, without statutory authority a private informer is not in Scotland entitled to prosecute for penalties or fines, and if this is so the concurrence of the Procurator-fiscal cannot supply the defect in the instance of a complaint brought by a private informer—*Duke of Bedford*.¹ In the present case the complainer prosecutes merely in the character of an informer, because it is not maintained that he had any other interest in the matter, the offence having been committed not on land belonging to the complainer but on the seashore.**

M'Donnell v. Irvine.
Lord Ardwall.

I am accordingly of opinion that under the Act of 1799, which is the only Act we have to deal with in this case, the complainer had no title to prosecute the complaint in question, that the concurrence of the Procurator-fiscal did not supply the defect in the instance, and that accordingly we should answer the question put in the stated case in the negative.

THE COURT answered the question in the negative, and dismissed the appeal.

E. A. & F. HUNTER & CO., W.S.—SIMPSON & MARWICK, W.S.—Agents.

No. 17. THE PARISH COUNCIL OF THE PARISH OF GOVAN COMBINATION, First Parties.—*D.-F. Campbell—Orr Deas.*
Nov. 2, 1907. THE PARISH COUNCIL OF THE PARISH OF GLASSARY, Second Parties.—*Hunter, K.C.—Addison Smith.*
Govan Parish Council v. Glassary Parish Council.

Poor—Settlement—Capacity to acquire Settlement—Puberty—Education (Scotland) Act, 1901 (1 Edw. VII. cap. 9), secs. 1 and 2.—The first section of the Education (Scotland) Act, 1901, enacts, that it shall be the duty of every parent to provide efficient elementary education for his children who are between five and fourteen years of age, and the second section prohibits any person from taking into his employment any child between twelve and fourteen years of age who has not obtained an exemption from the School Board.

Held that the capacity of a female child to acquire a residential settlement on attaining puberty at twelve years of age was not affected by these enactments.

1ST DIVISION. JOANNA MARGARET ROBERTSON MACKENZIE was born at Lochgilphead, in the parish of Glassary, on 19th December 1885, and was the lawful child of John Mackenzie, who died in February 1894, without having a residential settlement in any parish. From 3d July 1894 until 15th April 1902 she resided continuously in the Orphan Homes, Whiteinch, in the parish of Govan, and during her residence there, up to the age of fifteen, she was sent out each day to a public school for her education. From the date on which she left the Orphan Homes at Whiteinch, until 8th May 1904, she was in domestic service, and on the latter date she was admitted to the Govan District Asylum as a lunatic pauper. Until about two weeks before her admission to the asylum, she was a bright and intelligent girl.

In these circumstances this special case was presented by (1) the Parish Council of the parish of Govan Combination, and (2) the Parish Council of the parish of Glassary, for the determination of the question

¹ 20 R. (J. C.) 65.

whether the burden of supporting the pauper fell upon the parish of Govan, where she had resided for four years and four months after attaining the age of puberty, or upon the parish of Glassary, the parish of her birth. The case set forth the facts above narrated.

Nov. 2, 1907.

Govan Parish
Counoil v.
Glassary
Parish
Council.

The first parties maintained that in consequence of the Education (Scotland) Act, 1901, sections 1 and 2, no child was now capable of acquiring an independent settlement until it attained the age of fourteen.*

The second parties maintained that no change had been made by the Education Act in the time at which a child became capable of acquiring a settlement.

Both parties admitted that, if no change had been made by the Act on the existing law by which a female child, whose father was dead, became capable of acquiring a settlement on reaching puberty at twelve years of age, then in the present case the pauper had acquired a residential settlement in the parish of Govan, which was in that event the parish liable to support her; but if, on the contrary, it was now the law that no child could acquire a settlement until it was fourteen years of age, that no residential settlement had been acquired by this pauper, and that the parish of her birth was liable for her maintenance.¹

The questions of law were:—“(1) Did the said Joanna Margaret Robertson Mackenzie, the pauper, become capable of acquiring an independent settlement on attaining the age of twelve years? or did she become capable of acquiring an independent settlement only on attaining the age of fourteen years? (2) Are the first parties, the Parish Council of the parish of Govan Combination, liable for the maintenance of the said Joanna Margaret Robertson Mackenzie, the pauper, so long as she continues chargeable? or are the second parties, the Parish Council of the parish of Glassary, liable for such maintenance?”

LORD PRESIDENT.—It seems to me that this is a very plain case. It is admitted that but for the Education Act this case falls directly under the

* The Education (Scotland) Act, 1901 (1 Edw. VII. cap. 9), enacts:—

Sec. 1. “It shall be the duty of every parent to provide efficient elementary education in reading, writing, and arithmetic for his children who are between five and fourteen years of age.”

Sec. 2. “It shall not be lawful for any person to take into his employment any child . . . (2) who, being of the age of twelve years and not more than fourteen years, has not obtained exemption from the obligation to attend school from the School Board of the district in the manner provided in the next following section; nor shall any child . . . (2) who, being of the age of twelve years and not more than fourteen years, has not been exempted from the obligation to attend school in manner aforesaid, be employed in any casual employment as defined by section 6 of the Education (Scotland) Act, 1878 (41 and 42 Vict. cap. 78), after nine o’clock at night, from the first day of April to the first day of October, and after seven o’clock at night, from the first day of October to the first day of April.”

¹ The following authorities were referred to:—Craig v. Greig & Macdonald, July 18, 1863, 1 Macph. 1172; M’Lennan v. Waite, June 28, 1872, 10 Macph. 908; Inspector of Poor of St Cuthbert’s v. Inspector of Poor of Cramond, Nov. 12, 1873, 1 R. 174; Greig v. Ross, Feb. 10, 1877, 4 R. 465; Parochial Board of Elgin v. Parochial Board of Kinloss, June 1, 1893, 20 R. 763.

Nov. 2, 1907. decision in *Craig v. Greig & Macdonald*,¹ because here is a child, with her father dead, who, since the time of the father's death, and at her puberty, acquired a residential settlement. Now, the only thing that is said to prevent the application of the decided case is that, since the time of the decision, the Education Act of 1901 has been passed. The Education Act of 1901, by the first section thereof, makes it the duty of every parent to provide efficient elementary education in reading, writing, and arithmetic for his children who are between five and fourteen years of age. Accordingly, the second section prohibits persons from taking into their employment children being of the age of twelve and not more than fourteen, who have not obtained an exemption from the School Board. It is argued that, because of that Act, there is, therefore, a disability upon a female child who, although of the age of puberty, that is to say over twelve, is still under fourteen, doing those things which really go to the acquiring of a residential settlement.

Govan Parish
Council v.
Glassary
Parish
Council.
—
Ld. President.

It would be a very curious result if it were so, because undoubtedly I think it is easy to say that the Legislature, in passing the Education Act of 1901, had not the remotest notion that they were dealing with the poor-law. I do not think any such result follows, for a very simple reason. It has been said again and again—alas, too truly—that all these poor-law rules embodied in the decisions are artificial to the highest degree. How artificial in cases of this sort can easily be gathered when one thinks how practically impossible it is for a female child of twelve years of age to earn its own livelihood. But there is the rule, artificial as it is, that when the father is dead, and the child is emancipated and comes to the age of puberty, it is in a position in which it is theoretically supposed to be earning its own livelihood. Therefore, I think the answer to the argument is a very easy one, that although the Act imposes certain duties upon parents to provide the child with elementary education, it does not affect the theoretical capacity of the child to earn its own livelihood. The practical capacity, as I understand, in 999 cases out of 1000 is not there, although, theoretically, it is. One can conceive of a child, who, for some reason or other, was so gifted as to be able to perform upon an instrument such as the violin, and who, at such tender years, could make sufficient money to earn her own livelihood, and who, at the same time, might have quite enough hours of the day which she might devote to reading, writing, and arithmetic. But the answer is a simple one—that the Act which has been quoted has really nothing to do with the subject which is before us. Accordingly, I am for answering the first branch of the first question in the affirmative and the first branch of the second question in the affirmative also.

LORD DUNDAS.—The question raised in this special case is a very short one, and (although it has to deal with a poor-law settlement) I think it is a very simple one. The first parties maintain that, in consequence of the Education (Scotland) Act, 1901, no child can now be held to become capable of acquiring an independent settlement until it has attained the age of fourteen; and they seek to apply that doctrine to the effect that, in the

¹ 1 Macph. 1172.

case of females, the age at which they become capable of acquiring such a settlement has been altered from twelve to fourteen. I think that contention is unsound. The Act 1 Edw. VII. c. 9, is entitled "An Act to regulate the Employment and Attendance of Children at School in Scotland." It is an Education Act pure and simple. It does not profess in any way to deal with the poor-law, nor can it, in my judgment, be held to do so by any reasonable implication. I think it is plain, as your Lordship has pointed out, that the statute relied upon has nothing at all to do with the subject of the poor-law. We must therefore, in my opinion, negative the contention of the first parties, and I agree that the questions should be answered as your Lordship proposes.

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Lord Dundas.

LORD MACKENZIE.—I concur.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

LORD KINNEAR was absent.

THE COURT answered the first branch of each question in the affirmative.

MACKENZIE, INNES, & LOGAN, W.S.—R. ADDISON SMITH & Co., W.S.—Agents.

LEGGAT BROTHERS, Pursuers (Reclaimers).—*Hunter, K.C.*—*Macmillan.*

No. 18.

GEORGE GRAY, Defender (Respondent).—*M'Clure, K.C.*—*Constable.*
MOSS' EMPIRES, LIMITED, Arrestees.

Nov. 5, 1907.

Leggat
Brothers v.
Gray.

Arrestment—Arrestment ad fundandam jurisdictionem—Arrestment of debt paid by cheque received before but cashed after arrestment—Bank Cheque—Payment.—A Glasgow firm brought an action in Scotland against Gray, an Englishman, after having used arrestments to found jurisdiction in the hands of a Scotch company, Moss, who were alleged to be due a sum of money to Gray. Gray had already received from Moss a cheque on a Glasgow bank for the amount due, which he indorsed for value prior to the arrestment. The cheque was not presented for payment by the indorsee till the day after the arrestment. It was then duly paid.

Held that delivery of the cheque by Moss to Gray operated as instant payment of the sum due to him by Moss, that consequently, at the time when the arrestments were used, there was no fund in the hands of Moss which could be attached, and that jurisdiction had not been effectually constituted.

Observed that although an arrestment *ad fundandam jurisdictionem*, after creating jurisdiction, leaves no *nexus* over the property arrested, yet such an arrestment to be effectual must be laid on property which would be arrestable in execution.

In June 1906 Messrs Leggat Brothers, printers, Glasgow, raised an action of payment in the Court of Session against George Gray, residing in London, after having, on 14th June, in order to found jurisdiction, used arrestments in the hands of Moss' Empires, Limited, a Scottish registered company. On 10th July 1906 decree in absence was pronounced against Gray, and on 8th September 1906 Leggat Brothers having used arrestments in the hands of Moss' Empires in execution of the decree, raised the present action of furthcoming, to which they called as defenders Moss' Empires, Limited, arrestees, and George Gray, principal debtor.

1st Division.
Lord Ardwall.

Nov. 5, 1907.

Leggat
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Gray.

The action was defended by Gray on the ground that the arrestments to found jurisdiction in the original action were inept, and that consequently the decree therein obtained, upon which the arrestments in execution proceeded, was also inept.

The defender's averments were to the following effect: During the week ending Saturday 16th June 1906 he was fulfilling an engagement with Moss' Empires in Glasgow, and he applied to the chief accountant of the Company in London for payment of his salary in advance. In response to this request the chief accountant, by letter, dated 13th June, forwarded to the manager of the Company in Glasgow a cheque on the Commercial Bank, Limited, Glasgow, directly in favour of the defender for the amount of his salary, which was the only sum due to him by the Company. The defender received the cheque from the Glasgow manager on the morning of Thursday, 14th June, and before 2.30 P.M. on the same day indorsed the same and handed it for onerous consideration to a friend, Edward Cosens, who cashed it on the following day. The arrestment to found jurisdiction was not laid on until 4.20 P.M. on the afternoon of Thursday, 14th June, by which time there were no funds belonging to the defender in the hands of the arrestees, and consequently nothing which could be attached by diligence.

The pursuers did not deny that the arrestments were laid on at the time stated by the defender, and that he received a cheque from Moss' Empires, but they denied that he received the cheque on the morning of Thursday, 14th June, and on the contrary averred that it did not reach him until the morning of the following day, and that consequently, when the arrestment was laid on, he had not received payment of his salary, which still remained in the hands of the arrestees.

The pursuers pleaded;—In virtue of the decree and arrestments libelled, the pursuers are entitled to decree as concluded for, with expenses.

The defender pleaded;—The decree libelled having been pronounced, and the arrestments libelled having been used by the pursuers without effectually constituting jurisdiction over this defender, and being therefore wrongous and inept, this defender should be assoilzied, with expenses.

After a proof the Lord Ordinary (Ardwall) assoilzied the defender, holding that the arrestment *ad fundandam jurisdictionem* had been inept in respect that the cheque was received and indorsed before the arrestments were laid on, and that they did not attach any fund belonging to George Gray.*

The pursuers reclaimed, and argued;—Upon the evidence it was proved that the defender did not receive the cheque till the 15th, and that when the arrestments were used on the 14th, his salary was still in the hands of the arrestees. But even assuming it to be the case that the defender received the cheque on the morning of the 14th, it was not cashed till the following day, until which date the defender's salary remained unpaid. The receipt of a cheque did not of itself operate payment to the effect of extinguishing the debt, which, on the contrary, remained due until the cheque was cashed.¹ There was no assignment of the funds of the granter until the cheque was pre-

* As the legal questions raised in the Inner-House were not argued before the Lord Ordinary, it is unnecessary to refer to his note.

¹ Cohen v. Hale, 1878, 3 Q. B. D. 371.

sented for payment, and till then it was no more than a means of Nov. 5, 1907.
 procuring payment, not payment itself.¹ Accordingly, when the
 arrestment in question was laid on, there was, in the full sense of the ^{Leggat}
 term, a debt due to the defender, which could have been taken in ^{Brothers v.}
 execution. In any event, even after the cheque was received, there ^{Gray.}
 remained in the arrestees a contingent liability in the event of the
 cheque being dishonoured; the indebtedness had not been wholly and
 irrevocably extinguished, and this was sufficient to validate the arrest-
 ment. An arrestment *ad fundandam jurisdictionem* created no *nexus*
 over the property arrested,² and consequently it was immaterial
 whether or not the subject arrested ultimately proved worthless. It
 was enough if, at the moment of arrestment, there was even a potential
 relationship of debtor and creditor between the arrestee and the prin-
 cipal debtor. The arrestment in question was accordingly valid, and,
 if so, the pursuers were admittedly entitled to decree.

Argued for the defender;—On the evidence it was established that
 the cheque was received on the 14th June, and, in law, this amounted
 to payment of the debt. A debt could be discharged in other ways
 than by payment in legal tender. According to the ordinary course
 of mercantile dealings, and according to the intention of parties in the
 present case, payment by cheque was equivalent to payment in cash,
 and extinguished the debt.³ In any event, after the defender had
 indorsed the cheque to Cosens, which he did before the date of the
 arrestment, it could not be denied that he had received payment of
 his debt by means of the cheque, seeing that he had parted with it for
 valuable consideration, and had no longer any claim under it, a cheque
 being a negotiable instrument, and the title to sue upon it having
 passed to the indorsee.⁴ Admittedly, if the cheque was dishonoured,
 the debtor's liability revived, this being the resolute condition upon
 which payment by cheque was considered to satisfy the debt.⁵ Further,
 if the cheque were stopped by the debtor—a thing which he was
 under no obligation to do even if the debt were arrested in his hands
 before the cheque was cashed⁶—it might be that the arrestment
 would attach funds still in the hands of the debtor,—and that was
 all that was established by the case of *Cohen*⁷ relied on by the pur-
 suers. But that had no bearing on the case where, as here, the cheque
 was not stopped, but, on the contrary, was duly presented and cashed.
 The liability of the arrestees to make repayment of the debt in an
 event which never occurred, was not a subject which was capable of
 arrestment, seeing that, had it been made the subject of an arrestment

¹ Bills of Exchange Act, 1882 (45 and 46 Vict. cap. 61), secs. 53 and 74.

² *North v. Stewart*, July 14, 1890, 17 R. (H. L.) 60.

³ *Carter v. Johnstone*, March 5, 1886, 13 R. 698; *Glasgow Pavilion, Limited, v. Motherwell*, Nov. 18, 1903, 6 F. 116; *Bell's Comm.* ii. 202, 203; *Bell's Prin.*, sec. 2327; *Pearce v. Davis*, 1834, 1 Moody & Rob. 365; *Carmarthen, &c., Railway v. Manchester, &c., Railway*, 1873, L. R., 8 C. P. 685; *Chitty on Contracts* (14th ed.), 628; *Byles on Bills* (16th ed.), 24.

⁴ *M'Lean v. Clydesdale Bank, Limited*, March 2, 1883, 10 R. 719, aff. Nov. 27, 1883, 11 R. (H. L.) 1.

⁵ *Belshaw v. Bush*, 1851, 11 Scott's C. B. Rep. 191, at p. 207; *Currie v. Misa*, 1875, L. R., 10 Ex. 153, at p. 163; *Stott v. Fairland*, 1883, 53 L. J., Q. B. 47; cf. *Hall v. Pritchett*, 1877, 3 Q. B. D. 215.

⁶ *In re Palmer*, 1881, 19 Ch. D. 409; *Elwell v. Jackson*, 1884, 1 Cab. & El. 362.

⁷ 3 Q. B. D. 371.

Nov. 5, 1907. in execution, it would have produced nothing which could have been made available to the creditor using the arrestment. That was the true test in the question whether a subject was arrestable to found jurisdiction, even though it is true that an arrestment to found jurisdiction created no *nexus* over the subject arrested.¹

Leggat
Brothers v.
Gray.

At advising,—

LORD PRESIDENT.—Mr Gray, who is the defender in this action of furthcoming, granted a guarantee in favour of Messrs Leggat Brothers, the pursuers, for a debt due to them by one Mussett. Mussett had not paid his debt, and Messrs Leggat were anxious to raise an action against Gray upon the guarantee, Gray having refused to pay without legal process. Gray was an Englishman, and not subject to the jurisdiction of the Scottish Courts, and accordingly Messrs Leggat sought to subject him to the jurisdiction of the Scottish Courts by arrestments *ad fundandam jurisdictionem* in the hands of Moss' Empires, Limited, a Scottish registered company, who owed Gray money from time to time in respect that Gray was a person who took engagements with Moss' Empires. With that purpose Messrs Leggat used arrestments in the hands of Moss' Empires, Limited, at 4.20 P.M. upon Thursday, 14th June. The arrestment was immediately followed by service of the action, and in that action Messrs Leggat eventually obtained a decree in absence. They subsequently on the dependence of the action arrested other sums of money, and the present action is one of furthcoming as regards the sums of money so arrested. The defence to the action is that there was no jurisdiction in the action in which decree was got, and the defence of no jurisdiction admittedly depends on whether the arrestments *ad fundandam* were good or not. There is a good deal of controversy as to the precise state of the facts, but in order to see the questions that arise, I may take first what is common ground between the parties. There is no doubt that during the week, which began on Monday the 11th and ended on Saturday the 16th of June, Gray was fulfilling an engagement for which Moss' Empires would owe him a salary, and in ordinary course the salary would have been paid at the end of the week. There is no doubt also that Gray, having had a hint that it was possible that he might be proceeded against under this guarantee, had telegraphed to Moss' head office in London requesting that his salary might be paid before the usual day; and there is no doubt that, acceding to that request, Moss' Empires' office in London sent, during the course of the week, a cheque made out directly to Gray, which they addressed to the Glasgow manager, Mussett, with directions to him to hand it over to Gray.

Now, the controversy on the facts is when that cheque arrived and was handed over. Gray says that it arrived on the morning of Thursday the 14th, and that it was then handed over by him to a certain friend of his, Cosens, for value, the value consisting partly in a sum which he had already received from Cosens, and partly in an undertaking on Cosen's part to give him the balance of the cheque. Leggat Brothers, the pursuers, on the other hand, contend that the cheque was not received until the morning of Friday

¹ North v. Stewart, 17 R. (H. L.) 60; Craig v. Brunsgaard, Kjosterud & Co., Feb. 7, 1896, 23 R. 500.

the 15th, and was then handed to Gray. It is common ground between Nov. 5, 1907. the parties that the cheque, as a matter of fact, was cashed in the early morning of Friday the 15th, although there is again a discrepancy of statement, the pursuers saying that it was cashed by Gray himself, and the defender saying that it was cashed by Cosens. As I have already said, the arrestments were laid on at 4.20 on Thursday afternoon, and the question arises whether at that time there was anything to arrest.

We had a very satisfactory and good argument from the bar in this case, and a point has been raised in the Inner-House which does not seem to have been argued before the Lord Ordinary, and which logically comes first, because if the decision on it were to go in a certain way it would make inquiry as to the disputed facts unnecessary. The pursuers who, of course, are contending for the validity of the arrestments, say that even supposing the defender's story were correct, i.e., that the cheque arrived on Thursday morning and was indorsed or handed to someone else even for value on that Thursday, yet, inasmuch as it was admittedly not cashed until Friday, therefore at a quarter past four on Thursday afternoon there was still a debt owing by Moss to Gray. In other words, they say that the effect of handing the cheque by the debtor to the creditor is not to operate payment, but that the relation of debtor and creditor still exists until the cheque is cashed and the creditor, either directly or through someone else, gets possession of the money.

In order to investigate that question I think it is first of all necessary to clear one's mind upon the true nature of an arrestment. There is a great deal of authority, and there has, at one time or another, been a good deal of controversy upon the precise nature of an arrestment *ad fundandam*. I am not going through all these authorities to trace the development of the doctrine, but I think I am correctly summarising them when I say this. All admit that the proceeding is exceedingly anomalous. Nobody exactly knows what was its historical origin, but I think that while there has been perhaps a vacillation of opinion as to whether an arrestment *ad fundandam* does or does not create a *nexus* upon the property arrested, the opinion has come to be quite settled that although no *nexus* is created—at least after jurisdiction is founded and the action has commenced—yet the origin of the whole proceeding can be traced to the idea that, when the arrestment was laid on, there was some property to be taken in execution.

I think the authority which most directly supports what I am now saying is the case of *Trowsdale's Trustee v. Forcett Railway Company*.¹ The question there was as to the class of subject that was arrestable. The Lord Justice-Clerk there says²:—"It is perfectly true that in point of fact an arrestment *ad fundandam* does not fix the subject arrested within the jurisdiction, for the arrestee may safely part with it, and it so far differs from an arrestment in execution; but it does not follow, and is not in my opinion the law, that there is any difference between the two kinds of arrestment in regard to the subjects arrestable. I know no better statement of the law than is to be found in the opinion of Lord Corehouse (concurring in by a

¹ Nov. 4, 1870, 9 Macph. 88.

² 9 Macph., at p. 92.

Nov. 5, 1907. number of other Judges) in the case of *Cameron v. Chapman*,¹—‘If,’ says Lord Corehouse, ‘an arrestment *jurisdictionis fundandæ causa* was, as the defenders assume, a process by which a moveable subject is fixed down in this country, and rendered, in so far as jurisdiction is concerned, the same in all respects as a heritable subject, there might be some plausibility in their argument. But assuredly that is not the case. . . . It is not necessary to inquire on what principle the custom is founded of arresting moveables to found the jurisdiction against their owner, being a foreigner. It is plainly in opposition to the general doctrine both of the Roman law and modern jurisprudence, both of which admit the maxim *actor sequitur forum rei*. It was borrowed in Scotland from the law of Holland, where, as Voet observes, it had been introduced, contrary to principle, from views of expediency, and for the encouragement of commerce. We are of opinion, therefore, that it must not be carried further in any case than is expressly warranted by authority and precedent.’” In the same case of *Trowsdale’s Trustee*² Lord Neaves, after also observing that this arrestment is an exception to the rule that a creditor must go to the *forum* of his debtor, and that it had been introduced gradually, says³:—“The principle rests on the fact that there is something within the jurisdiction of the Court which can be specifically taken in execution of any decree which may be pronounced.” And accordingly the Court held in that case that there could not be an arrestment *ad fundandam* founded on the arrestment of books and papers, because these were not articles which could be taken by diligence.

I do not find that there is any subsequent authority which in any way infringes the authority of *Trowsdale*,² and in particular, I do not find anything inconsistent with that in a judgment, which is, of course, of paramount weight and authority—the judgment of the House of Lords in *North v. Stewart*.⁴ Lord Watson there also refers to the earlier history of arrestments, and says:—“The sole purpose and effect of an attachment”—that is the modern form of arrestment *ad fundandam*—“is to fix the locality of the subjects arrested in Scotland, and thereby to render their foreign owner liable to be convened in a process issuing from the Court of Session at the instance of the arrester for recovery of a personal debt. As soon as the foreign owner has been duly made a party to that process, the arrestment is spent, and the arrestee is no longer, as in a question with the arrester, under any obligation to retain in his hands the moveables which it affected.” But that is entirely consistent. In other words the doctrine, which after a certain amount of doubt, especially, I think, as shewn in the case of *Malone & M’Gibbon v. The Caledonian Railway Company*,⁵ may now be held to be firmly established by the case of *North*⁴—the doctrine, namely, that an arrestment *ad fundandam* does not create a *nexus* as against the arrestee which prevents him from parting with the subjects—that doctrine is perfectly consistent with the other doctrine that the origin of the process was the idea that there should be property which could be taken in execution; and consequently, when you are considering whether a subject is arrestable

¹ 16 S. 907, at p. 918.

² 9 Macph., at p. 95.

³ 11 R. 853.

⁴ 9 Macph. 88.

⁵ 17 R. (H. L.) 60.

to found jurisdiction, as was being considered in the case of *Trowdale's* Nov. 5, 1907. *Trustee*,¹ the true criterion is whether the subject is something which, if it were arrested in execution and the diligence were worked out, could be made available by the creditor in the debt. Leggat
Brothers v.
Gray.

Now, I find the same idea developed in the *dictum* of Lord Kinnear in the case of *Lucas' Trustees*.² His Lordship there says³:—"An arrestment and furthcoming is an adjudication preceded by an attachment, and the essential part of the diligence is the adjudication. It follows that an arrestment is futile unless it can be followed up and the diligence worked out by a decree effectually transferring from the common debtor to the arresting creditor the obligation which was originally prestable to the former by the arrestee. The proceedings for this purpose may vary according to the nature of the debt." Now, no doubt, in that case his Lordship is speaking of furthcomings upon arrestments which had been used in dependence. But if, as I have submitted to your Lordships, the origin of the arrestment *ad fundandam* rested upon the same principle, then the test, which is a good test for an arrestment in execution, is an equally good test for an arrestment *ad fundandam*. That being so, and assuming the facts to be as stated by the defender, I come to the question whether there was anything in this case which could have been made available to a creditor by the arrestee. That is to say, Moss' Empires having by the time when the arrestment was laid on sent a cheque in payment of their debt which had been received by Gray, was there anything resting owing by Moss to Gray which could have been made available in execution? I am bound to say I think clearly not. I think that really the question here resolves itself into one of ordinary mercantile dealing. In one sense, there can be no payment except in legal tender duly received, but in another sense there can be payment, and there is payment every day, which is made otherwise than by legal tender. The most familiar instance is payment by bank-notes—by any bank-notes in Scotland, and by bank-notes other than Bank of England notes in England. That is an ordinary and common form of payment. Well, in modern times I think it is an equally common form of payment to pay by a cheque upon the debtor's own bank account. A cheque, after all, is merely an order on a third person to pay, and it is very analogous to an order on a third person to hand over hard cash. It is perfectly true and quite obvious that when a creditor takes a cheque he takes it on the hypothesis that the cheque is going to be honoured, but if when he goes to the bank the cheque is not honoured, either by the bank refusing to pay, or by the bank being unable to pay, as would be the case if it had stopped payment in the interval, then there is no question that he would still have an action against his original debtor. But I do not think that that very obvious consideration creates any difficulty or alters the state of affairs when a cheque is ordinarily taken in payment. I do not know that it is necessary to refer the matter to any particular legal category, but if it is, I should rather suppose that the honouring of the cheque was a condition resolute,

¹ 9 Macph. 88.

² *Lucas' Trustees v. Campbell & Scott*, July 20, 1894, 21 R. 1096.

³ 21 R., p. 1103.

Nov. 5, 1907. and that if payment of the cheque failed to be made, the effect would be that no payment had been made, and the original debt would be set up again. But I am really not concerned as to whether that, which is after all a mere theory, is right or not. The point remains that according to ordinary commercial practice payment by cheque is recognised, and it seems to me that payment is complete the moment that the creditor has accepted the cheque as in payment, subject always to the condition that the cheque will be met when presented.

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Gray.

Ld. President.

I have put the matter upon what I think are the ordinary rules of mercantile dealing, but such authority as there is points in the same direction.

I refer particularly to two cases which were quoted to us at the Bar. The first case was that of *Carter v. Johnstone*,¹ where a distinction is made most markedly between the handing over of a person's own cheque and the indorsing of other people's cheques in which he was the payee, and it was held that one was struck at by the Bankruptcy Act, while the other was saved as a cash payment. Lord Shand after speaking of actual cash payments says:—"It is quite true that certain equivalents to cash payments have been recognised, and in practice at least have been understood to be effectual and not struck at by the statute. A draft or order purchased from a banker and transmitted to a creditor in another town, and a debtor's cheque on his own banker . . . have all been regarded as equivalents for cash payments, or different forms of making cash payments." And Lord Adam in the same case says:—"It is said that these indorsements were granted in the ordinary course of trade, and that a bank cheque on a man's own bank being equivalent to cash, the rule should be extended to such a case as the present. The two cases, however, are very different; in the first place, in actual business a draft on a man's own banker is universally held to be equivalent to a cash payment." The second case was that of the *Glasgow Pavilion, Limited*,² where Lord Young says:—"Now, that payment by a cheque which is accepted and duly honoured is a payment in cash, as the expression is used in our law, is, I think, a question not capable of being easily disputed. No creditor is bound to receive payment of a debt due to him by cheque or otherwise than in the current coin of the realm. A creditor may even refuse to accept Scottish bank-notes, and insist on his debtor bringing him current coin of the realm to the amount of his debt. Nevertheless, if he choose to accept these bank-notes in payment, I do not think it is capable of being disputed that he would be held, according to our law and practice, to have been paid in cash. In the same way if he receives, although not bound to do so, a cheque from his debtor, and gives him a receipt for the sum contained in the cheque, that is regarded as a payment in cash if the cheque is duly honoured, and the payment in cash is not at the date of the honouring of the cheque, but at the date of its receipt by the creditor." That seems to me precisely to meet the case in point. Although there the Court was dealing with the application of the principle to a different matter—namely, the question whether the directors of a company before proceeding to allotment had received payment of the requisite

¹ 13 R. 698.

² 6 F. 116.

sum in respect of the shares applied for, yet I do not think that the difference of application makes any difference to the doctrine. Nov. 5, 1907.

Certain English authorities were quoted to us. One of them seemed at first sight to be adverse to the opinion I have expressed—I refer to the case of *Cohen v. Hale*¹—but I have come to be satisfied that it is not. That was a case where there was a garnishee order, which is very analogous to an arrestment. The question came to be whether the garnishee order had attached anything. In that case the garnishees had granted a cheque in payment of the debt, but the cheque was stopped before it was presented. The whole point of the judgment is that when a cheque is stopped it is as if it had never existed, and that does not of course touch the question of what is the effect when the cheque is not stopped, but, on the contrary, passes into the hands of the person to whom it is made out and is eventually cashed. I think the matter is made quite clear by the decision in the case of *In re Palmer*,² where it was held that there was no duty in a person who had given a cheque to stop it in the interests of any other creditors. As little can there possibly be a duty in the interests of those who wish to do diligence. Accordingly, upon this part of the case I am clearly of opinion that, assuming the cheque to have been received by Gray on the morning of Thursday the 14th, that paid the debt subject to the condition that the cheque should be honoured, which it was. Accordingly, at twenty minutes past four on Thursday afternoon there was no debt due by Moss to Gray, and therefore nothing which could have been made available in a forthcoming if there had been an arrestment in execution in Moss' hands. That being the proper criterion to apply in considering whether or not there was a good arrestment *ad fundandam*, it follows that the arrestment which was laid on was inept.

Now, that being so, it becomes necessary to consider the facts of the case, because it is obvious that if as a matter of fact the cheque did not reach Gray till the Friday morning, then at the time of the arrestment on Thursday afternoon there was something which was due to Gray by Moss. Nobody supposes that payment is made simply by drawing out a cheque and putting it into the post; there must be reception by the creditor as well as despatch by the debtor. The case here is one that I confess is full of difficulty, and it is full of difficulty because there are very trenchant criticisms which can be made either upon the one story or upon the other; and these criticisms very nearly balance. As I said already we have had a most excellent argument from the Bar which gave us great assistance. I do not disguise that I have had considerable difficulty in making up my mind upon the matter, but in the end I have come to the conclusion that the Lord Ordinary is right.—(His Lordship proceeded to examine the evidence regarding the date at which the cheque was received.)

I therefore come to the conclusion that it would certainly not be wise to disturb the findings in fact of the Lord Ordinary, who after all has seen the witnesses and heard the evidence. If Cosens and Gray are speaking the truth, there can, of course, be no question as to what is the true state of the case. Upon the whole matter, therefore, I am of opinion that we should adhere.

¹ 3 Q. B. D. 371.

² 19 Ch. D. 409.

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LORD KINNEAR.—The question of difficulty in this case is one of fact, and as that depends on a conflict of testimony, in the course of which each side charges the witnesses of the other with perjury, I should be very slow to differ from the Lord Ordinary, who heard the witnesses, and has given us his opinion upon their credibility. But looking at the evidence independently as we are bound to do, as if it were brought before us for the first time, I have come to the same conclusion as your Lordship, and for the same reasons. I agree with the Lord Ordinary and with your Lordship, and do not repeat the considerations upon which, I think, that conclusion is justified. I, therefore, take the fact to be that the defender received a cheque from the arrestees in payment of the debt on 14th June, and that the arrestments founding jurisdiction were not used until a later hour of that day. The question therefore is, on that assumption as to fact, was there anything arrested, and I am of opinion with your Lordship that there was nothing. We had a very interesting discussion as to whether the delivery and acceptance of a cheque really extinguished the debt during the interval between its acceptance and the payment of the money by the bank ; but I confess to thinking that the interest of the question is rather abstract and logical than practical. As between a debtor and a creditor the delivery of a cheque payable on demand is, according to the intentions of both parties, payment of the debt ; and it is in fact as well as in intention payment, if there is in truth money in the bank to pay it, and it is cashed. It is beyond all question that Moss intended to pay the defender, and the defender intended to take payment, by cheque payable on demand, and, further, that when the cheque was presented it was duly cashed. As between the debtor and the creditor that seems to make an end of the whole matter. I do not think it is material to consider whether, according to one argument, the payment by cheque is a conditional payment suspended in its full operation until the cheque is cashed, or whether, according to the other view, it merely suspends the creditor's remedies until it is seen whether the cheque will be honoured or not. In either view, there may be a contingent liability still in the debtor if it should turn out that the cheque is not cashed. The question is whether that contingent liability is a proper subject for the diligence of arrestment or not. Now, it appears to me to be perfectly clear that if the arrestment now in dispute had been an arrestment in execution, it would have been inept. There was no interest of the defender's in the hands of the arrestees except, if it be an exception, a potential claim against them on a contingency which did not happen, and which was dependent upon conditions of fact which it is now certain never existed. He might have had a claim if the cheque had been dishonoured, but it was not ; and if that potential claim had been arrested it would have attached nothing, because it would have been perfectly obvious as soon as the arresting creditor proposed to carry his diligence into operation by forthcoming that there was nothing in the hands of the arrestee at the time, the possible contingency on which there might have been something not having happened.

I, of course, keep in view what your Lordship has explained—the distinction between arrestments in execution or on the dependence and arrestments for founding jurisdiction, and we must take it as now settled in law

that an arrestment for founding jurisdiction really attaches nothing. But, Nov. 5, 1907. then, it does not follow that such an arrestment will be good if, in fact, ^{Leggat} there is nothing to attach. I think the contrary is the law, because, although ^{Brothers v. Gray.} there is no actual *nexus* laid upon moveables or debts that are arrested for founding jurisdiction, still in order to make the arrestment effectual at all, ^{Lord Kinnear.} it must bear to attach something which is properly subject to diligence. I cannot find in any of the cases that it has ever been suggested that an arrestment for founding jurisdiction will be good although the subject which it bears to attach was not attachable by arrestment in execution. I think the authority of the case of *Trowsdale's Trustee*,¹ to which your Lordship referred, is conclusive to the contrary. The doctrine is that, whatever be the origin of arrestment for founding jurisdiction, it proceeds upon the hypothesis that there is in fact something within the jurisdiction of the Court which can be specifically taken in execution of any decree which may be pronounced. I think it is a good test of the validity of an arrestment for founding jurisdiction to inquire whether it purports to affect any property or fund which could be taken in execution.

Now, as I have said, it seems to me perfectly clear that if the arrestment now in question had been an arrestment in execution, or if it had been followed up by arrestment on the dependence of the action, nothing would have been attached, and for that reason and others which your Lordship has given, I am of opinion that this arrestment is altogether inept. If there be any novelty in the question as actually raised (and I think there is, because so far as direct authority goes it is a new point whether this was or was not an effectual arrestment *ad fundandam*), then I think the rule for our decision is furnished by the opinion of the whole Court in *Cameron v. Chapman*,² in which Lord Corehouse, after pointing out the opposition between the doctrine of a jurisdiction founded on the arrestment of moveables and the general principles of jurisdiction both in our own law and in the Roman law, goes on to say that while an artificial method has been so established, the Court are of opinion that it must not be carried further in any case than is expressly warranted by authority and precedent. Now, I think we are asked to carry it further in this case than it has ever been carried in any previous decision, so far as I know or counsel at the Bar were able to inform us. I therefore agree that we should adhere to the Lord Ordinary's interlocutor.

LORD DUNDAS.—I am entirely of the same opinion and upon the same grounds. Your Lordships have dealt with the case so exhaustively both as regards the law and as regards the facts, which I think present more difficulty than the law, that it would be idle for me to attempt to add further words on my own behalf.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

THE COURT adhered.

MACPHERSON & MACKAY, S.S.O.—BLAIR & CADELL, W.S.—Agents.

¹ 9 Macph. 88.

² 16 S. 907.

No. 19.

MARMOR, LIMITED, Pursuers (Respondents).—*Dickson, K.C.*—*J. G. Jameson.*

Nov. 7, 1907.

WILLIAM HENRY ALEXANDER, Defender (Reclaimer).—*Hunter, K.C.*—
*Horne.*Marmor,
Limited, v.
Alexander.

Company—Directors' Remuneration—Directors' Expenses—Expenses of travelling to and from Board Meetings—Illegal Payments.—The articles of association of a limited company, after providing for the remuneration of the directors, further provided that the directors "shall be indemnified out of the funds of the company against all costs, charges, losses, damages, and expenses which they shall respectively incur and be put to in the execution of their respective offices."

In an action at the instance of the company against a director for repayment of sums paid to him as his expenses in travelling from his home in Scotland to attend the meetings of the board in London, *held* that these expenses were not incurred by the director in the execution of his office, and that consequently the payments made to him were illegal and fell to be refunded.

1st DIVISION.
Lord Dundas.

ON 19th June 1907 Marmor, Limited, a company incorporated under the Companies Act and having its registered office in Finsbury Square, London, brought an action against William Henry Alexander, merchant, Glasgow, one of the directors of the Company, in which they concluded for payment (1) of the sum of £279, 6s., and (2) of the sum of £100. The sum first concluded for—viz., £279, 6s.—consisted of payments made by the Company to Mr Alexander on account of his travelling expenses between Glasgow and London, incurred in attending meetings of the board of directors in London. The sum second concluded for (with which this report is not concerned)—viz., £100—was alleged to be due upon certain shares that had been allotted to Mr Alexander. This action was raised by way of counter action to proceedings at the instance of Mr Alexander against the Company.

The pursuers averred that at a meeting of the directors, on 16th July 1902, at which Mr Alexander was present, a resolution was passed that travelling expenses should be paid to directors. Mr Alexander claimed travelling expenses for his attendance at thirty-eight meetings, at £7, 7s. for each attendance, amounting in all to £279, 6s., and this sum was subsequently paid to him. They further averred:—"The said resolution and the said payment were irregular, *ultra vires*, and illegal. The Company, its directors, and officers had no power to authorise or make any such payments. The board of directors acted in breach of their duty in sanctioning the said payment of travelling expenses. . . . The defender was not entitled to receive the said sum, and was acting in breach of his duty to the Company in accepting the same." In answer the defender averred:—"Denied. Explained that even if said payment was *ultra vires* of the Company, the action of the directors in authorising said payment is protected under the articles of association of said Company."

By article 77 of the articles of association of the Company it was provided that,—“The remuneration of the directors shall be a sum of £250 to the chairman and £200 per annum to each other director”; and by article 92 it was further provided that “the directors, trustees, and officers of the Company shall be indemnified out of the funds of the Company against all costs, charges, losses, damages, and expenses which they shall respectively incur and be put to in the execution of

their respective offices, or by reason or on account of any contract, Nov. 7, 1907. act, deed, matter, or thing which shall be made, done, permitted, entered into, or executed by them respectively on behalf of or *bona fide* Marmor, Limited, v. Alexander. in the interest of or with the view of benefiting the Company, notwithstanding that the same may be *ultra vires* in point of law."

The pursuers pleaded;—(2) The defender, while acting as director of the Company, having taken payment out of the Company's funds of the sum of £279, 6s. to which he was not entitled, the Company is entitled to repayment of the said sum, in respect that the said payment was illegal, *ultra vires*, and unauthorised.

The defender pleaded;—(5) The payment now challenged not being illegal or *ultra vires* of the Company, *et separatim* being protected by the articles of association of the said Company, the pursuers are not entitled to repayment of the sum claimed.

On 19th October 1907 the Lord Ordinary (Dundas) pronounced an interlocutor repelling, *inter alia*, the 5th plea in law for the defender, decerning and ordaining the defender to make payment to the pursuers of the sum of £279, 6s., and allowing proof before answer with respect to the conclusion for £100.*

Leave having been granted, the defender reclaimed, and argued that in terms of the articles of association the payment in question was not illegal. He also maintained that in any event the interlocutor, in view of the claim in the counter action, should have taken the form of a finding only.

Counsel for the respondents were not called on.

LORD PRESIDENT.—There are here two actions. The leading action was at the instance of Mr Alexander against a company called Marmor, Limited, and in it Mr Alexander sued for fees due to him as director. The defence was that he had already been paid, except as to a certain balance

* "OPINION.—The matter involved in the first conclusion of the summons may, I think, be disposed of upon the pleadings without the necessity of inquiry by way of proof. Payment to the defender of travelling expenses, though made and accepted in perfect *bona fides*, was, in my opinion, illegal. I find no warrant for it in the articles of association of the Company (No. 20 of process). By article 77 the 'remuneration' of each director (except the chairman) is declared to be £200 per annum. But the defender founds upon article 92, which, under the head of 'Indemnity to Officers,' provides that—[His Lordship quoted the passage from article 92 printed *supra*]. These words of indemnification are wide; but I do not think that expenses incurred by a director in arriving at the Company's board room to attend meetings (be the distance long or short) can be held to be expenses incurred by him in the execution of his office. Such expenses must, in my judgment, be included in the remuneration for which he agreed to give his services. The director, I take it, executes his office in the board room, but not on the way thither. It is, I consider, part of his ordinary duty, for which he is paid, to go to the place where the meetings are held. I should have come to this conclusion apart from authority, but I am fortified in it by the opinion of Farwell, J. (now L. J.), in the case of *Young*, 1905, 1 K. B. 687. The clause there under consideration is not, I think, materially different from article 92 of this Company's articles, and I assent to the general observations made by his Lordship as to the position and duty of directors in this matter. The case seems to be a hard one from the defender's point of view. But if my conclusion is sound, it follows that the Company is entitled to recover the sum (first) sued for. . . ."

Nov. 7, 1907. which was tendered ; but the true matter of dispute between the parties was whether, in an accounting between the parties, the Company were entitled to get back from Mr Alexander a sum of £279, 6s., which he had been paid in the name of travelling expenses, and also whether they were entitled to get from him a sum of £100 due upon certain shares which had been allotted to him. The Lord Ordinary held that these questions could not be raised by way of mere defence, but must be raised by counter action, and accordingly a counter action was raised by the Company against Alexander for these two sums. It is in that action that the operative decree of the Lord Ordinary has been pronounced. What his Lordship has done is, he has decerned against Mr Alexander for £279, 6s., and he has allowed a proof as to the £100. In the reclaiming note parties have agreed that there must be a proof about this matter of the £100, as to whether it has been paid or not ; but they are not at one about the £279, 6s.

Now, the first question that arises upon the £279, 6s. is whether the payment as originally made was an illegal payment. It is common ground that the travelling expenses in question are not travelling expenses incurred in any particular journey on which Mr Alexander was sent by the other directors, such as a visit of inspection to quarries or anything of that sort, but simply represent Mr Alexander's own expenses in arriving at the scene of the Company's meetings, the Company's meetings being held in London, whereas Mr Alexander lived in Scotland. It is also common ground between the parties that these expenses were authorised to be made by the directors, and that they have never been submitted to one of the authorising meetings of the Company. In these circumstances Mr Alexander pleads article 92 of the articles of association of the Company, which is in these terms :—"The directors, trustees, and officers of the Company shall be indemnified out of the funds of the Company against all costs, charges, losses, damages, and expenses which they shall respectively incur and be put to in the execution of their respective offices, or by reason or on account of any contract, act, deed, matter, or thing which shall be made, done, permitted, entered into, or executed by them respectively on behalf of or *bona fide* in the interest of or with the view of benefiting the Company, notwithstanding that the same may be *ultra vires* in point of law." I am clearly of opinion that these expenses do not come under either of these heads. I do not think that a payment to a director, in order to get from his own dwelling-house to where the Company has its meetings, is an expense which he is put to in the execution of his office. He only begins to execute his office for the Company at the directors' meetings. I am not doubting that a payment of travelling expenses could be perfectly well made to a director where the director, at the request of the other directors, undertakes any special visit of inspection, or undertakes to go anywhere where he would not naturally be in the interests of the Company. If, for instance, this Company had wished any of these quarries inspected, even if these quarries had been in Greece or any other far away part of the world, I do not doubt that it would have been a perfectly good charge to charge the travelling expenses of the director who was sent out there. But the ordinary expense which a man incurs in getting from where he himself chooses to live to the seat of the Company's business does not seem to me to be

expense that is incurred in the execution of his office at all. As little Nov. 7, 1907. could it be expense that falls under the second head, which truly deals Marmor, with another and different class of matter altogether. That means that Limited, v. if the directors or officers of the company have done something in the Alexander. interests of the Company *bona fide* they should be paid for the expenses Ld. President. that they have incurred in that, even although it may be afterwards found to be *ultra vires* of the Company. That has to do with a different category of circumstances. Therefore, I have come to the conclusion, without any difficulty, that we should start the matter by finding that these expenses were illegally paid by the directors to the particular director, and the consequence is that in a question with the Company he is bound to refund this illegal payment.

(His Lordship proceeded to consider another point raised in the case, and concluded)—Accordingly I think the Lord Ordinary has come to a right conclusion. As regards the actual form of the judgment he has made a decerniture for payment, which, of course, is not what was meant. I would advise your Lordships to recall the Lord Ordinary's interlocutor in so far as it decerns the defender to make payment to the pursuers of the sum of £279, 6s., and in lieu thereof find that the defender is bound to make payment, and *quoad ultra* adhere to the interlocutor.

LORD M'LAREN.—I agree with all that has been said by your Lordship in the chair. On the first branch of the case I think it is perfectly clear that directors' duties in general are to be performed at board meetings, for the business of directors of companies necessitates meetings for consultation, and the fees allowed to the directors cover the expenses of going to the board meetings. Of course, if a director is sent anywhere on a delegated duty, it is equally clear that he has to be paid his expenses, because I do not think that his colleagues would be able to secure the services of one of their number to go upon a distant journey except under the condition that he should be relieved of the expenses that he incurred in the interests of the company.

LORD KINNEAR.—I concur.

LORD PEARSON was absent.

THE COURT recalled the Lord Ordinary's interlocutor in so far as it decerned against the defender for payment to the pursuers of the sum of £279, 6s., and in lieu thereof found that he was bound to make payment of the said sum, and *quoad ultra* adhered.

BOYD, JAMESON, & YOUNG, W.S.—MORTON, SMART, MACDONALD, & PROSSER, W.S.—
Agents.

No. 20. BARCLAY, CURLE, & COMPANY, LIMITED, Petitioners.—*Dickson, K.C.*—*D. P. Fleming.*

Nov. 7, 1907.

Barclay,
Curle, & Co.,
Limited, v.
Sir James
Laing & Sons,
Limited.

SIR JAMES LAING & SONS, LIMITED, Respondents.—*Sol.-Gen. Ure*—*Clyde, K.C.*—*C. D. Murray.*

Sale—Transference of property—Ship—Property in ship in course of construction—Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71)—Arrestment—Recall.—A shipbuilder contracted to build a ship for an Italian firm of shipowners. The purchase price was to be paid by instalments at certain stages of the construction. The contract bore that the vessel should not be considered as delivered and finally accepted by the firm until it had passed a certain trial trip. When the ship was completed, and the greater part of the purchase price had been paid, but before the trial trip, the ship was arrested in the hands of the shipbuilders for a debt alleged to be due by the Italian firm to the arresters.

The shipbuilder presented a petition for recall of the arrestments, alleging that the property in the ship had not passed to the Italian firm.

Held that, under the Sale of Goods Act, 1893, the passing of the property depended on the intention of the parties as expressed in the contract, and, on a construction of the contract, that it was not the intention of the parties here that the property in the ship should pass until it was finally handed over to the shipowners, and arrestments recalled.

Arrestment—Recall—Recall at instance of arrestee—Process—Competency.—A petition for recall of arrestments at the instance of the arrestee is not competent (1) where the subject arrested is a debt or a sum due, or (2) where the subject arrested is a corporeal moveable which the arrestee admits is the property of the common debtor, but over which he alleges that he himself has claims; but such a petition is competent at the instance of the arrestee (3) where the subject arrested is a corporeal moveable which the arrestee does not admit is the property of the common debtor; and the arrestee will be entitled to have the arrestments recalled unless the arrester can establish a *prima facie* case that the subject arrested is the property of the common debtor.

Duffus & Lawson v. Mackay and Others, Feb. 13, 1857, 19 D. 430, commented on.

1ST DIVISION. ON 1st November 1907 Messrs Barclay, Curle, & Company, Limited, shipbuilders, Whiteinch, near Glasgow, presented a petition for recall of arrestments whereby Sir James Laing & Sons, Limited, Deptford Yard, Sunderland, on the dependence of an action by them against the Lloyd Sabaudo Società Anonima di Navigazione of Turin, had arrested in the hands of the petitioners two ships, the one designated by the No. 468, at that time lying in the graving dock at Glasgow, the other designated by the No. 469, at that time in the petitioners' ship-building yard, and also the sum of £221,000 stated to be due by the petitioners to the Lloyd Sabaudo Società, as well as all goods, gear, &c., in their hands belonging to the said Lloyd Sabaudo Società.

The ships in question were being constructed by Barclay, Curle, & Company for the Lloyd Sabaudo Società under a memorandum of agreement entered into between these firms, and dated 11th February and 11th March 1907. That agreement, after providing for the construction of the ships according to certain specifications, and fixing the dates for their delivery, contained the following provisions:—
“7. The vessels when completed to have steam trial or trials at sea off the Port of Greenock and adjacent coast. The cost of such steam trial or trials shall be at the builders' expense, they finding crew for the safe navigation of the vessels and for the engine department, also coal and engine stores, but the purchasers shall provide any cargo

which they consider necessary for the trial or trials, and shall pay any expenses incidental to loading same. Nov. 7, 1907.

"Delivery to be considered completed after the satisfactory official trial provided for, as follows :—

"After the steam trial off the coast of Greenock, mentioned above, the boats are to again undergo the official trial off the Italian coast, but all the cost of transporting the ships from Greenock, the costs of the official trial, including insurance, coals, oils, stores, port and harbour dues, and any further expenses attached thereto, to be borne by the purchasers.

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Curle, & Co.,
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Limited.

"The vessels will not be considered as delivered to, and finally accepted by, the purchasers until the said ships have passed the official trial trip in Genoa, have been approved in Genoa by the Italian Emigration Authorities, and all conditions of the contract have been fulfilled.

"8. On completion of each of the steamers at Greenock upon the terms and conditions aforesaid, the builders shall, in exchange for the purchase money due to them up to and including delivery instalment, and for a bank guarantee for the final instalment, hand over to the purchasers or their representative, the Builders' Certificate, British Lloyd's Certificate and Classification, Suez Canal Certificate, also Chain and Anchor, and other certificates as usual or necessary, or shall give an undertaking to hand over such certificates to the purchasers as soon as they are respectively received.

"9. The builders shall pay the British Lloyd and Registro Italiano classification fees, Italian Board of Trade measurement fees, and the launching dues, if any, as usual.

"10. The purchasers are entitled to appoint an expert to superintend the construction of the vessels and the machinery, and it is hereby agreed that no alterations or extra work are to be made or done or charged for without the consent in writing of the said purchasers, per their representative, specifying the extra sum to be paid, and the additional time agreed, for such alteration or addition.

"This clause is subject to special clause of the specifications.

"11. The steamers shall be at the risk of the builders until they finally leave the port of Greenock, up to which date the builders shall keep them insured against fire and other risks to an amount equal to the purchase money paid in advance."

The agreement also contained a provision that the ships should be constructed "with the midship section, profile, and deck plans approved by the British Lloyds and Registro Italiano and by the purchasers' expert."

The following statement was annexed to the agreement :—

"Statement of Prices of Steamers referred to in Contract of this date.

"First steamer, £——

"Second steamer, £——

"Payable in cash instalments as follows for each steamer :—

1. — on the signing of the contract.
2. — of balance when keel is laid.
3. — of balance when framed.
4. — of balance when plated.
5. — of balance when launched.
6. — of balance when handed over to owners after steam trials at Greenock.
7. — of balance, being the final instalment 6 months after delivery to owners at Genoa; this final instalment to

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bear interest from the date of delivery in Genoa until paid at the rate of 4 % (four per cent) per annum.

“ When the vessel is handed over to the owners at Greenock, the builders to give owners the builders’ and other certificates in exchange for the sixth instalment and a bank guarantee from the Società Bancaria Italiana or other bank of equal standing, to be mutually agreed upon, for the payment of the seventh instalment when it falls due.”

In their petition the petitioners averred :—“ The said ship No. 468 is due to leave the said graving-dock not later than the morning of Wednesday, the 6th November 1907, in order to undergo her trials off the port of Greenock, as provided for in article 7 of the agreement above set forth, and to leave the Clyde not later than Friday, the 8th day of November 1907, so that after her official trial at Genoa she may be delivered to and accepted by the Lloyd Sabaudo Company at Genoa ready to proceed on voyage, after time for loading, &c., by the 25th of November 1907. The ship No. 469 will, the petitioners anticipate, be completed about the month of January next. In terms of the said agreement, the said two ships are the property of the petitioners. The petitioners are not indebted in any sum to the said Lloyd Sabaudo Company, nor have they any goods, gear, &c. belonging to that Company.”

The petition was served on Sir James Laing & Sons only, and answers were lodged for them in which they averred that their claim against the Lloyd Sabaudo Società amounted to over £220,000, and further averred that “ by the agreement between the petitioners and the said Lloyd Sabaudo Company it is provided that the purchase price of the said vessels, Nos. 468 and 469, should be payable and paid by cash instalments at successive stages of their construction, all as therein set forth. It was further provided that the vessels should be constructed under the inspection and superintendence of a representative to be appointed by the purchasers. The above provisions of the contract have been duly carried out, and, in particular, the purchasers have made payment to the petitioners of the stated instalments as these became due. The amount of said instalments so received by the petitioners, viz, £221,000 or thereby, is presently in the hands of the petitioners. The respondents aver that under said agreement between the petitioners and the Lloyd Sabaudo Company it was the intention of parties, and it was agreed, that the property of the vessels under construction should vest in the purchasers during the progress of their construction, and that the property in said vessels, so far as constructed, is presently vested in the Lloyd Sabaudo Company. Said Company are not called hereto as respondents. In these circumstances the respondents submit that the petition is incompetent and ill-founded, and should be dismissed.”

The respondents objected to the granting of the petition, and argued ;—The petition was incompetent. A petition for recall of arrestments at the instance of the arrestee could not be considered unless the petitioner was able instantly to produce clear evidence that the property in the subject arrested was in himself. If there was a question as to the property, that question could not be appropriately tried in a petition for recall, but must be brought before the Court in an action of furthcoming.¹ Not only had the petitioners failed to

¹ Duffus & Lawson v. Mackay and Others, Feb. 13, 1857, 19 D. 430 ; Bildstein v. Bock & Co., June 15, 1872, 9 S. L. R. 512 ; Vincent v.

produce clear evidence that the property was in themselves, but the Nov. 7, 1907. contrary appeared from the terms of the contract. The contract provided for the inspection of the work done and the payment of instalments, and when that was so the property in the ship, so far as completed, passed on the payment of each instalment.¹ The effect too of the provisions of the Mercantile Law Amendment Act, 1856,² was to give to a purchaser a *jus ad rem*, and such a right was arrestable.

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Argued for the petitioners;—The property in these ships still remained with the petitioners. The mere payment of instalments did not cause the property to pass. The decision of the majority of the Court in *Simpson v. Duncanson*³ did not really turn on the question of property, and the erroneous view that had formerly been taken of that decision was commented on and corrected in *Seath v. Moore*⁴ and *M'Bain v. Wallace*.⁵ The materials used here were all the property of the petitioners, and that property remained with them unless clearly transferred.⁶ The law as to the passing of property now depended on the provisions of the Sale of Goods Act, 1893,⁷ in this case on secs. 5, 16, 17, 18, and 62 thereof. This was really a case of "future goods" as defined in that statute. In any event, the "intention" of the parties to this contract was clearly that the property should not pass till the ship was completed. The whole terms of the contract pointed to the fact that it was a contract for the sale of a completed ship only, and not for portions of a ship. If the contrary had been intended it should have been made clear in the contract. It was a great hardship that the petitioners should be prevented from handing over these ships when completed, and so getting payment of the large instalments still due. The arrestments therefore should be recalled, and, in view of the enormous sums claimed, without caution.

At advising,—

LORD PRESIDENT.—Sir James Laing & Sons, Limited, an English registered company, having an alleged claim against an Italian company called the Lloyd Sabaudo Società Anonima Di Navigazione of Turin, arrested two ships which were being built for that company by Barclay, Curle, & Company, Limited, a Scottish Company, the said ships being one in their yard in the Clyde, and the other in a graving dock in Glasgow; and the present petition is a petition at the instance of Barclay, Curle, & Company for the recall of the said arrestments, Barclay, Curle, & Company averring that the ships at this present moment are theirs, and do not as yet belong to the Italian Company, although they are admittedly being constructed upon the orders of that Company. So far as one of the ships is concerned, it is very

Chalmers & Co.'s Trustee, Nov. 2, 1877, 5 R. 43; Brand v. Kent, Nov. 12, 1892, 20 R. 29.

¹ *Simpson v. Duncanson's Creditors*, Aug. 2, 1786, M. 14,204, commented on in Bell's Com. i. 189; *Orr's Trustee v. Tullis*, July 2, 1870, 8 Macph. 936; *Spencer & Co. v. Dobie & Co.*, Dec. 17, 1879, 7 R. 396; *M'Bain v. Wallace & Co.*, July 27, 1881, 8 R. (H. L.) 106, *per* Lord Salborne, at p. 109, Lord Watson, at p. 116; *Seath & Co. v. Moore*, March 8, 1886, 13 R. (H. L.) 57; *Reid v. Macbeth & Gray*, March 4, 1904, 6 F. (H. L.) 25.

² 19 and 20 Vict. cap. 60.

³ M. 14,204, and Bell's Com. i. 189.

⁴ 13 R. (H. L.) 57.

⁵ 8 R. (H. L.) 106.

⁶ *Wylie & Lochhead v. Mitchell*, Feb. 17, 1870, 8 Macph. 552.

⁷ 56 and 57 Vict. cap. 71.

Nov. 7, 1907. near delivery ; all that it still requires is to pass its trial in the Clyde, and afterwards to pass a trial at Genoa.

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The authorities upon this matter are not very numerous, but I think it is well that we should on this occasion lay down, with perhaps somewhat more precision than has hitherto been employed, the rules which I opine must obtain as to the recall of arrestments. Two cases were quoted to us

Ld. President. in somewhat recent times—the case of *Vincent v. Chalmers*,¹ and the case of *Brand v. Kent*.² Those were both cases where the petition for recall was presented by a third party—and by a third party I mean one who was neither the arrestee nor the common debtor—and it was laid down in these cases, and I have no doubt whatsoever laid down perfectly rightly, that such questions as he wished to raise could not be raised and determined in a petition for the recall of arrestments. If a creditor, whom we will call A, arrests in the hands of the arrestee B in respect of the debt of the common debtor C, it may very well be that the thing or the debt arrested is not really due to C, but is due to somebody else ; and if that somebody else, D, wishes to raise the question he cannot raise it by a petition for the recall of the arrestment, he must raise it by some other appropriate form of process. As to that law I do not think there is any doubt. There is as little doubt that the common debtor may always petition for the recall of the arrestments upon the ground that they are nimious and oppressive, and that in such circumstances the arrestments may be recalled, in some cases *simpliciter*, but much more generally on caution.

But there remains the case with which we are going to deal—the case of where the person who wishes to get rid of the arrestment is the arrestee. There have been cases where the arrestments were recalled at the instance of the arrestee, and in particular we had cited to us the case of *Duffus*.³ The facts in *Duffus*' case³ were these :—A ship was arrested as belonging to B. At the moment of the arrestment the ship was registered in the name of A, and A petitioned for the recall of the arrestment. It was argued for the arrester that the ship really belonged to B. Historically it had belonged to B, because it had been registered in B's name before it came to be registered in A's name. Their Lordships held, and I think quite rightly, that that question could not be tried in that process ; that they were bound to take the register as it stood as being the proper evidence of title to a ship ; and that, consequently, as the ship, according to the register, belonged to A, it could not be arrested as if it had belonged to B. But I am bound to say, with great respect, although I think the judgment is perfectly right, I do not think that the criterion as laid down by the Lord Justice-Clerk in that case can, on further consideration, be supported. His Lordship there makes a distinction between moveables to which there is no written or statutory title, and moveables to which there is a written title, and he says—"In the ordinary case of moveables, to which there is no written or statutory title, it is no objection to the competency of an arrestment that the arrestee says he has no funds of the common debtor, or that the same thing belongs to himself by virtue of preference, compensation, or otherwise. For, in a furthcoming, he can appear and assert and make good his right ; and, if he

¹ 5 R. 43.

² 20 R. 29.

³ 19 D. 430.

is confident of his right to the money, may use it in the meantime." But Nov. 7, 1907. then he says that when there is an actual written title, "no arrestment can competently be used, according to rules applicable to such diligence, in direct contradiction to that title."

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I am afraid that distinction will not do, and for this reason: So long as the thing arrested is a claim for money or a debt, it is quite true, as his Lordship says, that in a furthcoming the arrestee can appear and make good his right, and in the meantime no prejudice is created. The arrestee could not be made to pay the alleged debt till the furthcoming, and in the meantime his general funds are laid under no embargo. It is quite obvious that that is not so in the case of a corporeal moveable, and for this very good reason that, if a corporeal moveable is arrested, and the arrestee wishes to say that it is his own, the arrestee has no power of either starting himself or getting others to start a furthcoming; and, accordingly, if he had not some other way of getting rid of the arrestment, he would be in this uncomfortable position that a *nexus* would be upon the subject which would put him in danger to deal with it, and at the same time he would have no possible means of starting a furthcoming in which he could appear to vindicate his right. It seems to me that the true distinction is between the arrestment of debts or sums due and the arrestment of corporeal moveables. In the case of the arrestment of debts or sums due, I think that the rule as laid down by Lord Justice-Clerk Hope holds perfectly good. There is no reason why a question of whether a sum is due or is not due should be taken up in the inconvenient form of a petition for the recall of arrestment, and for the very simple reason that the arrestee is not in any way hurt or damaged by waiting until a furthcoming is raised. An arrestment in the hands of A of all moneys due by him to B does not put a *nexus* upon any particular money in A's hands, it does not prevent A from going on with his business, and using any money that he has got; it only attaches such sum as A is due to B, and it leaves A perfectly free in the furthcoming that is directed against him to say that he is due no sum to B. As your Lordships will remember, a furthcoming really first of all defines the sum that is due by the one to the other, and then it transfers it for the benefit of the creditor who has made the arrestment by way of adjudication. Accordingly, as long as it is a debt, there can be no expediency in trying to unravel these questions in a petition for recall, and there can be no harm in allowing them to stand over until a furthcoming is raised, if it is ever raised.

But when it comes to a corporeal moveable then the position seems to me quite different. When a corporeal moveable is arrested in the hands of A as truly belonging to B, and A wishes to say that it is his own and not B's at all, then, I think, he has an immediate interest to get that question decided. What would then happen I think depends upon circumstances. It may be that A, the arrestee, admits that the article in question belongs truly to B, but at the same time says that he has certain claims over it. Take for instance the case of a person who has had a corporeal moveable entrusted to his care for the purpose of performing some operation upon it, and has a good lien upon it for his charges—in such a case as that the question of how much he is entitled to by way of lien could perfectly well be tried in the furthcoming. There you have practically the admission

Nov. 7, 1907. of the arrestee that the subject does belong to somebody else, and is therefore well arrested, subject only to the fact that he has certain claims upon it. But when he makes no admission of the sort it seems to me that the general position is that the possession of a moveable is *prima facie* evidence that it is his property, that is to say it is *prima facie* evidence except with regard to a certain class of people, such as warehousemen and so

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Ld. President. on, whose business it is to have in their possession the property of others. Accordingly, it seems to me that if a person arrests a corporeal moveable in the hands of somebody else, alleging it to belong to a third person, he has got at least to make a *prima facie* case for saying so; and if he cannot make a *prima facie* case then it seems to me that the arrestee, who has had the corporeal moveable in his hands arrested, is entitled to say:—"No *prima facie* case has been made out; therefore, I am entitled to have the arrestment recalled." But, when a *prima facie* case is made out, then I hesitate to give any general definition, because I think each case will depend upon circumstances; it will depend upon circumstances in each case whether there should be an immediate determination of the question, or whether there might not require to be an inquiry—I mean, that although I think a petition for recall of arrestments is always, so far as may be, a summary process, yet I can imagine a case in which it would be right to have an inquiry.

Now, applying these doctrines to the present case what I find is this—an uncompleted ship, that is to say, a ship that has not come into the position of being registered—when, of course, the proper title is the title of registration—but is still in the builder's yard. *Prima facie* it seems to me that ship belongs to the builders. Accordingly, if anyone arrests the ship upon the ground that it does not belong to the builder, but that it belongs to somebody else, I think he is bound to give a *prima facie* reason for that assertion. In this case the respondents table what they say fulfils my desire. They table the contract under which, admittedly, the ship is being built; and accordingly this case is one of those cases where it is possible to give a judgment without further inquiries. We have here, admittedly, the document on which, and on which alone, the transference of the ship from the builders, who created it, to the third party, to whom it is now said to belong, depends.

Accordingly the question of whether this ship should be allowed to be arrested, as it has been, or whether the arrestment should be recalled, seems to me to turn upon the interpretation of the contract. I think the *onus*, so to speak, rests upon the person who wishes to shew that the ship belongs, not to the builder, to whom it would what I call naturally belong, but to someone else. We have the contract before us, and that brings one to the consideration of that branch of the law which has been much discussed in recent years, I mean the branch of the law which was illustrated in the case of *Simpson v. Duncanson*.¹ I do not think it is necessary for your Lordships to try to add anything more to the elucidation of what was really originally decided in *Simpson v. Duncanson*.¹ Probably a sufficient word, if not the last word, has been said about it in the judgment of Lord Watson in *Seath v. Moore*.² One cannot help feeling that probably the doctrine of *Simpson*

¹ M. 14,204.

² 13 R. (H. L.) 57.

*v. Duncanson*¹ had its origin in an endeavour to secure an equitable result Nov. 7, 1907. in the teeth of what at that time was the very strict Scottish doctrine of the transfer of property, because there is no doubt that at the time of *Simpson v. Duncanson*¹ you might contract in what terms you pleased—you might contract that property should pass—and yet it was impossible to make the property really pass without delivery—I mean delivery in the fullest sense of the word, including all forms of what may be called constructive delivery. But all that has now been altered. It was altered to a large extent by the Mercantile Law Amendment Act,² although, as has been often pointed out, that Act did not really alter the true conception of where the property was, but merely interfered with the rights which sellers and purchasers in old times would have had. But the whole matter has been really altered by the Sale of Goods Act,³ and now it is quite clear that, by the law of Scotland, if people choose so to contract they can pass the property of a thing which is being sold without delivery. That being so, it seems to me clear, and I think it should be clearly laid down, that if people want these consequences to happen they must really say so. There is not the slightest difficulty in so framing a contract, if it is wished, as between a shipbuilder and the person who is buying the ship, that the property in a gradually constructed ship shall be held to pass at certain stages; but if so, I think it must be clearly said.

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In the contract under discussion not only is that not clearly said, but I think the other thing is said. I think that the only sale that is found in this contract is the sale of a completed ship. It seems to me to resemble in that respect the contract in *Reid v. Macbeth*.⁴ Accordingly I am of opinion, upon the construction of this contract, that the property of the ship was not passed from Barclay, Curle, & Company—to whom undoubtedly it originally belonged—to the purchaser bit by bit, as it came into existence. That question we cannot decide in this process as in a question between Barclay, Curle, & Company and the Italian purchaser; but we can decide it to the effect of saying whether the arrester has made out a *prima facie* case. I hold, accordingly, that the arresters here have not made out any case for the ship being the property of the common debtor, and that the arrestments fall to be recalled.

LORD M'LAREN.—I have followed with much interest the exposition of this branch of the law given by your Lordship in the chair. I shall not attempt to go over the ground again, because I feel quite sure the various points of the case could not be put more clearly. But having regard to the large sum of money involved in this case, it may be right that I should state my opinion upon the point in which the parties to this dispute are chiefly interested. First, I think a distinction, a clear distinction, may be drawn between the arrestment of a sea-going ship, under maritime law, and such an arrestment as we are here dealing with. In the ordinary case of the arrestment of a ship within the jurisdiction,—it may be in a harbour afloat,—there is no arrestee. The ship is simply arrested by description for a debt of the owners, and this particular form of arrestment was, I think,

¹ M. 14,204.

² 56 and 57 Vict. cap. 71.

³ 19 and 20 Vict. cap. 60.

⁴ 6 F. (H. L.) 25.

Nov. 7, 1907. originally confined to the Admiralty Courts who exercised jurisdiction in *rem*. But this is a case of an arrestment of a ship which, although finished—because I think she was to make her trial trip yesterday or to-day, —is still in the hands of the builders, physically undelivered. In such a case, and it may be in the case of other corporeal moveables, if the builder of the vessel admits that it is not his property, if he admits that according

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Lord M'Laren. to his contract it has passed to the purchaser, he would not be in a position to raise any objection to the arrestment, and we should not have the case that is now before us. But if he says that this ship is his property I see no reason why he should not be allowed to determine that question in a petition for the recall of arrestments, because I do not see how it can be determined in any other process; and even if it could be done, he is put to the inconvenience of having his property meantime under an embargo until the issue of a case which it is supposed will determine the question of right. Accordingly, where the person in whose hands the ship is arrested, in this case the builder, claims that the ship is his own property, then, agreeing with your Lordship, I should hold that his possession, physical possession, raises a certain presumption in favour of his claim, and that it lies with the arresting creditor to shew by the contract or documents of title that the true ownership is vested in the common debtor.

In this case, when we examine the contract of sale under which this ship was built, and apply to it the principles of the Sale of Goods Act,¹ under which this particular principle of the law of England was practically extended to Scotland—that property may or may not pass to the purchaser according to the wishes of the parties—I say when we apply that principle to this case then, as a matter of intention, I see no reason to doubt that it was the wish of both the seller and the purchaser that the ship should remain the property of the seller until payment of the penultimate instalment of the price and the completion of the trials. If it had been intended that there should be partial transfers of the property at the successive stages of payment of the instalments, it would have been easy to express that in the contract of sale. As it was not expressed, I presume that the parties did not desire that the property should pass in stages, but that on the contrary the Italian Company, being perfectly convinced of the ability and willingness of the builders to fulfil their obligations, were content to wait until the ship was ready for use before claiming or desiring delivery. For these reasons I agree that these arrestments should be recalled; and I only add that this is not a case where they should be recalled upon caution. That is one reason why it has been necessary to consider the matter as one of contract right, because the idea of finding a cautioner for £200,000 is altogether absurd.

LORD KINNEAR.—I agree entirely with all your Lordship has said, and I have only a few words to add. I think it is very material to observe in the outset that the arrestment we are asked to recall is a real diligence, that is to say, it is a diligence affecting two vessels specifically described in the petition by numbers and description, and has the effect of laying an embargo upon these ships, so that, whatever the interests in the property of the ships

¹ 56 and 57 Vict. cap. 71.

may be, they cannot be removed from the dock and shipbuilding yard in Nov. 7, 1907. which they are at present. That this is a totally different thing from the arrestment of a debt, and that the true owner of the ship has a perfectly good interest and a good title to say that the arrestments should be recalled, so that he may deal with his own property in the ordinary course of his business, is, I think, for the reasons your Lordship has already given, perfectly clear. I do not think that we can in this process decide any question of right as between the petitioners and the firm for whom they were building the ships, so as to form a *res judicata* as between these two parties, and for this plain reason that the competing interest or competing right, if there be any such right or interest, is not really represented by any of the parties to the process. If the ships do not belong to Barclay, Curle, & Company, and do belong to the Italian Society, the Italian Society is not here, and therefore we cannot decide the question of property. But I think we can decide whether the ships can be effectually arrested as the property of the Italian Company, and, if they cannot, then the arrestments must be recalled.

My reason for deciding that question in the way your Lordship has explained is put, I think, briefly, and also very clearly and decisively, by Lord President M'Neill, in the case of *Duffus*.¹ His Lordship's opinion does not proceed upon the distinction taken in the opinion of the Lord Justice-Clerk upon which your Lordship has commented. The Lord President says:—"The case of a ship is a peculiar one. It is peculiar as affects the nature of the property itself, and peculiar also as regards the nature of the title to that property. It is peculiar as to the manner in which the arrestments once laid on are to be followed up. Therefore, it is a case in which we are not to be led into the ordinary course of *in dubio* requiring caution. We must see our way more clearly in regard to the arrestment of a ship than in the ordinary case of arrestment,"—and then he says that in such a case persons outside the jurisdiction ought not to be required to find caution. The doctrine with which he starts is that in reference to this very peculiar arrestment we must see clearly that the thing arrested is really subject to the diligence. Then he goes on to consider the question of title, and he says that upon the face of the title the ship is not the property of the common debtor for whose debts it is proposed to arrest it, and that the Court ought not to enter into an inquiry for the purpose of subverting the inference from the *prima facie* condition of the title. He says:—"If we were to enter into an inquiry as to the nature of the right in this ship, and to have proof of the facts adduced from Halifax and then to inquire as to the law of that country, and its effect upon this transaction, we would in effect expose these petitioners to all the evils which could arise from this vessel being detained till an ordinary action should dispose of this question." Therefore, he declined to enter into that question for the purpose of setting up a right to use diligence against the *prima facie* fact of the title of property in the ship.

Now, although we have here a ship that has not yet arrived at the stage at which we can have the same kind of *prima facie* title as in the case of a registered ship, yet the principle upon which the Lord President proceeds

¹ 19 D., at p. 442.

Nov. 7, 1907. appears to me to be perfectly applicable, because we have in this case clear *prima facie* evidence of property in the petitioners and not in the common debtors. I agree with your Lordship that if it had not been for the Sale of Goods Act¹ we might have had some difficulty in considering how far the question of property in a ship might or might not be affected by the decision of the case *Simpson v. Duncanson*² and of subsequent cases. The authority of *Simpson v. Duncanson*² has been very much shaken, if not completely destroyed, by the observations that have been made upon it in the House of Lords, and it is extremely difficult to ascertain from the state of the record what was really decided. But the conclusive consideration to my mind upon that branch of the argument is that the law affecting the completion of rights of property by a contract of purchase and sale has been entirely altered by the Sale of Goods Act.¹ At the date of that decision the law was that property could not pass without delivery, and the Court had to consider whether there had been, or had not been, something equivalent to delivery in a case where it was plain upon the face of the facts that no actual delivery had taken place. Now, that is not the law. We have to seek the law as to the transference of property upon a contract of purchase and sale from the provisions of the Sale of Goods Act,¹ and that makes it clear that the question is one of intention upon the contract. What is the intention of the contract? The particular rule of the Sale of Goods Act¹ which is said to apply, besides the general provision that the intention of parties as to the time at which the property of the goods is to pass to the buyer is to be determined by the contract, is Rule 2 of section 18, that unless a different intention appears from the terms of the contract, "where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof." Now, it appears to me that the operation of that clause in the particular question in hand is this, that where a contract has been made for the sale of a ship which is still in course of construction, although the ship may be so specifically identified as to fix it as the subject of the particular contract, still no property passes until it is in a deliverable state, or, in other words, until it is either delivered in a finished state or is so completed as to be ready for delivery, and is approved of by the buyer upon notice to him. Applying that rule to the terms of the particular contract in hand, I agree with your Lordship that upon the face of the contract there was no intention of delivery until the ship should be completed and sent to Genoa. Therefore there is under the contract no delivery, and the property still remains in the hands of the shipbuilder.

I do not depart from the observation with which I began, that we cannot decide the question of property as between the shipbuilders and the company with whom they had the contract; but we can decide, and I think we ought to decide, that there is a *prima facie* right of property in the shipbuilders, and that they ought not to be subjected to the extreme hardship and inconvenience of having their ship stopped in dock at the instance of a creditor of the firm for whom they are building, who cannot instantly

¹ 56 and 57 Vict. cap. 71.

² M. 14,204.

verify a preferable title to the ship. I agree especially with the observation made by Lord M'Laren that to make it a condition of recalling the arrestments in this case that the shipbuilders should find caution would be altogether unjust and unreasonable. Therefore I agree that the arrestments should be recalled, so far as regards the ship, *simpliciter*.

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LORD PEARSON was absent.

THE COURT recalled the arrestments *simpliciter*.

H. B. & F. J. DEWAR, W.S.—STEEDMAN, RAMAGE, & Co., W.S.—Agents.

GEORGE TURNBULL M'KECHNIE, Pursuer (Respondent).—

Morison, K.C.—Munro—Mair.

JEMIMA WHITE AND OTHERS (M'Kechnie's Trustees), Defenders (Reclaimers).—*Watt, K.C.—Macmillan.*

JEMIMA WHITE, Defender (Reclaimer).—*Watt, K.C.—Macmillan.*

Undue Influence—Testament—Reduction—Paramour.—*Held* that the relation existing between a man and a woman who had lived with him as his mistress was not of such a character as to support a plea of undue influence in an action for reduction of a will by which he left the bulk of his property to her and their illegitimate son, to the detriment of his legitimate family.

In March 1906 George Turnbull M'Kechnie, youngest lawful son of the late John M'Kechnie, ladies' dressmaker in Edinburgh and Glasgow, raised an action concluding for reduction of a trust-disposition and settlement which had been executed by his father on 11th January 1904, and of a codicil thereto executed on 16th September 1904. The defenders were Miss Jemima White and others, being the trustees under the settlement, and Miss White as an individual.

The pursuer averred;—(Cond. 9) "The foresaid pretended trust-disposition and settlement and codicil thereto were impetrated from the said John M'Kechnie through the fraud and circumvention and undue influence of the defender Jemima White, at a time when the said John M'Kechnie was in a weak and facile condition, and easily imposed upon. The said deeds are not the true deeds of the said John M'Kechnie. They were impetrated from him by said defender Jemima White, who took advantage of the position of ascendancy and domination which she had acquired over the said John M'Kechnie, and which she exercised over him down to the date of his death, in order to procure the execution of the said deeds."

The defenders denied these averments.

The pursuer pleaded;—(1) The said trust-disposition and settlement and the codicil thereto not being the deeds of the testator, decree of reduction should be pronounced. (2) Or otherwise, the pursuer is entitled to reduction as concluded for in respect that at the time of executing the said trust-disposition and settlement, and the said codicil thereto, the said John M'Kechnie was weak and facile in mind and easily imposed upon, and that the defender Jemima White, taking advantage of his said weakness and facility, obtained the said deeds from the said John M'Kechnie by fraud and circumvention, to the lesion of the pursuer. (3) Or otherwise, the pursuer is entitled to reduction as concluded for in respect that the said trust-disposition and settlement, and the said codicil thereto, were procured from the said John M'Kechnie by the defender Jemima White by undue influence, to the lesion of the pursuer.

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Trustees.

2D DIVISION.
Lord Ardwall.

Oct. 30, 1907.

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A proof was allowed and led. At the conclusion of the proof the pursuer stated that he abandoned his first plea in law.

The following were the leading facts in so far as material to the purposes of the present report:—

The testator was born in 1848, and died on 16th October 1905.

In 1873 he married Miss Elizabeth Turnbull. In 1884 the spouses separated under a contract of separation. Mrs M'Kechnie became an inmate of an asylum in 1895, and she was in an asylum at the date of the present proceedings.

Four children were born of the marriage, namely, John, Jane, David, who predeceased his father, and George, the pursuer.

In 1888 the testator, who had previously been a partner in a ladies' dressmaking firm, began business on his own individual account, the firm having been dissolved, by opening a ladies' dressmaking shop in Princes Street, Edinburgh. He subsequently acquired other shops in Edinburgh and in Glasgow.

The defender Miss White, who had been in the employment of the testator's former firm, was appointed manageress of his Princes Street shop.

From 1896 the testator and Miss White lived together as man and wife. On 10th January 1897 a son was born to them.

In 1903 the testator was possessed of property of the value of about £12,000. In August 1904 he executed a contract of copartnership with Miss White, by which he gave her as a free gift one half of the capital in his businesses, and this, together with other gifts to her, reduced the value of his estate as at his death to about £8400.

By the trust-disposition and settlement under reduction Miss White received the liferent (about £90 a year) of two heritable properties. The fee of these properties, together with the fee of certain other properties, some of which were to be liferented by the testator's daughter, was left to Miss White's son. The total value of the properties left to her son was about £5850. A heritable property of the value of £420 was left to the testator's brother Alexander, and another of the value of £650 was left to his two sisters in liferent and fee respectively. The residue, amounting to about £1000 (after deducting debts, &c.), was left in specified proportions to the testator's legitimate children, subject to a liferent of two-thirds to their mother.

By the codicil the testator revoked the gift of the heritable property to his brother Alexander, and gave that property to Miss White's son, making the total left to him about £6270. The codicil otherwise left the trust-disposition and settlement untouched.

The evidence shewed that a few days before his death the testator was making preparations for having a new trust-disposition and settlement made out, and certain jottings, Nos. 51 and 52 of process, were produced. No. 51 was in pencil in the testator's own handwriting, and the evidence of Miss Peter, the cashier of the Edinburgh business, was to the effect that No. 52 was dictated to her by the testator, he having No. 51 before him. The effect of these jottings was, *inter alia*, to give the testator's brother Alexander a heritable property of about the same value as that originally given to him by the settlement.

On 2d February 1907 the Lord Ordinary (Ardwall) pronounced this interlocutor:—"Reduces, decerns, and declares in terms of the conclusions of the summons for reduction in so far as regards the pretended codicil to the trust-disposition and settlement of John M'Kechnie,

warehouseman, No. 99 Princes Street, Edinburgh, now deceased, and bearing date 16th September 1904: *Quoad ultra* assoilzies the defenders from the conclusions of the summons, and decerns." * Oct. 30, 1907.
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* "OPINION.— . . . I shall now proceed to state shortly what I consider the result of the very voluminous proof which was led. . . .

"The next point to be considered is the state of Mr M'Kechnie's health after his illness in May 1903. . . . It is, I think, pretty clear, that after his illness there was a great apparent loss of physical energy on the part of Mr M'Kechnie, partly due, no doubt, to the change wrought in him by his illness, but still more due to the fact that having been seriously alarmed as to the state of his heart, he took much greater care of himself, and this was, of course, accentuated by the defect in his eyesight, which seems to have troubled him more or less for a considerable time. His weakened physical condition undoubtedly would affect his disposition more or less, and might make him more amenable to pressure on the part of others, and especially of Miss White, who was constantly with him, and whose presence and assistance were invaluable to him in his impaired state of strength.

"As to his mental capacity, I do not think it has been proved that that was impaired in the sense that he was less capable of understanding business of any kind, although it is possible that he may have been unable to seize ideas as rapidly as he had done before, or to carry them out as promptly and energetically. . . . The strongest evidence upon this I consider to be the evidence of Miss Peter, which is completely borne out by the documents Nos. 51 and 52 of process, and which shews how capable he was up to within a few days of his death of making a settlement of his affairs, to meet certain main ideas which he had himself jotted down in his own hand, and wished to carry out. The conclusion I arrive at, therefore, as to his mental condition is that possibly owing to failing bodily strength and the condition of his heart he may have been less able to resist any pressure brought to bear on him by others than he was before his illness, yet I cannot say that it is proved that generally he was weak and facile in mind, although it is possible that he might be more or less facile in the hands of a person who had very strong influence over him.

"This leads me to the consideration of the question as to alleged undue influence of Miss White over the testator.

"Miss White, as the whole of her history in this case shews, is an exceedingly capable, clever, and managing woman, and I have little doubt that Mr M'Kechnie spoke the truth when he said, as he repeatedly did, that he owed his success in business very much to her. His business was one in which a great many young women were employed, both in the dressmaking department and in the shop, and the principal customers were ladies. In a business of that kind, accordingly, it was all-important to have a capable managing lady both to look after the employees and to interview customers. Miss White was, owing to her ability, experience, and tact, in a position of commanding influence in relation to Mr M'Kechnie as regarded his business. But besides that, she was really in the position not merely of a mistress but of a wife, and possessed the influence attached to both these positions, because while she managed his household, looked after himself, and was his companion at bed and board, just as a wife would have been, she was, as being only his mistress, in the position of being able to leave him whenever she liked, being under no legal obligation whatever to remain with him longer than she chose. I think that she only spoke the truth when she signified to two or three of the employees who speak to the matter that she could twirl Mr M'Kechnie round her little finger, and from various things that she is reported, I think truly, to have said at different times, it is apparent that she was quite conscious of the influence she had with Mr M'Kechnie, either to prevent him doing what she did not want done or to

Oct. 30, 1907. The defenders reclaimed. The undernoted authorities were cited.¹

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LORD JUSTICE-CLERK.—We have had a very full and elaborate debate in this case. There are two questions involved. The first question is with regard to the will, and the second question is with regard to the codicil. As regards the will, the Lord Ordinary has held that the pursuer has no case for reducing it, and in that opinion I entirely concur. I do not think it is necessary, because it is very much a matter of verdict, to enter into the question at length. All I say is this, that the pursuer has failed to prove any case entitling him to a verdict upon the facts. That being so, I am for affirming the Lord Ordinary's interlocutor as regards that part of the case. As regards the codicil, I confess I do not quite appreciate what the Lord Ordinary has done, or the reasons he has given for doing it.

We have had an argument upon the law as applicable to such a case. I am not of opinion that the cases which are founded upon by the pursuer—the case of *Strain*² and similar cases—have any bearing upon this case what-

do what she did want. I attach no importance to her denials of what these witnesses say, for while she struck me as a very clever witness, I observed that when a crucial question was put to her, she several times either pretended that she did not hear it or did not understand it, while she was thinking hard all the time what answer it would be best for her case to give. In short, she conveyed to my mind the impression that she was a very clever witness, but not a very reliable one.

“But however strong an influence one person may possess over another, especially when holding such close personal relationship as Miss White did to Mr M'Kechnie, that will not suffice to reduce a will unless it is proved that that influence was exercised unduly in order to impetrate the will from the testator, or failing such evidence of connection between the person possessed of such influence and the preparation or execution of the deed complained of, it would require to be shewn that the will was so outrageously against the presumed intentions or clear moral duty of the testator as to make it incredible to suppose that it could have been executed except under the pressure of undue influence on the part of those who were taking the principal interest under it. Now, there is not a particle of evidence to shew that Miss White had anything whatever to do with the giving of the instructions for the preparation of the deed under reduction or the execution of it. . . .

“It is always of importance in a case of this sort to consider the terms of the deed itself, and if, as I have already said, the terms of such deed are in conflict either with the known or presumed intentions of the testator, or are so entirely contrary to ordinary moral obligations as to make it incredible that it should have been executed by him voluntarily, that may have the effect of opening the door for the plea of undue influence.”

(After considering the provisions of the will)—“On the whole I cannot say that the will is either an irrational or absurd one, or one the terms of which, looking to the history of the family, were not consistent with what may be

¹ Gilchrist v. Morrison, Feb. 28, 1891, 18 R. 599; Duncan v. Duncan, Dec. 14, 1892, 20 R. 200; Swanson v. Manson, 1907, S. C. 426; Harris v. Robertson, Feb. 16, 1864, 2 Macph. 664; Munro v. Strain, Feb. 14, 1874, 1 R. 522; M'Callum v. Graham, May 30, 1894, 21 R. 824; Weir v. Grace, Dec. 13, 1898, 1 F. 253; Bell's Prin., sec. 14 B; Hargreave v. Everard, 1856, 6 Ir. Ch. Rep. 278; Clunie v. Stirling, March 11, 1854, 17 D. 15; Gray v. Binny, Dec. 5, 1879, 7 R. 332; Fearn v. Cowpar, March 14, 1899, 1 F. 751; Morley v. Loughnan, L. R., [1893] 1 Ch. 736.

² 1 R. 522.

ever. These are cases of persons who having, from an official position towards Oct. 30, 1907. another person, some capacity for influence over him, misuse that position ^{M'Kechnie v.} for the purpose of inducing him to do, or abstain from doing, something that ^{M'Kechnie's} he has right to do, or abstain from doing, in the exercise of his rights as ^{Trustees.} regards his own property. The essence of the matter is that the persons in Lord Justice- Clerk. that official position, such as clergyman, or doctor, or lawyer, are people who have not only a duty but a right to advise and urge those with whom they have to deal in certain directions ; and it is natural and right that a person who is so dealt with should give effect to or at least be greatly influenced by the advice of those persons and what is urged upon him by those persons. Therefore the person who has that influence, and ought to have it, in dealing with a person who ought to be influenced by it, must take the greatest possible care that he does not outstep the bounds of his official

presumed to have been the wishes and intentions of the testator ; nor is it a will which ignores his obligations to his lawful wife and family, and even his collateral relations. I need hardly say that, granting all this, I consider that it was, when taken along with the contract of copartnery and other deeds, a most unfair disposition of his property as regarded his lawful children.

“While, therefore, I think there is no evidence to justify me in reducing the will on the ground that it was impetrated by undue influence on the part of Miss White, I think the matter is different with regard to the codicil under reduction. That codicil deprives Alexander M'Kechnie, the testator's brother, of the fee of the property 13 Annandale Street, and gives it to C. J. M'Kechnie. I regard this codicil as being directly the work of Jemima White and her alone. The incident out of which the matter arose was a sufficiently absurd one. Miss White, on her way to Edinburgh one morning, had requested Alexander M'Kechnie to get a cap for her boy, and to send it by the porter to the Pollokshields train along with other parcels in the afternoon. In the bustle of business Alexander M'Kechnie forgot this commission till the porter had started with the parcels for the train. On recollecting this, he rushed out and bought a cap, and sent one of the shop girls down to the train with it, telling her to give it to Miss White. I must here notice that Miss White was known by that name in all the shops, but at Westminster Terrace and at Shawfield she was known as Mrs M'Kechnie, and was visited by a number of people, including the Free Church minister and his wife, who supposed her to be Mr M'Kechnie's wife. When the girl got to the station Mr M'Kechnie and Miss White were seated in a carriage for Pollokshields, and in the same carriage was a gentleman from Pollokshields who lived right opposite them, and who had known and visited them as Mr and Mrs M'Kechnie. The girl, when she saw them, rushed forward with the parcel, and said quite loudly, ‘Here's a parcel for Miss White,’ to whom accordingly it was handed. Mr M'Kechnie and Miss White, but I expect especially the latter, were much disconcerted, it is said, by this occurrence. Miss White says that Mr M'Kechnie was very angry at Alexander, and on getting home resolved to dismiss him from the shop, and sent her in to tell him so ; that she, after getting her tea, went back to Glasgow to the shop and did not dismiss Alexander from the shop as she had been told to do, but talked a lot to him and told him how angry his brother was. Alexander says about Miss White when she came into the shop, ‘She told me that I had a lot of consideration for her, and she would have as much consideration for me, and would pay me back and make me suffer for it.’ Miss White denies this, but I believe Alexander M'Kechnie, who appeared to me to be an exceptionally candid and honest witness, and I do not believe Miss White's denial, and I further believe that it was

Oct. 30, 1907. position and endeavour to get other things done, under that influence which he has, with which he has no right whatever to interfere. The clergyman and the doctor may have cause to strongly advise a person with whom they have to deal officially, but their advice must not be tainted by any motive not within their own border. As regards the lawyer, in a question of property, the position is somewhat different from the position of a clergyman or the position of a doctor, because it may be his duty to advise his client, and even sometimes to urge his client, in a particular direction, when the client desires to make a disposal of his affairs; and if in doing so he urges anything in his own favour, or urges anything in favour of a particular individual who gets him to do it, then of course he is in a corrupt position, in which anything that is done under his influence cannot receive effect. These cases are clear enough. Most of these cases do not turn either upon the question whether a person has capacity to make his will or not, or upon the question whether he is weak and facile. Of course, if there is anything of the nature of weakness or facility in such cases, the weakness or facility will make it much more easy to hold that a person acted under undue influence. But as regards the relatives of a man, and particularly as regards the people who are living in close relationship, practically of husband and wife, such rules do not apply. Such persons are entitled to use influence to induce

entirely due to her influence that Mr M'Kechnie, on the 16th September 1904, made the codicil he did. I do not believe Miss White's story. I have the gravest doubts whether Mr M'Kechnie told her to dismiss Alexander, but, if he did, I think that with her usual acuteness in business matters, she thought Alexander was very useful where he was in the Argyle Street shop, and where I may observe he still remains under Miss White's management, and that she thought a better way of punishing him would be to get him taken out of the will and her own son substituted. I do not think Mr M'Kechnie would have done this himself. It was much more like a woman's trick, and not what Mr M'Kechnie would have done of his own free will when he heard how innocent his brother Alexander had been in the matter, which was a pure accident so far as he was concerned. I am confirmed in this view by the fact that in the jottings which represent Mr M'Kechnie's last intentions he again makes a bequest to Alexander, though not of the same nature as formerly. It is also noticeable that Miss White knew what had been done by Mr M'Kechnie, for she told Alexander the moment he went out to the house after Mr M'Kechnie's death that he had been cut out of the codicil in consequence of the incident above referred to. On the facts, therefore, I am of opinion that Miss White, being very much enraged with Alexander M'Kechnie, though with no good reason, exercised the strong influence she had with Mr M'Kechnie in order to carry out her threat to pay Alexander back and 'make him suffer for it.' We have here the position which is familiar in criminal law of an evil threatened and an evil perpetrated, the person who made the threat having it in her power to accomplish the perpetration by the hand of another person. I am of opinion that in such circumstances a judge or jury is entitled to infer that the person who made the threat was the person who truly carried it out.

"I accordingly propose to grant decree of reduction of the codicil, on the ground that it was impetrated by undue influence on the part of Miss White, Mr M'Kechnie being at the time facile in mind in relation to her, in consequence of the commanding influence she had obtained over him and his entire dependence upon her."

the man to do what he may be expected to do himself, namely, to make provision for those whom he has placed in the position of being dependent upon him, and particularly in the case of a person who is placed in the position of being the mother of his child. In such circumstances there may be grounds for setting aside a will made by a person if, being on the face of it an absolutely unjust and wrong will, it can be proved that he had not the mind to make a will, or if it can be proved that his mind had got into a weak and facile condition, so that he was a person who could be easily imposed upon, and the person accused, taking advantage of his weakness and facility, did impose upon him, and impetrated from him the deed which is complained of.

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Now, that matter again is a question of fact. Two questions of fact are involved. First, was the late Mr M'Kechnie weak and facile and easily imposed upon? If that question be answered in the affirmative, then we must consider the second question, whether advantage was taken of his condition, and whether he was imposed upon. Now, as regards the first question, giving the best consideration to the evidence which has been put before us and to the argument upon it, I am unable to say on the jury question that I can find that he was weak and facile and easily imposed upon. I find no evidence of that. There is no doubt that after he had a certain illness he was weaker than he was before. His body had suffered, and to a certain extent his sight had suffered. But I think the evidence read fairly leads to the conclusion that he was quite as capable of making up his mind about his own affairs as he ever had been in his life. I come without any difficulty to the conclusion that he was not a man who was weak and facile or easily imposed upon. That being so it is unnecessary to go any further, because the first answer to that part of the issue applicable to such a case must be in the negative. But I shall assume that influence was used for the purpose of obtaining this deed. I confess I agree with the view that was taken by the solicitor that what he was doing was going too far in the direction of providing for this woman with whom he was living, and to whom he had been attached for many years, and for the child whom she had borne to him. On the other hand, I think it was a case in which he himself was of opinion, and I assume rightly of opinion, because it is not said that later in life he had ceased to have the opinion which he had held for so long, that to a very great extent his success in life and the fortune he had accumulated was due to the energy of this defender with whom he lived. I assume also that when he was spoken to about it by the solicitor, the solicitor did impress upon him the importance of what he was doing in the way of dealing with his property. He seems to have made up his mind distinctly to do what he had expressed his desire to do before his agent urged him in the opposite direction, and he carried that out. I think in doing so he carried out his own will. It is not to be left out of view that he was not a man who rushed into these matters wildly, but that he was giving consideration to them from time to time. That is I think conclusively proved by the pencil jotting we have in the large print of the proof. We have ascertained from an unimpeachable witness, namely, Miss Peter, that that was a pencil jotting made to his dictation in which he shewed a perfect knowledge of his own affairs, and was jotting down his

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As regards the codicil, I have no doubt that that codicil was granted at a time when he was in an irritated state, perhaps not wisely, for people get very irritated sometimes about small matters. This was in itself a small matter, but most certainly very trying to the parties concerned, namely, that, owing to the blunder of Alexander this mistake had been made in exposing the nature of the relations between Miss White and him, at the railway station. He acted upon that, but he was evidently considering the matter later in a calmer state of mind, as is shewn by the pencil jotting, and it was because of the unfortunate circumstance that he died before giving effect to that jotting, that matters are in their present state. On the whole matter I find myself unable to say that I am satisfied with the grounds of the Lord Ordinary's judgment. I think he has drawn inferences which were not justified, and that therefore his interlocutor must be recalled in so far as it reduces the codicil. The only remaining question is the question of expenses, and I think the trustees should be found entitled to their expenses.

LORD STORMONTH-DARLING.—I agree with your Lordship. This case has been very fully and carefully argued. There can be no doubt, I think, that the pursuer of the action, who was the youngest son of the testator, has, as indeed all the family have, good reason to complain of the deeds which he here challenges, because the provision which the testator made as between his legitimate family and his paramour and the child which she bore to him was most disproportionate and unfair. But that, I need hardly say, is no reason for reducing a settlement. That can only follow if, in the first place, it is a case of testamentary incapacity, which is not here alleged, or if it can be brought under the category of facility and circumvention, coupled with impetration by some person who takes advantage of that facility. This case is brought alternatively on that latter head, and on the further head, which I rather think is the real ground of action, of undue influence exercised towards the testator by the person who impetrates the will. I admit that that is a third ground of reduction, which has in some cases been held sufficient to warrant reduction, though I rather think no instance exists of such an issue being sent to a jury. But I agree with your Lordship that that principle has only been hitherto applied to cases either of transaction, of which *Gray v. Binny*¹ is an example, or in the much rarer case of wills, where a position of trust and confidence is held by the person who impetrates the will towards the testator, and where that position of trust and confidence has been abused. The only illustrations which Mr Mair, in his exhaustive examination of the evidence and authorities, was able to give us were cases of the well-known categories of such trust and confidence being reposed in law-agents, or doctors, or clergymen, or some person in a position of being trusted by the testator himself—that is to say, trusted that they would not ask him to do anything inconsistent with his duty, or anything wrong in itself. I need hardly say that

¹ 7 R. 332.

is not the case here. Mr Mair, with all his ingenuity, was not able to adduce a single instance of undue influence exercised by a paramour towards the man with whom she was living, and for the very good reason, I think, that she is not in the position of owing any duty towards him or, so far as I can see, towards anybody but her own child. I quite agree with the Lord Ordinary where he says that Miss White did possess very considerable influence over this testator, but then I thoroughly agree with the Lord Ordinary when he goes on to say,—“However strong an influence one person may possess over another, especially when holding such close personal relationship as Miss White did to Mr M’Kechnie, that will not suffice to reduce a will unless it is proved that that influence was exercised unduly, in order to impetrate the will from the testator; or failing such evidence of connection between the person possessed of such influence and the preparation or execution of the deed complained of, it would require to be shewn that the will was so outrageously against the presumed intentions or clear moral duty of the testator as to make it incredible to suppose that it could have been executed except under the pressure of undue influence on the part of those who were taking the principal interest under it. Now, there is not a particle of evidence to shew that Miss White had anything whatever to do with the giving of the instructions for the preparation of the deed under reduction or the execution of it.” I quite agree with that passage. There is not a particle of evidence, literally not a particle of direct evidence, to shew that Miss White took any part in the preparation or execution of this will; and the whole evidence of the pursuer consists of inferences, which he asks us to draw from the relationship of the parties towards each other. I find myself wholly unable to draw these inferences without a great deal more than there is in this proof. The influence was undoubted, but it fails altogether in the necessary requisite of being undue—that is to say, it was just what might be expected, and what the testator was bound to expect, from the relationship of the parties. It was a very strong interest no doubt, but interest by itself is not enough in a case of undue influence, because here it could not be said that confidence has been betrayed. The actual facts being as they are, I agree with your Lordship that there is nothing to justify us in drawing the inferences which we are asked to make. I further think, differing from the Lord Ordinary, that there is no reason for making a distinction between the will and the codicil, and I do so for the reasons which your Lordship has given. I also agree with your Lordship’s proposal as regards the expenses of the case.

LORD LOW.—I have felt this case not to be altogether free from difficulty, and I have listened most anxiously to the able argument which we heard on both sides. I am not surprised that the settlement in this case was challenged, because it is evidently a most unfair disposition of the testator’s property so far as the claims of his legitimate children were concerned—indeed, so unfair as to suggest from its very terms either that Mr M’Kechnie, who we know had been a shrewd man of business, and who seems to have been an affectionate parent, was not in a condition in which he was able to make his will when he executed the settlement in question, or that some outside influence had induced him, when suffering from the effects of serious

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It was, however, argued that the pursuer did not require to go so far as to shew that the testator was facile and easily imposed upon, and that Miss White impetrated the will from him by fraud or circumvention when he was in that condition, because it was sufficient to shew that she had strong influence over him which she unduly exercised. I am of opinion that this case does not fall within that category of the law at all. I think that the doctrine of what is called undue influence is confined to cases where the relationship between the two persons is such that the natural and legitimate consequence is influence upon the one side, and trust and confidence upon the other. It is quite clear that the relationship which exists between a woman and a man with whom she has lived in concubinage is not of that kind, and therefore the issue here is the issue of facility and fraud or circumvention.

No doubt after his illness Mr M'Kechnie was not the man he had formerly been, but the evidence, read as a whole, shews very clearly that down to the last he was fully capable of taking the management of his own affairs, and of understanding matters of business even of a complicated nature. I am quite satisfied that there was no facility in this case. If that be so, then, as your Lordship in the chair has pointed out, there is an end of the case, because if there is no facility one part of the issue on which the case depends has not been established. Upon the whole question I have in the end come to the conclusion—I confess, without much difficulty latterly—that the pursuer has not made out his case.

In regard to the codicil I cannot think that the evidence is really different from the evidence in regard to the settlement itself, because the circumstances as regards the testator's condition are the same, and if there was no facility in the one case there was no facility in the other. But then, if I had agreed with the Lord Ordinary that there were grounds for setting aside the codicil which did not apply in the case of the will, I should not have thought that that entitled the pursuer to decree. When the pursuer brought his reduction of the settlement, it was, of course, quite right that he should also bring a reduction of the codicil. The two together constituted the will of the deceased. If the pursuer had been found entitled to reduce the settlement, the codicil also would necessarily have fallen, because the codicil could not stand without the settlement. If, however, it is once established that the will is not reducible, I think it is very clear that the pursuer has no interest to insist upon reduction of the codicil. If he had brought an action for the reduction of the codicil alone, I think it would have fallen to be thrown out, upon the ground that he had no interest, because he had nothing whatever to gain by setting aside the codicil. For this same reason, if the will is not to be reduced, I think that the pursuer cannot insist upon

reducing the codicil. On the whole matter therefore I agree with your Oct 30, 1907. Lordships.

LORD ARDWALL was sitting in the Extra Division.

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THE COURT pronounced this interlocutor:—"The Lords having heard counsel for the parties on the defenders' reclaiming note against the interlocutor of Lord Ardwall dated 2d February 1907, recall the same: Assoilzie the whole defenders from the conclusions of the summons, and decern: Find the pursuer liable to the defenders John M'Kechnie's trustees in expenses, and remit the account thereof to the Auditor to tax and report: *Quoad ultra* find no expenses due."

J. FARQUHARSON MACDONALD, Solicitor—WILLIAM GEDDES, Solicitor—
DAVIDSON & SYME, W.S.—Agents.

ROBERT LANG, Pursuer (Respondent).—*Kennedy, K.C.—M. P. Fraser.* No. 22.
ST ENOCH SHIPPING COMPANY, LIMITED, Defenders (Appellants).—
Hunter, K.C.—Spens. Nov. 12, 1907.

Ship—Seaman—Carriage of contraband of war—Refusal of seaman to proceed to belligerent port—Discharge of seaman by master—Wages—Damages—“Final Settlement”—Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), secs. 134 and 186.—In 1905, when Russia and Japan were at war, British seamen signed articles to serve on board a British ship for a voyage from Cardiff to Hong-Kong, and, if required, to any port or ports within certain limits of latitude specified. At Cardiff the ship took on board a cargo of coal. Coal had been notified by both belligerents as contraband of war. On arrival at the signal station, about eight hours' steaming from Hong-Kong, the master received orders to proceed to Nagasaki, in Japan—a port within the limits specified in the articles. The crew refused to work the vessel to Nagasaki, but were not ordered and did not refuse to work her to Hong-Kong. She was worked to Hong-Kong by the officers alone. At Hong-Kong the members of the crew were each sentenced, at the instance of the master, to three weeks' imprisonment with hard labour, for refusal to obey the lawful orders of the master.

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In an action by one of the crew against the owners of the vessel for wages at the stipulated rate from the date of the articles down to "the time of final settlement" within the meaning of section 134 of the Merchant Shipping Act, 1894, and also for damages, *held* (1) that the pursuer, having been engaged for an ordinary commercial voyage, was not bound to incur the risks involved in serving on board a vessel carrying contraband of war to a port of one of the belligerents, and was therefore justified in disobeying the order of the master to proceed to Nagasaki; (2) that, the delay in paying the wages being due solely to the wrongful act or default of the master, the pursuer was entitled to wages at the stipulated rate down to "the time of final settlement," and that "the time of final settlement" was the date of the interlocutor of the Court; and (3) that the pursuer was entitled to a sum in name of damages.

Caine v. Palace Shipping Co., Limited, L. R., [1907] A. C. 386, followed.

ON 24th January 1905 Robert Lang, ship's fireman, Glasgow, signed articles to serve as a fireman on board the s.s. "St Helena," belonging to the St Enoch Shipping Company, Limited, Glasgow. By the articles Lang bound himself to sail in the St Enoch Shipping Company's employment on a voyage from Glasgow to Hong-Kong via

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Nov. 12, 1907. Cardiff, "and/or if required to any port or ports within the limits of 75 degrees north and 60 degrees south latitude. Trading to and from as may be required until the ship returns to the final port of discharge in the United Kingdom or to outward loading port if required. Probable period of engagement two years."

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The "St Helena," which took on board a cargo of Welsh steam coal at Cardiff, arrived on 16th April 1905 at Gap Rock Signal Station, about eight hours' steaming from Hong-Kong, where the master received orders to proceed to Nagasaki, in Japan. Nagasaki was within the limits specified in the articles.

Lang and other members of the crew declined to proceed to Nagasaki on account of the war then going on between Russia and Japan, coal having been notified as contraband of war by each belligerent. Eventually the vessel was worked to Hong-Kong by her officers.

At Hong-Kong Lang and the other members of the crew who had declined to go to Nagasaki were charged in the Police Court, at the instance of the master, with wilful disobedience to lawful orders. They were found guilty, and were each sentenced to three weeks' imprisonment with hard labour, but after three days' imprisonment they were released by order of the Governor.

In September 1905 Lang brought an action in the Sheriff Court at Glasgow against the St Enoch Shipping Company, Limited, praying for decree for payment of (1) the sum of £4 per month from 24th January 1905 till date of settlement, less £4, 12s. 5d. paid to account, and (2) the sum of £100.

The pursuer averred:—(Cond. 9) "To order said ship to a port in Japan with a cargo declared by Russia to be contraband of war was a breach of pursuer's agreement with defenders. It . . . exposed pursuer to serious dangers which he had not in contemplation when he signed on, and was not bound to undertake. . . ." (Cond. 10) "On receiving intimation at Gap Rock that the intended destination of the ship was a port in Japan, and knowing of the King's proclamation, and that the cargo had been notified by Russia as contraband of war, pursuer, with the other members of the crew, justifiably declined to proceed further on the voyage. In consequence thereof, instead of dealing with the men under section 186 of the" Merchant Shipping Act, 1894,* "the ship was put into Hong-Kong, where pursuer with

* The Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), enacts:—

Sec. 134. "In the case of foreign-going ships (other than ships employed on voyages for which seamen by the terms of their agreement are wholly compensated by a share in the profits of the adventure)—

"(a) The owner or master of the ship shall pay to each seaman on account, at the time when he lawfully leaves the ship at the end of his engagement, two pounds or one-fourth of the balance of wages due to him, whichever is least, and shall pay him the remainder of his wages within two clear days (exclusive of any Sunday, fast day in Scotland, or Bank holiday) after he so leaves the ship:

"(b) If the seaman consents, the final settlement of his wages may be left to a superintendent under regulations of the Board of Trade, and the receipt of the superintendent shall in that case operate as if it were a release given by the seaman in accordance with this part of this Act:

"(c) In the event of the seaman's wages or any part thereof not being paid or settled as in this section mentioned, then, unless the

other members of the crew was apprehended, taken before a magistrate, and falsely charged by the master with wilful disobedience to lawful orders. After being remanded for two days they were each sentenced to three weeks' imprisonment with hard labour. About a week after their incarceration, however, they were all liberated. . . .

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(Cond. 11) "Pursuer received no wages at Hong-Kong, and has not yet signed clear of the ship. His wages are £4 per month, and in terms of the Merchant Shipping Act, 1894, section 134, are payable to date of final settlement. To account, however, he has received advances of £4 and 2s., and stores were supplied to him to the extent of 10s. 5d." Then followed averments of loss and damage in support of prayer (2) of the petition, being maintenance; loss incurred through the refusal of the shipping master to sign the pursuer's continuous discharge sheet; and injuries due to his having to go home as a distressed seaman.

The defenders answered:—(Ans. 10) "Denied as stated, and explained that on arrival at Gap Rock, when it became known that the vessel was to proceed to Japan, the pursuer, along with the rest of the crew, declined to perform any work. The master thereupon intimated that he would take the vessel to Hong-Kong, and ordered the crew, including the pursuer, to discharge their duties for that purpose, but they all refused duty of any kind, and the steamer had to be worked into Hong-Kong by means of her officers. On arrival at Hong-Kong the master reported the matter to the authorities, with the result that the crew, including the pursuer, were sentenced

delay is due to the act or default of the seaman, or to any reasonable dispute as to liability, or to any other cause not being the wrongful act or default of the owner or master, the seaman's wages shall continue to run and be payable until the time of the final settlement thereof."

Sec. 186. "(1) In the following cases, namely—

"(a) . . .

"(b) Where the service of any seaman or apprentice belonging to any British ship terminates at any port out of Her Majesty's dominions,

the master shall give to that seaman or apprentice a certificate of discharge in a form approved by the Board of Trade . . .

"(2) The master shall also, besides paying the wages to which the seaman or apprentice is entitled, either—

"(a) provide him with adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman, or

"(b) furnish the means of sending him back to some such port, or

"(c) provide him with a passage home, or

"(d) deposit with the consular officer . . . such a sum of money as is by the officer . . . deemed sufficient to defray the expenses of his maintenance and passage home.

"(3) . . .

"(4) If the master fails without reasonable cause to comply with any requirement of this section, the expenses of maintenance or passage home

"(a) if defrayed by the seaman or apprentice shall be recoverable as wages due to him; and

"(b) if defrayed by the consular officer or by any other person shall . . . be a charge upon the ship . . . and upon the owner . . . and may be recovered against the owner . . ."

Nov. 12, 1907. to three weeks' imprisonment with hard labour. Explained further that the master was quite justified in reporting the occurrence as he did, and that the pursuer was properly tried by a competent tribunal in Hong-Kong for wilful disobedience to orders." (Ans. 11) "Admitted that pursuer's wages were £4 per month, and that advances to the extent of £4, 12s. 5d. were received by him. *Quoad ultra* denied, and explained that on the pursuer being sentenced to imprisonment, and thereby unable to proceed with the vessel, the master immediately made out a statement of the balance of wages due to him as at that date, and paid the same to the Superintendent of Shipping in Hong-Kong in accordance with the provisions of the Merchant Shipping Act, all claims competent to the pursuer against the ship or her owners being thereby discharged. The balance of wages so paid amounted to the sum of £6, 8s. which will no doubt be paid or accounted for to the pursuer on application to the Board of Trade. In any event, there being a dispute between the parties regarding the wages, the pursuer is not entitled to a continuance of his wages during the dispute."

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The pursuer pleaded, *inter alia*;—(1) The pursuer having signed articles to sail as fireman on board defenders' s.s. "St Helena," and having all along been willing to implement his agreement, is entitled to wages at the stipulated rate to date of final settlement, in terms of section 134 of the Merchant Shipping Act, 1894. (2) The defenders having broken said articles as within condescended on, in consequence of which pursuer suffered loss and injury, pursuer is entitled to damages from them therefor.

The defenders pleaded, *inter alia*;—(3) The pursuer himself being in breach of his contract is not entitled to wages, or, at all events, to wages beyond the date when his services terminated. (4) The pursuer having been tried and sentenced by a competent tribunal in Hong-Kong, and being thereby unable to proceed with the steamer, and as his wages up to that time have been paid by the master to the Superintendent of Shipping in Hong-Kong in accordance with the provisions of the Merchant Shipping Act, the defenders are entitled to absolvitor, with expenses.

A proof was allowed and led. The import of the evidence sufficiently appears from the opinions of the Lord Justice-Clerk and Lord Stormonth-Darling.

On 9th June 1906 the Sheriff-substitute (Boyd) pronounced an interlocutor in which, *inter alia*, he found, "(6) That the pursuer along with the majority of the crew refused to go to Nagasaki with the cargo; that the master determined to put into Hong-Kong and lay the case before the authorities; that he summoned the crew to communicate this to them, but they, including the pursuer, refused to obey, and the master and officers were obliged to work the vessel to Hong-Kong: (7) That the master charged the crew before the magistrate at Hong-Kong with refusing duty at sea, the charge including both the refusal to go to Nagasaki and the refusal to obey the summons aforesaid; and on the magistrate's sentence the pursuer and crew suffered certain imprisonment: . . . Finds in law (1) that under the articles the pursuer undertook the ordinary risks incidental to seamanship: (2) That the voyage from Gap Rock to Nagasaki with coal was not a risk which the pursuer was bound by the articles to undertake, and that he was entitled to refuse to serve on such a voyage, and this refusal was no competent ground for the charge

before the magistrate: (3) That the refusal to work the vessel into Hong-Kong was a breach of duty undertaken by the pursuer under the articles, and competently fell within the charge laid before the magistrate; and (4) that the pursuer being thus in breach of his contract is not entitled to the wages or damages sued for"; and assoilzied the defenders.

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On appeal the Sheriff (Guthrie), on 22d November 1906, recalled the Sheriff-substitute's interlocutor; found "that it is not proved that the pursuer and the rest of the crew of the 'St Helena' refused to obey orders, and to work the ship from Gap Rock to Hong-Kong, but that it is proved, on the contrary, that the master of the 'St Helena' refused to have more to do with them when they declined to go to Nagasaki, and elected to take the ship to Hong-Kong, and did so, by the officers alone: Finds that the engagement of the pursuer was thus terminated at Gap Rock." The Sheriff decerned for £6, 8s. as the unpaid balance of his wages up to his arrival at Hong-Kong on 24th April, and for £40 in name of damages.

The defenders appealed, and argued;—After the judgment of the House of Lords in the case of *Caine v. Palace Steam Shipping Co.*¹ the defenders could not maintain that the pursuer was not entitled to disobey the order to go to Nagasaki, but he and the rest of the crew were not entitled to disobey the order to go aft, and on the evidence the Sheriff-substitute had rightly held that that was what they had in fact done. Possibly the reason for the order—viz., to inform them that the vessel was now going to Hong-Kong—was not communicated to the men, but discipline would be at an end if a master was bound to give reasons for his orders, and the men could see for themselves that the vessel was making for Hong-Kong. The Sheriff-substitute therefore had rightly assoilzied the defenders. If, however, the Sheriff-substitute was wrong and the Sheriff was right on the question of fact, in no view was the pursuer entitled to wages down to the date of the interlocutor to be pronounced by the Court; the utmost to which he was entitled was wages down to the date of the Sheriff's interlocutor, which corresponded to the date of the judgment of the Court of Appeal in the case of *Caine*¹—the date there adopted by the House of Lords. That was the "time of final settlement" within the meaning of section 134 of the Merchant Shipping Act, 1894, if it applied here, which it did not. There was here "a reasonable dispute as to liability" in the sense of section 134. Further, the pursuer was not entitled both to wages and to damages; that was the fair meaning of sections 134 and 186, read together. The pursuer had been earning wages since he left the "St Helena," and the amount of these wages ought to be deducted from such sum as he might be found entitled to from the defenders.

The pursuer argued;—The Sheriff was right on the question of fact upon which he and the Sheriff-substitute differed, and that being so, the case was indistinguishable from the case of *Caine*.¹ Every argument advanced by the defenders here was answered there. The reason why the judgment of the Court of Appeal was taken to be "the time of final settlement" was that an arrangement was come to and was sanctioned by the Court of Appeal after the judgment was pronounced.² Here there had not been any such arrangement; hence

¹ L. R., [1907] A. C. 386.

² L. R., [1907] A. C. 386, *per* Lord Macnaghten, at p. 393.

Nov. 12, 1907. the pursuer was entitled to wages down to the date of the interlocutor to be pronounced by the Court.

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At advising,—

LORD JUSTICE-CLERK.—The pursuer seeks compensation under the following circumstances: He was a fireman—one of the crew of a vessel called the “St Helena.” The vessel being on the way to Hong-Kong, which by her papers was her port of destination on the voyage she was making at the time, was signalled, when still at sea, from the signal station on the coast near Hong-Kong, to proceed to Nagasaki, in Japan, and her course was altered accordingly. The war between Russia and Japan being in progress at the time, and the cargo, which was coal, having been declared contraband by both belligerents, the crew in a body refused to work the ship in the direction of Nagasaki. They had various interviews with the master, in which they consistently refused to serve the ship in a voyage to Nagasaki, and accordingly they remained on board idle. That being the position, the master, after consultation with his officers, who in the meantime were navigating the vessel, altered her course, and made for Hong-Kong. He says that he summoned the men aft to inform them that he was going to Hong-Kong, but that they refused to come aft. The crew say that the delay in coming aft was only a few minutes, while they cleared away their dinner things, and that when they came aft he waved them back, saying he “wanted nothing more to do with them.” Whoever is right as to what happened, the important point is that the master did not take proper steps to test whether the crew would assist in taking the vessel to Hong-Kong, but navigated the vessel by the officers only for some time. No new order was issued. The crew were under the order to go to Nagasaki, or if that order was one that the master had no legal right to enforce, it was for him to cancel it and issue other orders. It therefore becomes the crucial point in the case, whether from the time when the order to set the course for Nagasaki was given until the time when the crew were landed at Hong-Kong, any order was given by the master which the crew were bound to obey and which they refused to obey. The occasion was an important and a serious one, the master having maintained that the crew were bound to give their services to go to Nagasaki, in which he was wrong. It lay with him to take proper measures to bring the working of the vessel into normal conditions if he could do so. In testing this, one naturally looks to the log to see what was recorded at the time, that being the official statement made on the responsibility of the master, when the events were recent, and by which the position must be judged in any question with him. Now, the log records the abandonment of the voyage to Nagasaki, and gives the details of the duties undertaken by the officers, plainly upon the footing that the master had not then informed the crew or called on them to return to duty. The day after this entry was made there appears an entry which is of great importance in the case. It is in these words:—“The foregoing entry had been read over to the members of the crew interested, who replied as follows, that they refused to go to Nagasaki as ordered, but they professed their willingness to take the ship into Hong-Kong.” That entry follows immediately on the entry mentioned

above. It is very difficult to see how in the face of that entry it can be said that the crew ever refused to assist in navigating the vessel into Hong-Kong. That being so, the sole question between pursuer and defender is narrowed down to this: Had the master the right to demand that the crew should work the ship on a course for Nagasaki? That is the question which was raised by the master before the magistrate in Hong-Kong, and on which the master succeeded in having the men imprisoned. It is plain that the master proceeded throughout upon the footing that the crew were bound to obey his order to work the vessel to Nagasaki, and that, they refusing to do so, he did not put them to the duty they were willing to undertake, viz., to navigate the vessel to Hong-Kong.

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The conviction in Hong-Kong was plainly wrong, and cannot be maintained. The risk of sailing into waters in which capture for carrying contraband of war was probable was not a risk which the men in signing articles had undertaken. Therefore the men were in no default in refusing to go to Nagasaki, and it is plain that had that been accepted they might have been used to do what they had undertaken to do, namely, to work the vessel on the course for Hong-Kong.

In these circumstances the pursuer sues for wages in so far as not paid down to the date of final settlement, and for damages. The damages found are not impugned, but the Sheriff has not given wages down to the date of settlement. In that I think the Sheriff has erred. I am clearly of opinion on section 134 (c) of the Merchant Shipping Act, that the wages under that clause run to the date of final settlement, there being no ground for attributing the delay in the settlement to the pursuer or anyone else than the master or owners.

The view I take in this case is strongly confirmed by the case of *Caine v. The Palace Shipping Company*,¹ recently decided in the House of Lords.

Accordingly, my view is that the pursuer is entitled to the damages as found in the Court below, and to his wages, as far as not already paid, down to the date of settlement.

LORD STORMONTH-DARLING.—In my opinion this case is indistinguishable in point of principle from the case of *Palace Shipping Company, Limited, v. Caine and Others*,¹ decided by the House of Lords on 29th July last. If so we are bound to follow that case.

There, as here, the question arose out of the war between Russia and Japan, and out of a demand by the master that the crew (including in this case the pursuer, who was a fireman and therefore a "seaman" in the sense of the Merchant Shipping Act, 1894), should go with the cargo of coal, which had been declared contraband of war by both belligerents, to a port in Japan. The information as to the destination of the ship was communicated to the crew for the first time in this case when the ship reached Gap Rock, the signal station for Hong-Kong, while in the House of Lords case the information was given at Hong-Kong itself. But it is not contended that this trifling variation in the facts makes any distinction in principle. The only difference which the defenders represent as material is that the

¹ L. R., [1907] A. C. 386.

Nov. 12, 1907. refusal of the pursuer and the rest of the crew to obey a lawful order applied, as they say, to an order to take the vessel to Hong-Kong, and had nothing to do with the orders to go to Nagasaki in Japan. But this, though quite distinctly averred by the defenders on record (Ans. 10) is not borne out by the proof. The master nowhere says that he ever asked the pursuer and the others to take the vessel to Hong-Kong. On the contrary, he says that after he had twice asked the men, first collectively and then individually, to "continue on the voyage," the course being at that time set for Nagasaki in accordance with orders which had been received at the signal station, and they had twice refused in the face of his remonstrances, he had a conference with the chief officer and the chief engineer as to the possibility of continuing the voyage, and it was then for the first time decided to go into Hong-Kong with the aid of the officers and engineers, the course being changed for Hong-Kong in consequence of this decision. The Sheriff-substitute discusses the precise sequence of events and prefers the evidence of the officers examined to that of the men, but the Sheriff, on the other hand, accepts the evidence of the men, which is to the effect that they were in the act of going aft in response to the master's command delivered by the third officer, when he held up his hand on the bridge and "said he wanted nothing more to do with us." Though personally I am disposed to agree with the Sheriff, I do not think that it is necessary to decide absolutely between these two slightly different versions of what occurred, seeing that there is no attempt on the part of the defenders to prove that any order or even suggestion was ever made to the pursuer and the others, that whether they were willing to go to Nagasaki or not, they were at least bound to work the vessel into Hong-Kong. The most that is attempted on the part of the defenders by way of suggestion is to say that the men must have seen that the ship was turned towards Hong-Kong, and might then have offered to do their duty. But if the men were right in their refusal to carry contraband of war to a port of one of the belligerents, their legal position could not be reversed or affected so long as this order was never withdrawn or a new order substituted. And that this was the truth of the case sufficiently appears, I think, from the log-book of the ship on the two critical days. After the entry about the refusal of the crew "to do any more work or continue the voyage" (*i.e.*, to Nagasaki) there is an entry—"In consequence of the above refusal we were compelled to abandon the voyage and take the ship into Hong-Kong"—and then there is a description of the several duties undertaken by the officers. That again is followed by an entry made next day, and signed not only by the master and the chief officer but also by the chief engineer, in the following terms:—"The foregoing entry has been read over to the members of the crew interested, who replied as follows, that they refused to go to Nagasaki as ordered, but they professed their willingness to take the ship into Hong-Kong." I regard this statement not only as a *de recenti* record made by the officers of the ship of the true position of the contending parties, but it squares with all that followed. Acting on his erroneous views of the crew's rights, the master had the men tried before the Police Magistrate at Hong-Kong, and sentenced to three weeks' imprisonment with hard labour for refusal of duty. After three days of the sentence had elapsed the Governor of Hong-Kong, in the exercise

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of his discretionary powers, released the men because, as appeared from sub-^{Nov. 12, 1907.}sequent correspondence with the Colonial Office, there had been an opposite decision in Hong-Kong on a similar charge. In that opposite decision it had been held that in view of the proximity of belligerent ships, special risks not covered by the crew's agreements did exist. It is therefore plain that the whole question turned, not on any minor point connected with the few hours' steaming from Gap Rock to Hong-Kong, but on whether the crew, having signed an agreement to serve on an ordinary commercial voyage subject only to perils of the sea, were justified in refusing to serve after the agreement had been broken by the shipowner requiring them to serve on a voyage which, although within the geographical limits of the articles, was yet attended with risks not contemplated by the articles. The consequences, as regards the pursuer, were that when he was released the ship was gone, and that he had to accept a passage home as "a distressed seaman." He accordingly now sues the defenders (1) for wages at the rate of £4 per month from the date of the articles till the date of final settlement, in terms of section 134 of the Merchant Shipping Act, 1894, less a small sum paid to account, and (2) for the sum of £100 of damages. The Sheriff deals with the claim for wages merely by giving decree for the sum of £6, 8s., admitted in the defences as the amount of the pursuer's wages up to his arrival in Hong-Kong. The damages he assesses at £40.

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The pursuer is satisfied with this latter award as covering maintenance and every other claim except money wages. But I am of opinion that we must follow the rule applied by the House of Lords with regard to wages; and to that extent we must recall the Sheriff's interlocutor. In other words we must hold that the master acted wrongfully in procuring the imprisonment of the pursuer on an unlawful ground, and in bringing his engagement to an end without making any provision for his passage home, in terms of section 186 of the Merchant Shipping Act, 1894. In these circumstances it follows that the matter is regulated by section 134 (c) of that Act, which declares that the seaman's wages shall continue to run and be payable until the time of the final settlement thereof. There has been no final settlement thereof down to the present time, and the delay is not due to any cause other than the wrongful act or default of the owner or master. We must therefore give decree for the pursuer's wages at the admitted rate of £4 per month down to the date of our judgment hereon, under deduction of the sum of £4, 12s. 5d. admitted to have been received by him in Cond. 11, but without any reference to the sum of £6, 8s. alleged to have been paid by the defenders to the Superintendent of Shipping in Hong-Kong as the balance of wages due to the pursuer, and *quoad ultra* we must affirm the Sheriff's award of damages (including maintenance), with which the pursuer declares he is satisfied.

This does not mean that we dissent from the main findings of the Sheriff. On the contrary we agree with them; but it is necessary formally to recall his interlocutor and to vary his findings in order to bring his judgment into harmony with a later decision of the House of Lords.

LORD LOW concurred.

LORD ARDWALL at the hearing was sitting in the Extra Division.

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Shipping Co.,
Limited.

THE COURT pronounced this interlocutor :—" Recall the interlocutor of the Sheriff of Lanark, dated 22d November 1906, as also the interlocutor of the Sheriff-substitute, dated 9th June 1906: Find in fact (1) that on 24th January 1905 the pursuer agreed to serve as a fireman on board the defenders' steamship 'St Helena' under articles which are admitted on record; (2) that the said steamship loaded at Cardiff a cargo of Welsh coal, and on 16th April 1905 she arrived at Gap Rock, the signal station for Hong-Kong; (3) that the master there received orders to take the vessel to Nagasaki in Japan; (4) that the master in accordance with these orders altered the ship's course for Nagasaki and communicated the change to the crew; (5) that at this time a state of war existed between Russia and Japan, while towards them Great Britain maintained an attitude of neutrality; (6) that some time previously Russia had notified as contraband of war every kind of fuel, including coal; (7) that the pursuer along with the majority of the crew refused to go to Nagasaki with this cargo, and was entitled under the articles so to refuse; (8) that it is not proved that the pursuer and the rest of the crew refused to work the ship from Gap Rock or the vicinity thereof to Hong-Kong; (9) that the defenders thereafter wrongously charged the pursuer and the rest of the crew before the Police Magistrate at Hong-Kong with refusal of duty, and that the said magistrate convicted each of them of the said offence, and sentenced them to three weeks' imprisonment with hard labour; (10) that while they were still undergoing imprisonment the said ship was dispatched from Hong-Kong, and that the defenders having made no provision for the passage home of the pursuer in terms of the Merchant Shipping Act, 1894, he was sent home as a distressed seaman: Find in law that in these circumstances the defenders are liable to the pursuer in damages; and also that under and by virtue of section 134 (c) of the said Merchant Shipping Act the pursuer's wages continue to run, and are payable, until the time of the final settlement thereof: Therefore assess the damages at £40 (including maintenance); find the pursuer entitled to wages at the admitted rate of £4 per month from 24th January 1905 until the date hereof, under deduction of the sum of £4, 12s. 5d. received by him to account (£134, 9s., less said £4, 12s. 5d); and accordingly decern against the defenders to make payment to the pursuer of the said sums of £40 and £129, 16s. 7d., being together the sum of £169, 16s. 7d., with interest thereon at the rate of 5 per centum per annum from the date hereof until payment," &c.

D. HILL MURRAY, S.S.C.—CAMPBELL FAILL, S.S.C.—Agents.

MISS MARGARET NAIRN AND OTHERS, Pursuers (Reclaimers).—

No. 23.

Sol.-Gen. Ure—Kennedy, K.C.—Munro—Mair.

THE UNIVERSITY COURTS OF THE UNIVERSITIES OF ST ANDREWS AND EDINBURGH AND OTHERS, Defenders (Respondents).—*D.-F. Campbell—Macmillan.*

Nov. 16, 1907.

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Election Law—University Franchise—Right of women graduates to vote—Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. cap. 48), secs. 27 and 28—Universities Elections Amendment (Scotland) Act, 1881 (44 and 45 Vict. cap. 48), sec. 2 (3), (10), and (16)—Universities (Scotland) Act, 1889 (52 and 53 Vict. cap. 55), sec. 14 (6).—Women graduates of a Scottish university are not entitled to vote in the election of a Member of Parliament for the university.

The Representation of the People (Scotland) Act, 1868, sec. 20, enacts as to the franchise for universities that “every person whose name is for the time being on the register . . . of the general council of such university, shall, if of full age and not subject to any legal incapacity, be entitled to vote in the election of a Member” of Parliament for the university.

By sec. 28 of the same Act, it is enacted that persons holding certain university degrees shall be members of the general council.

The Universities Elections Amendment (Scotland) Act, 1881, section 2 (3), enacts, that in case of a poll the registrar of the university shall issue a voting paper “to each voter to his address as entered on the register of the general council.”

The Universities (Scotland) Act, 1889, sec. 14, empowers the Commissioners thereby appointed to make ordinances for the purpose, *inter alia*, of enabling each University to admit women to graduation; and in virtue of an ordinance in 1892 women were admitted to graduation in, and their names were placed on the register of the General Councils of, the Universities of St Andrews and Edinburgh.

In an action brought in 1906 by certain women graduates against the University Courts and officials of St Andrews and Edinburgh Universities, *held* that as it was a principle of the unwritten constitutional law of the country that men only were entitled to take part in the election of representatives to Parliament, women graduates were not entitled to vote for a Parliamentary representative of a university, and that the registrar of the university was not bound to issue voting papers to them although their names appeared on the register of the general council of the university.

In 1906 Miss Margaret Nairn, M.A., and certain other women, brought this action against the University Courts of the Universities of St Andrews and Edinburgh, and the Chancellors, Vice-Chancellors, and Registrars of the said Universities, in which they concluded for declarator that “(1) prior to 31st December 1905, and at the date of the demand for a poll at the election of a Member of Parliament for the Universities of St Andrews and Edinburgh, the pursuers were and have since been and now are on the register of the General Council of the University of Edinburgh; (2) while and so long as the pursuers are on the said register they are entitled at the present and on the occasion of any and every future Parliamentary election for the said Universities, (a) to receive voting papers from the registrar, (b) to vote by duly marking the same, and (c) to have their votes so given duly recorded.”* (It was explained for the pursuers that the word “recorded” was used in the sense of “counted.”)

The pursuers were graduates of the University of Edinburgh, and

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DIVISION.
Lord Salvesen.

* The Representation of the People (Scotland) Act, 1868 (31 and 32

Nov. 16, 1907. **Nairn v. University Courts of St Andrews and Edinburgh.** their names were entered in the register of members of the General Council of that University. By ordinance No. 18 passed by the University Commissioners in virtue of the powers given to them by section 14 (6) of the Universities (Scotland) Act, 1889, women had been admitted to graduation in several of the faculties of the Scottish Universities, and the names of women graduates had been placed on the general councils, and such women graduates had attended and voted at the meetings of the respective general councils. In terms of section 9 of the Representation of the People (Scotland) Act, 1868, the University of Edinburgh has the privilege of returning, jointly with the University of St Andrews, a Member of Parliament. A contested election of a Member of Parliament for the Universities of St Andrews and Edinburgh, the first since the admission of women to graduation, took place in February 1906. Voting papers were not issued to the pursuers.

Vict. cap. 48), enacts:—Sec. 27. "*Franchise for Universities* . . . Every person whose name is for the time being on the register, made up in terms of the provisions hereinafter set forth, of the General Council of such University, shall, if of full age, and not subject to any legal incapacity, be entitled to vote in the election of a member to serve in any future Parliament for such University in terms of this Act."

Sec. 28. "Under the conditions as to registration hereinafter mentioned, the following persons shall be members of General Council of the respective Universities, viz.:—(1) All persons qualified under the 6th or 7th section of the Act 21 and 22 Vict. cap. 83; (2) all persons on whom the University to which such General Council belongs has after examination conferred the degree of doctor of medicine, or doctor of science, or bachelor of divinity, or bachelor of laws, or bachelor of medicine, or bachelor of science, or any other degree that may hereafter be instituted. . . ."

The Universities Elections Amendment (Scotland) Act, 1881 (44 and 45 Vict. cap. 40), enacts:—Sec. 2, subsec. (3). "In case of a poll the registrar of the University, as soon as he conveniently can after the day of demand for a poll, and not later than six clear days thereafter (exclusive of Sundays), shall issue simultaneously through the post a voting paper in the form or to the effect set forth in Schedule (A) annexed to this Act to each voter to his address as entered on the register of the General Council of the University, who shall appear from said address to be resident within the United Kingdom or the Channel Islands. . . ."

Subsec. (10). "It shall be lawful for any candidate, or the agents of the candidates who may be in attendance, to inspect any voting paper before the same shall be counted, and to object to it on one or more of the following grounds . . . (2) that the person giving a vote by the voting paper is not qualified to vote . . . and the Vice-Chancellor or one of his Pro-Vice-Chancellors shall have power to reject or receive, or receive and record as objected to, any voting papers. . . ."

Subsec. (16). "Provided always that no person subject to any legal incapacity shall be entitled to vote at any Parliamentary election, or exercise any other privilege as a member of the General Council of any University."

The Universities (Scotland) Act, 1889 (52 and 53 Vict. cap. 55), enacts:—Sec. 14. "The Commissioners shall have power . . . after making due inquiry, to make ordinances for all or any of the following purposes as shall to them seem expedient:— . . . (6) To enable each University to admit women to graduation in one or more faculties, and to provide for their instruction."

Ordinance No. 18, dated 22d February 1892, provides:—"It shall be in the power of the University Court of each University to admit women to graduation in such faculty or faculties as the said Court may think fit."

The pursuers averred that they had applied to the Registrar of the University to issue to them voting papers, but that the Registrar had declined to do so. Nov. 16, 1907.

The pursuers pleaded, *inter alia*;—(1) The pursuers, as members of the General Council of the University of Edinburgh, and duly enrolled on the statutory register, are entitled (a) to receive from the Registrar voting papers, and (b) to return the same to the Registrar, duly marked, signed, and attested. (2) The pursuers, as registered members of the said General Council, are entitled to have the votes so tendered by them recorded as votes in the election; *et separatim*, the pursuers are entitled to have the said votes recorded unless the same shall, on objection taken by one of the candidates or his agent, be rejected by the returning officer. Nairn v.
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The defenders pleaded, *inter alia*;—(1) The action is incompetent. (3) The pursuers being incapacitated by reason of their sex from voting at the election of a Member of Parliament for the said Universities, the defenders should be assoilzied from the declaratory conclusions of the summons, with expenses. (4) In respect that the statutes and ordinances founded on by the pursuers do not confer upon them any right to vote at the election of a Member of Parliament for the said Universities, the defenders are entitled to absolvitor from the declaratory conclusions of the summons.

By interlocutor dated 5th July 1906 the Lord Ordinary (Salvesen) assoilzied the defenders from the conclusions of the summons.*

* "OPINION.—This case raises the important question whether women graduates are entitled to vote at the election of a Member of Parliament for the Universities of St Andrews and Edinburgh. The question is a new one, and the earliest opportunity has been taken of raising it, as the election which took place in 1906 was the first contested election for these two Universities since women have been admitted to graduation. All the pursuers are members of the General Council of the University of Edinburgh, and their names are duly entered in the register of such members.

"The pursuers' claim is rested primarily on the Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. cap. 48). By section 27 of that Act it is, *inter alia*, provided that 'every person whose name is for the time being on the register, . . . of the General Council of such University, shall, if of full age, and not subject to any legal incapacity, be entitled to vote in the election of a member to serve in any future Parliament for such University in terms of this Act.' The pursuers' argument on this section may be stated thus: They say that 'person' is a word which ordinarily includes all human beings without distinction of sex; that therefore the words 'male or female' may be inserted after it in the section in question; and, if so, it would be meaningless to suggest that the clause 'not subject to any legal incapacity' should be supposed to infer any incapacity on the ground of sex. They point to the fact that in Part I. of the Act, where all the other franchises are dealt with, the word used instead of person is 'man,' that the difference in the phraseology cannot be assumed to be accidental; but that, even if it were accidental or mistaken, effect must be given to the plain language of the Act. They further found on section 2, subsection 3, of the Universities Election Amendment (Scotland) Act, 1881, which provides for the registrar, in case of a poll, sending voting papers through the post to each voter to his address as entered on the register of the general council of the university, who shall appear from said address to be resident within the United Kingdom or the Channel Islands, and especially on the proviso in the last clause of subsection 16, which is to the following effect: 'Provided always that no person subject to any legal incapacity shall be

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The case was heard in the Extra Division on 22d and 23d October 1907.

Argued for the pursuers and reclaimers ;—(1) The pursuers were entitled to declarator in terms of the conclusions of the summons down to and including 2 (b). Their names were on the registers, and by the Universities Elections (Scotland) Act, 1881, section 2 (3), every person on the register was entitled to receive a voting paper. The Registrar had no power to decide to whom he should send voting papers, but was bound to issue them to all whose names appeared on the register. It might have been provided that there should be one register for the purpose of voting at elections and another register with reference to the other privileges of graduates, just as there was a provision for separate registers in the Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50), but there was no such distinction,

entitled to vote at any Parliamentary election, or exercise any other privilege as a member of the General Council of any university.' Women having now, by the Ordinance of 1892 following on the Universities (Scotland) Act, 1889, section 14, subsection 6, been admitted to graduation, and the names of women graduates having been placed on the register of the General Council, they contend, with great force, that the legal incapacity dealt with in the above proviso must be construed as excluding any incapacity on the ground of sex, otherwise they would be equally disqualified from exercising other privileges as members of the General Council—privileges to which they have been admitted without objection and which they have regularly exercised.

"The whole of this argument depends for its validity on the construction which is put on the word 'person' in section 27 of the 1868 Act. I agree with the argument of the pursuers that, in any ordinary statute, this word would be presumed to include individuals of both sexes, but it is equally true that the word is open to construction ; and if it sufficiently appears from the context, or on other grounds, that it must be construed as meaning male person, the case for the pursuers entirely fails. Acts of Parliament, no doubt, constitute, for the most part, alterations on the common law ; but when the language used is ambiguous, that construction will ordinarily be preferred which is consistent with the common law, rather than a construction which would override it. Now, in 1868 and 1881, women were legally incapacitated at common law from voting at the election of Members of Parliament. That was decided in England in the case of *Chorlton v. Lings*, L. R., 4 C. P. 374, and in Scotland in the case of *Brown v. Ingram*, 7 Macph. 281. That being so, it is scarcely conceivable that women should be entitled to vote at elections of a university member when they were debarred from the same privilege in county and burgh elections. It was said that they are expressly so debarred by the 1867 and 1868 Acts, which deal with the representation of the people in England and Scotland respectively, by the use of the word 'man' instead of 'person,' and that this does not apply to the university franchise. The alteration in language is, at first sight, curious ; but I think it may be explained on the footing that in 1868 and 1881 there were many women who had the necessary qualifications for the occupier and ownership franchise ; while at these dates women were not admitted to the university at all, and it was no doubt thought unnecessary to limit the university franchise expressly to males, when males alone could, at that time, obtain the necessary qualification. Holding, therefore, that the word 'person' is open to construction, I feel constrained, for the reasons I have stated, to construe it as equivalent to 'male person.' An alternative view would be to construe the word as of common gender, and to hold that, as women were, at common law, legally

and one register only was kept with reference to both the voting and the academic privileges of graduates. If any question arose as to the qualification of a person whose name appeared on the register, that question fell to be determined, not by the Registrar, whose functions were only ministerial, but by the Vice-Chancellor, who, by section 2 (10) of the Universities Elections Amendment (Scotland) Act, 1881, alone had power to decide such questions. In this case the Registrar was in error in refusing to send voting papers to the pursuers, and by his error they had been deprived of the opportunity of obtaining a decision on their claim to vote from the Vice-Chancellor. (2) On the question whether the pursuers were entitled to have their votes counted, section 27 of the Representation of the People (Scotland) Act, 1868, gave the vote to "every person" whose name was on the register, and who was "not subject to any legal incapacity." Two questions arose on this section, viz.:—(a) Does "person" include

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incapacitated from exercising the Parliamentary franchise, their claim is excluded by the clause 'not subject to any legal incapacity,' which strikes at peers and aliens equally with women.

"The construction of the proviso in subsection 16 of section 2 of the 1881 Act is, I think, somewhat more difficult, on the assumption that women graduates are legally entitled to be placed on the register as members of the General Council, and to exercise the privileges, other than the franchise, which belong to such members. It is enough, however, to say that that subsection conferred no franchise on members of the General Council, and that it can scarcely be used for the purpose of construing an Act of Parliament passed thirteen years before. Besides, it may be inferred here, as in the earlier Act, that the Legislature had within its purview only male persons, as the doors of the universities had not then been opened to women. I think, moreover, it is extravagant to assume that when Parliament in 1889 conferred powers on the University Commissioners to make ordinances 'to enable each university to admit women to graduation in one or more faculties, and to provide for their instruction,' it was introducing so important a constitutional change as the extension of the franchise to women in university constituencies. What the Act of 1889 was dealing with was provision 'for the better administration and endowment of the Scotch universities, and for improving and regulating the course of study therein,' and it was not an Act which had the remotest bearing on election law. If the proviso on which the pursuers found so strongly is to be interpreted literally, it might lead to the conclusion that women graduates ought not to be on the Register of the Council of the University at all.

"The only other matter which was argued was that, in any event, the pursuers were entitled, so long as they were on the Register of the General Council of the University of Edinburgh, to receive voting papers from the Registrar, and that the Registrar in refusing to issue such papers to them was in breach of his statutory duty. The short and, to my mind, conclusive answer to this contention is that the Registrar is only bound to issue voting papers to persons who are qualified to vote. If he makes a mistake by refusing to issue the voting paper to such a person, he may render himself liable in a penalty; but it would be neither good sense nor good law to hold that he should be compelled to issue voting papers to persons whose votes, when given, he would be compelled to reject. I am, therefore, of opinion that this separate ground of action also falls.

"I hope it may console the pursuers for their want of success if I remind them that the legal incapacity of women to vote at Parliamentary elections did not in the opinion of that very learned Judge, Mr J. Willes, 'arise from any underrating of the sex either in point of intellect or worth,' but was 'an exemption, founded on motives of decorum, and was a privilege of

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women? and (b) Do the words "not subject to any legal incapacity" refer to disqualification by reason of sex? The Lord Ordinary based his decision on the ground that the word "person" was ambiguous, and was not to be construed as over-riding the common law. But in the ordinary use of language "person" was not ambiguous, and included both men and women. In sections 3, 4, 5, and 6 of the Representation of the People (Scotland) Act, 1868, which dealt with the county and burgh franchise, the expression used was "every man"; and this distinction between the term used in these sections and the term used in section 27 indicated a difference in the meaning of the terms. A similar distinction was observed in the Representation of the People (Ireland) Act, 1832 (2 and 3 Will. IV. cap. 88), which was the first Act dealing with the representation of universities, for the words "male person" appeared in sections 2 and 7 of that Act, which contained the provisions as to the general franchise, whereas "person" alone was used in sections 60 and 61, which dealt with the representation of Dublin University. Further, in other statutes "person" had been held to include women. Thus the Education (Scotland) Act, 1872 (35 and 36 Vict. cap. 62), in Schedule B enacted that "the electors shall consist of all persons being of lawful age, and not subject to any legal incapacity, whose names are entered in the latest Valuation-roll," and it was decided in the Sheriff Court by Sheriff (afterwards Lord) Fraser that women were entitled to vote at a School Board election.¹ They were also entitled to vote in municipal elections. And in *Queen v. Crosthwaite*² it was expressly decided that "person," as used in the Towns Improvement (Ireland) Act, 1854, gave women the right to vote. The only other case in which the word "person" was construed—*Wilson v. Town-Clerk of Salford*³—was not applicable, because the words were "said persons," and the words to which "said" referred were the words "male persons" previously used in the statute there under construction. Accordingly, as "person" included women the franchise was expressly conferred by the Representation of the People (Scotland) Act, 1868, taken with the subsequent Acts and Ordinance, on women whose names were on the register of the general council of the universities, and any reference to the common law for the purpose of defeating the grant was inadmissible. The university franchise was unique; it depended not on a property qualification, but on education, and it was not confined to specified geographical limits, and, therefore, no argument or inference could be legitimately drawn from the common law which could affect the question of the university franchise. If "person" included women it could not be held that the words "not subject to any legal incapacity" had the effect of excluding them, for if "person" included all without reference to sex it would be absurd immediately to adject a condition which should debar parties on the ground

the sex (*honestatis privilegium*); and again that 'the absence of such a right is referable to the fact that in this country in modern times, and chiefly out of respect to women and a sense of *decorum*, they have been excused from taking any share in the department of public affairs.' If this be so, I am afraid this action, if it has served no other purpose, has at least demonstrated that there some members of the sex who do not value their common law privileges."

¹ 20 Journal of Jurisprudence, 483.

² 17 Irish Com. Law Rep. 157.

³ L. R., 4 C. P. 398.

of their sex. The condition referred to peers, minors, and aliens—persons who were disqualified independent of sex. Thus in the Representation of the People Act, 1832 (2 and 3 Will. IV. cap. 45), the same phrase was attached to the words "male person," and therefore in that case could not imply disqualification in respect of sex. The meaning of the words in that Act was the same as their meaning in the Acts under consideration in this case. Further, section 2 (16) of the Universities Elections Amendment (Scotland) Act, 1881, applied to all the privileges conferred on graduates, and it was impossible to hold that the words meant one thing with reference to the franchise, and another thing with reference to other privileges. The Lord Ordinary mentioned *Charlton v. Lings*¹ and *Brown v. Ingram*,² but these cases referred to the general franchise, and the question was whether the names of women should be placed on the register. Here the franchise to be exercised was different, and the pursuers were already on the register, and rightly on the register. Further, there was no authority for saying that by the common law women were under a legal incapacity. If they had not possessed the franchise this was due to the fact that the statutes conferring and regulating the franchise used terms which limited the right to males, and not to any common law disability.

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Argued for the respondents ;—(1) The question whether the women graduates were entitled to receive voting papers depended upon the question whether they were entitled to vote. The Court had jurisdiction to decide as to the validity of votes cast in the election of a representative of the universities. The Election Judges had no jurisdiction ; and, in any event, the jurisdiction of the Court of Session would be ousted only by the creation of a Registration Court with reference to university constituencies. As no such Court had been created, the jurisdiction of the Court of Session remained. By section 2 (10) of the Universities Elections Amendment (Scotland) Act, 1881, the Vice-Chancellor might reject votes, but this provision would not debar a person whose vote had been wrongly rejected by the Vice-Chancellor from bringing an action of declarator, and obtaining decree declaring that he was entitled to vote ; and similarly, if votes given by disqualified persons were allowed to pass, no objection being taken to them—and the Vice-Chancellor could decide on votes only if objection were taken by the candidates or their agents—it would be possible for anyone having an interest to apply to the Court of Session to have the votes thus admitted rejected. Accordingly, as the Court was vested with the right to determine the question whether the pursuers were entitled to vote, the conclusion that the pursuers were entitled to receive voting papers could not stand apart from the other conclusions of the summons. It would be absurd to find that the pursuers were entitled to receive voting papers if their votes fell to be rejected when given. The provision in section 2 (3) of the Universities Elections Amendment (Scotland) Act, 1881, was that the Registrar should issue a voting paper to each "voter." The mere fact that a person's name appeared on the roll of voters did not make him a voter, if he were disqualified³ ; and, therefore, the question whether the women graduates were entitled to papers depended on

¹ L. R., 4 C. P. 374.

² Dec. 19, 1868, 7 Macph. 281.

³ *Stowe v. Jolliffe*, L. R., 9 C. P. 734 ; *Oldham Case*, 1869, 1 O'Malley and Hardcastle, p. 151 ; *Marquis of Bristol v. Beck*, 1907, 23 T. L. R. 224.

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the decision as to their right to vote. (2) On the main question, the pursuers had no right to vote. By the common law the Parliamentary franchise was confined to the male sex, and it had been decided that women could not vote in burgh and county constituencies.¹ If the Legislature had intended that this rule should not hold in the case of University constituencies it would have made this clear by means of an express provision to that effect. In none of the Acts founded on by the pursuers was there any such provision. The Ordinance of 1892, on which the pursuers' case depended, was made in virtue of the powers given to the Commissioners to make ordinances to enable the universities to admit women to graduation; and any ordinance made under this power could not affect the Parliamentary representation of the universities. As to the use of the word "person" in section 27 of the Representation of the People (Scotland) Act, 1868, at the date of the Act the names of women did not appear on the register. The word must be construed according to the subject-matter with reference to which it was used, and it did not necessarily include women.² The contrast between the use of the words "male persons" in the earlier sections and the use of "person" in this section was explained by the fact that the former sections dealt with a property qualification, and it was necessary to use words exclusive of women, for women might possess that qualification, whereas the latter section dealt with the university franchise, and as at the date of the Act women could not qualify for that franchise it was unnecessary to exclude them expressly. Further, women being disqualified at common law from exercising the franchise, the words "subject to any legal incapacity," included them as well as peers and aliens.³

At advising on 16th November 1907,—

The opinion of the Court (LORD M'LAREN, LORD PEARSON, and LORD ARDWALL) was read by

LORD M'LAREN.—Apart from the right to university representation which is now claimed, it is an incontestable fact that women never have enjoyed the Parliamentary franchise of the United Kingdom. Prior to the Reform Acts of 1831 and 1832 there were many varieties of the Parliamentary franchise. The vote in counties was confined to freeholders. In Scotland the borough members were elected by town-councils. Some of the English boroughs had a representation as wide as that of the present law; in the greater number the franchise was more or less restricted, but not always in the same degree or on the same type.

All varieties of the Parliamentary franchise had this element in common, that its exercise was confined to men; and even in the cases where the right of election was confined to a few burgage tenures, or even to a single tene-

¹ Brown v. Ingram, Dec. 19, 1868, 7 Macph. 281; Charlton v. Lings, L. R., 4 C. P. 374.

² Wilson v. Magistrates of Salford, L. R., 4 C. P. 398.

³ Earl Beauchamp v. Madresfield, L. R., 8 C. P. 245; Beresford-Hope v. Lady Sandhurst, L. R., 23 Q. B. D. 79; Wilson v. Magistrates of Salford, L. R., 4 C. P. 398; Stowe v. Jolliffe, L. R., 9 C. P. 734; Oldham Case, 1 O'Malley & Hardcastle, 151; Marquis of Bristol v. Beck, 23 T. L. R. 224; Charlton v. Lings, L. R., 4 C. P. 374; and Brown v. Ingram, 7 Macph. 281.

ment, if the owner was a woman she was not entitled to vote. In view of Nov. 16, 1907. these facts, we must conclude that it was a principle of the unwritten constitutional law of the country that men only were entitled to take part in the election of representatives to Parliament.

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All ambiguous expressions in modern Acts of Parliament must be construed in the light of this general constitutional principle. We are not to be understood as invoking any merely technical rule of construction in this matter; what is meant is that if Parliament had intended to subvert an existing constitutional law in favour of women graduates, the intention would naturally be expressed in plain language, and therefore if ambiguous language is used it must be construed in accordance with the general constitutional rule.

Lord M'Laren.

By sec. 27 of the Representation of the People (Scotland) Act, 1868, a vote for the election of a university member is given to "every person whose name is for the time being on the register . . . if of full age and not subject to any legal incapacity." The qualification of "full age" was necessary, because the register of graduates might contain the names of men who had taken their degrees before attaining majority. The qualification "not subject to any legal incapacity" was also necessary; a peer, for example, might be on the register of graduates, but it was not intended that he should have a vote for returning a member to the House of Commons. It was not necessary to exclude women by express words, because at that time women could not lawfully be on the university register.

Now, this is the Act of Parliament which created the university constituencies of Scotland, and therefore in its inception the university franchise had this element in common with the franchises of counties and burghs, that it was confined to men. It may here be observed that in the third, fourth, fifth, and sixth sections of this Act, which define the qualifications of voters in counties and burghs, the words used are "every man," so it appears that the expression "every person," which is used with reference to university elections, had the same meaning as "every man" in the earlier sections.

By the Universities Elections Amendment (Scotland) Act, 1881, provision is made for taking the vote at university elections by means of "voting papers," and in particular by sec. 2, subsec. 3, the Registrar in case of a poll is required to send through the post a voting paper "to each voter to his address as entered on the register of the general council of the university, who shall appear from said address to be resident within the United Kingdom or the Channel Islands." The expression "each voter" here used could not give rise to any ambiguity as to sex, because at this date the university register was a register of men. The proviso of subsec. 16, excluding persons "subject to any legal incapacity," does not seem to have any material bearing on the present question.

The claim of the pursuers to vote at the election of a member for the Universities of Edinburgh and St Andrews is founded on their status as graduates of one of these universities. By the Universities (Scotland) Act, 1889, the Commissioners thereby appointed were empowered to make ordinances "to enable each university to admit women to graduation in one or

Nov. 16, 1907. more faculties." By the Ordinance of 1892 this power was exercised, and women have been admitted to graduation in certain faculties. The pursuers' names have been placed on the registers of the General Council of one of these Universities in right of their respective degrees. It may be observed that the Universities Act, 1889, does not empower the University Commissioners to admit women graduates to the franchise; and if it had been intended that the degree should carry with it the right of voting at Parliamentary elections, we should have expected to find a provision to that effect in the Act of Parliament itself. It is quite certain that the University Commissioners had no power to make any deliverance on this subject, and the same observation applies to the powers of the University Courts in the execution of the ordinance. The pursuers' claim accordingly must rest on the Representation Act of 1868, and the Universities Elections Act, 1881.

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University
Courts of St
Andrews and
Edinburgh.
Lord M'Laren.

The argument must be that a franchise originally conferred on graduates who were necessarily men has been extended to women graduates, not by a direct enfranchising enactment, but by the indirect effect of an Act of Parliament which does not profess to deal with political privileges, but is concerned only with academic functions, and which, in the interests of the higher education of women, authorises the admission of women to graduation. The degree itself, or rather the right to take a degree, is not even conferred by the Act of Parliament, but is made dependent, first, on the judgment of Commissioners empowered to take evidence, and, secondly, on the pleasure of the governing bodies of the respective universities. It is difficult to conceive that the Legislature should have conferred by devolution the power of extending the franchise to a class of persons hitherto excluded by a constitutional rule, a power which it has always kept in its own hands, and it appears to us that there is absolutely no evidence in the terms of the Universities Act, 1889, that Parliament intended to extend the franchise to women, or had any question of political privileges in view, when it empowered the university authorities to admit women to graduation. We think that the Representation Act, 1868, and the Universities Elections Act, 1881, must be construed now, as heretofore, with reference to the political disabilities of women, and that the circumstance of the pursuers being on the university registers does not remove the disability.

The pursuers contend that in any event they are entitled to receive voting papers, leaving it to the candidate or his agent to object to the vote if tendered, and to the Vice-Chancellor or his deputy to dispose of the objection, all in terms of the 10th subsection of section 2 of the Universities Elections Act, 1881. It is, no doubt, true that if the Registrar (taking a different view of his statutory duty), had sent the lady graduates voting papers, the votes might have been objected to and disallowed by the Vice-Chancellor.

But as our judgment on the main question is adverse to the claim of the lady graduates, it follows that no individual of the class has a cause of action for not receiving an invitation to give a vote which she could not lawfully exercise, or a title to sue for a declaratory finding that she is entitled to receive such a paper. We are therefore of opinion that the

Lord Ordinary's judgment should be affirmed, and the reclaiming note Nov. 16, 1907. refused.

THE COURT adhered.

WILLIAM PURVES, W.S.—W. & J. COOK, W.S.—Agents.

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University
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Edinburgh.

THE WALKER STEAM TRAWL FISHING COMPANY, LIMITED (AND REDUCED), Petitioners.—*Morton*.

No. 24.

Nov. 16, 1907.

Company—Capital—Reduction of Capital—Conversion without Reduction of Capital—Companies Act, 1867 (30 and 31 Vict. cap. 131), secs. 9-19—Companies Act, 1877 (40 and 41 Vict. cap. 26), secs. 3 and 4.—A limited liability company under its memorandum of association had a capital of £50,000, divided into 50,000 shares of £1 each, with power to reduce its capital. All its shares had been issued, 12s. 6d. being paid up on each share. The shareholders unanimously passed and confirmed a special resolution that the capital of the company should be converted from 50,000 shares of £1 each, with 12s. 6d. paid up, into 50,000 shares of £1 each, with the full amount paid up on 31,250, leaving 18,750 to be issued at the discretion of the directors; and that such conversion should be effected by re-allocating the share capital among the shareholders, crediting to each of them one £1 share for each pound sterling at his credit in the share capital account.

Walker Steam
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The company presented a petition for confirmation of the "reduction of capital resolved on by" the special resolution above mentioned. All the creditors of the company consented.

The Court *refused* to confirm the resolution in respect that it effected a "conversion" and "re-allocation," and not a reduction of capital.

THE WALKER STEAM TRAWL FISHING COMPANY, LIMITED (AND REDUCED), presented a petition to the Court for power to reduce capital under the Companies Acts, 1862 to 1900, and more particularly sections 9-19 of the Companies Act, 1867, and sections 3 and 4 of the Companies Act, 1877.*

2D DIVISION.

The Walker Steam Trawl Fishing Company, Limited, was incorporated in 1901 under the Companies Acts, 1862 to 1900, and had its registered office in Aberdeen.

Clause 5 of the memorandum of association provided:—"The

* The Companies Act, 1867 (30 and 31 Vict. cap. 131), sec. 9, enacts,—
"Any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital; but no such resolution for reducing the capital of any company shall come into operation until an order of the Court is registered by the Registrar of Joint Stock Companies as is hereinafter mentioned."

The Companies Act, 1877 (40 and 41 Vict. cap. 26), sec. 3, enacts:—
"The word 'capital,' as used in the Companies Act, 1867, shall include paid-up capital; and the power to reduce capital conferred by that Act shall include a power to cancel any lost capital, or any capital unrepresented by available assets, or to pay off any capital which may be in excess of the wants of the company; and paid-up capital may be reduced either with or without extinguishing or reducing the liability (if any) remaining on the shares of the Company, and to the extent to which such liability is not extinguished or reduced it shall be deemed to be preserved, notwithstanding anything contained in the Companies Act, 1867."

Nov. 16, 1907. capital of the Company is £50,000, divided into 50,000 shares of £1 each, with power to increase or reduce the capital in conformity with the law in force at the time and with this memorandum and articles of association of the Company, as originally framed or as duly and competently altered” *

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Co., Limited.

The whole of the original share capital was issued as ordinary shares, and 12s. 6d. had been paid up on each share.

On 27th April 1907 an extraordinary general meeting of the Company was held at which the following special resolutions were passed unanimously:—

“(1) That the capital of the Company be converted from 50,000 shares of the value of £1 each, whereof 12s. 6d. has been paid upon each share, a total of £31,250, into 50,000 shares also of the value of £1 each, upon 31,250 of which the full amount shall have been paid up, leaving 18,750 shares to be issued at the discretion of the directors for the time being, and that such conversion be effected by re-allocating the share capital among the shareholders, crediting to each shareholder one £1 share in respect of every pound sterling with which he or she is credited in the share capital account of the Company;

“(2)” (A resolution for facilitating the carrying out in detail of the proposed re-allocation of capital);

“alternatively,

“(3) That the capital of the Company be reduced from £50,000, divided into 50,000 shares of £1 each, on which 12s. 6d. each has been called and paid up, to £31,250, divided into 50,000 shares of 12s. 6d. each fully paid, and that such reduction be effected by extinguishing the liability in respect of uncalled capital on the said shares to the extent of 7s. 6d. per share.”

At an extraordinary general meeting held on 13th May 1907 these special resolutions were unanimously confirmed.

The Company thereupon presented the present petition, in which they craved the Court to confirm “the reduction of capital resolved on by one or other of the special resolutions” above set forth, and to approve of one or other of the following minutes for registration by the Registrar of Joint Stock Companies:—

“The capital of the Walker Steam Trawl Fishing Company, Limited, is £50,000 divided into 50,000 shares of £1 each, of which 31,250 shares have been issued and are fully paid up, leaving 18,750 shares still to be issued;

“or alternatively,

“The capital of the Walker Steam Trawl Fishing Company, Limited, is £31,250, divided into 50,000 shares of 12s. 6d. each, all of which shares have been issued and are fully paid up.”

In the petition the petitioners stated as follows:—“The Company finds that the capital subscribed is as much as it can profitably make use of for many years to come, and its financial position is such that there is no necessity for retaining the liability of 7s. 6d. attaching to each share, which liability has the effect of unduly depressing the

* Clause 52 of the articles of association provided:—“The Company may by a special resolution reduce its capital by reducing the number or the value or both the number and the value of the shares into which it is divided, and may consolidate or subdivide its shares, and may cancel any shares that have not been taken or agreed to be taken by any person in the manner and with all or any of the incidents prescribed by the statute.”

selling value of the Company's shares. The Company desires, how-
 ever, to retain the denomination of its shares at £1 sterling each,
 which is the reason for resolutions numbers one and two and for the
 first minute" quoted *supra*. Nov. 16, 1907.
 Walker Steam
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The petition was not opposed.

The Court remitted to Mr W. G. L. Winchester, W.S., to inquire and report whether the power prayed for should be granted.

Mr Winchester reported that the subscribed capital was sufficient for the present requirements of the Company; that the creditors of the Company, on a list of creditors produced in terms of section 13 of the Companies Act, 1867, had all consented to the proposed reduction, and that after advertisement duly made as ordered by the Court no creditors not entered on the list had claimed to be entered thereon; that he had found the proceedings regular and proper and in conformity with the statutes and the Company's memorandum and articles of association; that the first special resolution appeared to him to be incompetent, but that the petitioners had adduced good reasons for the proposed reduction as set forth in the alternative special resolution; and that the Court might pronounce an order confirming the reduction of capital conform to the said alternative special resolution, and approving of the second alternative minute proposed by the petitioners.*

* In his report the reporter stated, *inter alia*, as follows:—

"Section 3 of the Act of 1877 enumerates the modes of reducing capital, and applies to capital whether paid up, subscribed, or unissued, and embraces (1) cancelling lost capital; (2) cancelling capital unrepresented by available assets; (3) paying off capital in excess of the wants of the company; (4) cancelling issued but unpaid capital; and (5) cancelling unissued shares.

"Sir Henry Burton Buckley, in his work on 'The Law and Practice under the Companies Acts' (8th edition, page 615), observes that neither the Act of 1867 nor that of 1877 prescribes the manner in which the reduction of capital is to be effected. Nor is there, he adds, any limitation of the power of the Court to confirm the reduction except that it must first be satisfied that all the creditors entitled to object to the reduction have either consented or been paid or secured—(*British Finance Corporation v. Couper*, 1894, A. C. 399-403). The power of reduction is general, and extends to every possible mode of reducing capital—(*Phoebe Gold Co.*, 1900, W. N. 182). Subject to the confirmation by the Court, which is required, and which is the safeguard of the minority, the question is a domestic one for the decision of the majority, and the Act leaves the Court to determine the extent, the mode, and the incidence of the reduction, and the application of any capital moneys which the reduction may set free.

"The observations made, and the cases referred to in Buckley, and those which have been decided in the Scotch Courts, all appear to deal with applications for the 'reduction of capital' in one form or other.

"The conclusion I have formed is that the first resolution printed in this petition cannot be confirmed by the Court as 'a reduction of capital' under either the Act of 1867 or that of 1877. The resolution in question purports to be 'a conversion' or 're-allocation' of the share capital, and I do not think it can in any sense be held to be 'a reduction of capital' within the meaning of the Acts founded on by the petitioners.

"I have found nothing in the Acts, nor in the authorities, which would warrant me in suggesting that such a resolution is competent as 'a reduction of capital,' but as the petitioners are anxious that the first resolution should be confirmed I have thought it right, in the absence

Nov. 16, 1907. **Walker Steam Trawl Fishing Co., Limited.** Argued for the petitioners ;—The petitioners preferred that the first alternative resolution should be confirmed rather than the second, because for Stock Exchange purposes it was better to have £1 shares than 12s. 6d. shares, and the directors wished to have unissued capital available for issue. It made no difference to anyone outside the Company which of the two resolutions was confirmed. This was a reduction of capital. The available capital was reduced. There was no statutory restriction as regards the manner of reduction. The approval of the Court was required solely to protect the interests of creditors, or possibly a dissentient minority of shareholders. Here the creditors all consented, and the shareholders were unanimous. Where there was no question as to the interests of creditors or a dissentient minority of shareholders the Court should not interfere with the decision of the domestic tribunal as to the method of reduction to be adopted.¹

LORD STORMONTH-DARLING.—In this case we have the benefit of a very careful report by Mr Winchester, and we have also had the advantage of a fair and candid statement by Mr Morton. He says that the shareholders would prefer to have the first alternative resolution confirmed. But the reporter is of opinion that we ought not to confirm the first alternative resolution, and that we ought to confirm the second, which has this at least to be said for it, that it is literally and plainly a resolution for “reduction of capital.” I agree with Mr Winchester. He does not say that any existing creditor will be prejudiced by the one proposal more than the other. But he says that a resolution to “convert” and “re-allocate capital” is not in terms or in reality a proposal to “reduce” capital. Therefore, the first alternative resolution is not strictly within the words of the statute. Mr Morton says that he has searched for and has failed to find any case which would be a precedent for doing what he asks the Court to do here. In the absence of such a case I think the safer course will be to walk by the strict words of the statute, and confirm the second alternative resolution.

LORD LOW.—I concur, but with considerable regret. I recognise, however, that the first of the alternative resolutions, although for practical purposes it amounts to very much the same thing as the second, does not in fact reduce the capital, which is the only matter which the statute empowers the Court to deal with.

LORD ARDWALL.—I concur. I am of opinion that no reasons of expediency

as far as I can find of any direct authority, to report the matter to your Lordships.

“The second or alternative resolution clearly imports a reduction of capital, and is authorised by the regulations of the Company as originally framed, and is competent under sections 9 to 19 of the Act of 1867. The petitioners ask for confirmation of one or other of the special resolutions, and I beg respectfully to suggest that, should your Lordships hold the first resolution to be incompetent, the second or alternative resolution may be confirmed.”

¹ *Authorities cited.*—*In re Phoebe Gold Mining Co.*, 1900, W. N. 182; Buckley on the Companies Acts (8th ed.), p. 615, and cases there cited; Lindley on Companies (6th ed.), p. 557; Companies Act, 1867, secs. 9-19; Companies Act, 1877, secs. 3 and 4.

can justify the Court in departing by a hair's breadth from the provisions of the statutes under which alone they have jurisdiction to make alterations in the capital of a company that has been incorporated under the Companies Acts. Nov. 16, 1907.
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The LORD JUSTICE-CLERK was absent.

THE COURT pronounced this interlocutor:—"The Lords having resumed consideration of the petition and proceedings, together with the report by Mr W. G. L. Winchester, No. of process, approve of said report; of new settle the list of creditors entitled to object to the proposed reduction of capital, No. 13 of process; find that they have all consented to the proposed reduction of capital; confirm the reduction of capital resolved on by the alternative resolution set forth in the petition; approve of the minute alternatively set forth in the petition; direct the registration of this confirmation order, and of the said minute, by the Registrar of Joint Stock Companies, and on this order and the said minute being registered as aforesaid, direct notice of such registration to be given by advertisement once in the *Edinburgh Gazette*; and dispense altogether with the words 'and reduced' as part of the name of the Company; and decern."

JOHN N. RAE, S.S.C., Agent.

MONTGOMERIE & COMPANY, LIMITED, Pursuers (Reclaimers).—
Clyde, K.C.—R. S. Horne.

No. 25.

THE PROVOST, MAGISTRATES, AND COUNCILLORS OF HADDINGTON,
Defenders (Respondents).—*D.-F. Campbell—Malcolm.*

Nov. 12, 1907.

Police—Public Health—Drainage—Sewers—Formation—Procedure—Statute—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), secs. 217, 220, 221—Public Health (Scotland) Act, 1897 (60 and 61 Vict. cap. 38), sec. 103—Burgh Sewerage, Drainage, and Water Supply (Scotland) Act, 1901 (1 Edw. VII. cap. 24), secs. 1-5, and 7.—Notwithstanding the provisions of the Burgh Sewerage, Drainage, and Water Supply Act, 1901, it is competent for the town-council of a burgh, as sewerage authority in the burgh, (1) to carry out drainage operations in the burgh under the powers conferred by the 103d section of the Public Health Act, 1897, and (2) to do so without following the procedure or being subject to the conditions imposed by the Burgh Police Act, 1892. Montgomerie
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Brown v. Magistrates of Kirkcudbright, 8 F. 77, followed.

Police—Public Health—Drainage—Sewers—Formation—Notice to Proprietors—Public Health (Scotland) Act, 1897 (60 and 61 Vict. cap. 38), sec. 103.—Terms of letter, which, in the circumstances, was held (*diss.* Lord Stormonth-Darling) not to be a reasonable notice to a proprietor in terms of the Public Health (Scotland) Act, 1897, sec. 103.

Police—Public Health—Drainage—Sewers—Formation—Failure to give reasonable notice to proprietor—Effect—Public Health (Scotland) Act, 1897 (60 and 61 Vict. cap. 38), secs. 103 and 109.—A burgh sewerage authority laid two sewer-pipes on and above the *solum* of the bed of a river in the burgh without giving reasonable notice, in the sense of sec. 103 of the Public Health Act, 1897, to a proprietor of lands on the bank of the river, who was owner of the river bed at least *ad medium filum*, with a right of common interest in the whole *alveus*, and who alleged that the result of the drainage operations was to subject his property to additional risk of flooding. The proprietor brought an action for removal of the pipes.

Nov. 12, 1907. *Held* that the proprietor was not entitled to have the sewer pipes removed, and the river bed restored to the condition in which it existed prior to the operations, in respect that, if the pipes were removed as demanded, he could not prevent the Local Authority, if they thereafter gave reasonable notice, from replacing the pipes in the same position.

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Corporation.

Dictum of Lord Adam in *Brown v. Magistrates of Kirkcudbright*, 8 F. 77, p. 88, as to the functions of the Sheriff under sec. 109 of the Public Health Act, 1897, *approved*.

Expenses—Taxation—Party and Party or Agent and Client—Public Authorities Protection Act, 1893 (56 and 57 Vict. cap. 61), sec. 3—Public Health (Scotland) Act, 1897 (60 and 61 Vict. cap. 38), sec. 166.—Held that, in virtue of sec. 3 of the Public Authorities Protection Act, 1893, that Act does not apply to an action against a Local Authority for an act done in pursuance of the Public Health Act, 1897.

2D DIVISION.
Lord Dundas.

IN 1905 the Town-Council of the royal burgh of Haddington executed certain operations with the view of securing an improvement in the drainage of the burgh. These operations included the lifting and relaying of an existing 12-inch pipe and the construction of a new 18-inch pipe alongside it on the bed of the River Tyne where it flows downwards and northwards through the burgh of Haddington between two points in the burgh, viz., Victoria Bridge and Spoutwell Brae. The 12-inch pipe as existing prior to these operations lay embedded under the surface of the bed of the River Tyne.

Messrs Montgomerie & Company, Limited, were the proprietors of certain lands, and of mills and maltings thereon, called the Bermaline Mills and Maltings, lying upon the east bank of the River Tyne, and within the royal burgh of Haddington. They claimed that they had right under their titles to the whole of the *solum* or *alveus* of the River Tyne between Victoria Bridge and Spoutwell Brae, but that, apart from this contention, they had an undisputed right to the *alveus ad medium filum*, and a common interest in the stream. They also drew water for their mills and maltings from a dam in the River Tyne, and the weir of this dam was immediately above Victoria Bridge. Before the drainage operations above mentioned they had complained of a discharge of sewage which was made into the dam. By the proposed scheme for the improvement of the burgh drainage that discharge was to be discontinued, and all the sewage was to be taken down the river by means of the two pipes above mentioned.

On 20th June 1905 the Town-clerk of Haddington wrote to Montgomerie & Company, Limited, as follows:—"Church Street, &c., Drainage.—I send you herewith enclosed the plan which has now been approved of by the Council, in order that you may see what is proposed to be done. The leading features of the scheme are the substitution of an iron and clay spigot and faucet pipe for Myldsburn—the normal flow of Myldsburn being taken in a 6-inch fireclay pipe to the manhole at the foot of Gowl Close, and thereafter right down the drain—provision being made at the manhole at the end of Trinity Church for the abnormal flow of the burn, which would then discharge into the river to the south of the Victoria Bridge. The whole of the built Myldsburn conduit is to be removed. The existing 12-inch water-closet sewage pipe will remain, and enter the manhole at the foot of Gowl Close—which will also receive the contents of the drain coming down Gowl Close. The only drain which will discharge above the bridge will, as I have indicated, be the overflow of Mylds-

burn when it is in flood, and I do not think there can be any objection to that, as when the burn is in flood the river will probably also be in flood. I shall be very glad to give you any further information. I am expecting to see your Mr Montgomerie soon, but, in the meantime, you might kindly return to me the plan, as it is wanted here.”

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 —
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The plan sent along with this letter shewed a 12-inch pipe, and alongside of it an 18-inch pipe, but it shewed nothing as to the level at which the pipes were to be laid.

On 23d June 1905 Montgomerie & Company, Limited, replied to the Town-clerk as follows:—“ We are in receipt of your favour of 20th inst. We quite approve of the scheme so far as it affects our property, and we think it will be a great improvement on the existing drainage system.”

On 24th June 1905 the Town-clerk wrote:—“ *Drainage.*—I have to thank you for your letter of yesterday, and note that you quite approve of the scheme so far as it affects your property.”

Thereafter the Town-Council proceeded with the proposed drainage operations, beginning work in September 1905. They took up the existing 12-inch pipe, and relaid it on the surface of the bed of the river between Victoria Bridge and Spoutwell Brae. Alongside it, and also on the surface of the river bed, they laid the new 18-inch pipe. They covered these pipes with cement, and so covered the two pipes formed a structure of from 4 to 10 feet in breadth. This structure was wholly to the westward of the *medium filum* of the river.

In December 1905 Montgomerie & Company, Limited, who alleged that they had only discovered the fact of the pipes being laid on the surface of the river bed in November, applied for interim interdict in the Bill-Chamber. Interim interdict having been refused, they brought an action against the Provost, Magistrates, and Councillors of the royal burgh of Haddington, in which they concluded (1) for declarator that they were proprietors of the whole *solum* or *alveus* of the River Tyne between Victoria Bridge and Spoutwell Brae, or otherwise that they had a right of common interest therein; (2) for declarator that the defenders had no right to construct any works upon the said portion of the *solum* or *alveus* of the said river; (3) for interdict against their laying, *inter alia*, sewer drain pipes thereon, or from otherwise encroaching upon or interfering with the bed or flood channel of the said river between the said points in any way which might have the effect of altering the natural flow of the said river, or of diverting the stream of said river in times of flood from its accustomed course, and of throwing the same upon the lands of the pursuers; and (4) for decree ordaining the defenders “to restore the bed or flood channel of the said river between the said points to the condition in which it existed prior to the operations of the defenders thereon, and to remove away therefrom all pipes, manholes, cesspools, or other works or structures and building material laid down by them thereon.”

The pursuers averred:—(Cond. 19) “The operations complained of are in violation of the proprietary rights of the pursuers, and are illegal. They will necessarily interfere, to the serious prejudice of the pursuers, with the natural flow of the river, and particularly in times of flood the proposed alteration of the bed of the stream will tend to divert the river from its accustomed course, and to throw the water upon the property of the pursuers. The defenders’ proposed works

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contract the bed of the river where it is narrow. They form a bulwark or an embankment of about 123 yards in length, which extends into the river from 10 to 12 feet, and is about 3 feet in height. . . . Such works, if completed, will form a permanent obstruction, and be a continual source of great danger to the pursuers' property."

The defenders denied this averment.

The pursuers also averred:—(Cond. 12) "The said operations complained of on the part of the defenders are entirely unauthorised. They have obtained no right of wayleave of any kind from the pursuers. Their operations are contrary to the provisions of the Burgh Police (Scotland) Act, 1892, the Public Health (Scotland) Act, 1897, and the Burgh Sewerage, Drainage, and Water-Supply (Scotland) Act, 1901." (Cond. 13) "In particular, the defenders have not complied with the provisions of the Burgh Police (Scotland) Act, 1892. . . . The defenders have not obtained the consent in writing of the pursuers to the operations complained of, as provided by section 217 of this statute. The defenders, further, did not give notice of their intention to execute such operations as was incumbent upon them under section 220 thereof. Nor did they obtain an estimate and report in connection therewith from their surveyor, as provided by section 226 thereof. . . ." (Cond. 14) "Further, while the pursuers maintain that the defenders were bound to carry out their intended operations in accordance solely with the provisions of the said Burgh Police (Scotland) Act, 1892, and upon the assumption that the defenders claim to have acted under the Public Health (Scotland) Act, 1897, it is the fact, and the pursuers aver, that the defenders also failed to observe the provisions of the said Statute of 1897." (Cond. 15) "Under the said Public Health (Scotland) Act, 1897, the defenders were bound, in terms of section 103, before constructing and carrying their said drains in the manner complained of, into, through, or under the lands of the pursuers, . . . to have given the pursuers reasonable notice in writing of such intended operations on their part. . . ." (Cond. 16) "The said letter of 20th June 1905 was not a notice under the said Public Health (Scotland) Act, 1897, and was not intended to be so. Moreover, the said letter of 20th June 1905 did not, in point of fact, notify the pursuers that the defenders (1) intended to uplift the said then existing 12-inch drain, and to relay it; (2) intended to lay down a new 18-inch drain in the said river bed between the said Victoria Bridge and Spoutwell Brae foresaid; or (3) to proceed with drainage operations of any kind to the north of the said Gowl Close, or to the north of the said Victoria Bridge. Gowl Close is on the south side thereof. It gave, further, no notice of any kind that the defenders intended to alter the levels of such existing drain, or to make the level of any proposed new drain above the surface instead of beneath the surface of the said river bed." (Cond. 18) "By the said Burgh Sewerage, Drainage, and Water-Supply (Scotland) Act, 1901, and by terms of section 5 thereof in particular, the said Public Health (Scotland) Act, 1897, is incorporated, subject to the necessary modifications, with the said Burgh Police (Scotland) Act, 1892, which is there styled the principal Act. In virtue of this section, the said provisions of the Public Health (Scotland) Act, 1897, in regard to notice as aforesaid, are repealed by implication, or fall to be disregarded as necessary modifications in the sense of the said section, in all cases where the Local Authority is the Town-Council of a burgh. The defenders were bound to comply with the provisions of the said

Burgh Police (Scotland) Act, 1892, and to disregard the said provisions of the Public Health (Scotland) Act, 1897." * Nov. 12, 1907.

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* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), enacts :—

Sec. 217. "Nothing in this Act contained shall be construed to authorise the Commissioners, contrary to any private right, to use, injure, or interfere with any sewers or other works already made or used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament, or for the purpose of irrigating lands, or to use, injure, or interfere with any watercourse, stream, river, dock, basin, wharf, quay, or towing-path in which the owner or occupier of any lands, mills, mines, or machinery, or the proprietors of any canal or navigation, shall have right and interest, without the consent in writing of the person legally entitled to grant the same; and nothing in this Act contained shall prejudice or affect the rights, privileges, powers, or authorities given or reserved to any person under any local or private Act of Parliament for the drainage, preservation, or improvement of land, or for or in respect of any mills, mines, machinery, canal, or navigation as last aforesaid."

Sec. 220. "Twenty-eight days at the least before making any new sewer where none previously existed, or altering the course or level of or abandoning or stopping any sewer, the Commissioners shall give notice of their intention, by posting a notice in a conspicuous place at each end of every such street through or in which such work is to be undertaken, which notice shall set forth the names of the streets and places through or near which it is intended that the new sewer shall pass, or the existing sewer be altered or stopped up, and also the places at the beginning and the end thereof, and shall refer to the plans of such intended work, and shall specify a place where such plans may be seen, and a time when and place where all persons interested in such intended work may be heard thereupon."

Sec. 221. "The Commissioners shall meet at the time and place mentioned in the said notice to consider, in the presence of the surveyor of the Commissioners, any objections made against such intended work, and all persons interested therein, or likely to be aggrieved thereby, shall be entitled to be heard before the Commissioners at such meeting; and thereupon the Commissioners may, at their discretion, abandon or make such alterations in the said intended work as they judge fit; and no such work to which any objection is made at such meeting shall be executed unless the burgh surveyor, after the person making such objection, or his agent, has been heard, shall certify that the work ought to be executed, nor shall such work be begun until the end of seven days after an order for the execution thereof has been duly made by the Commissioners, and entered in their books."

The Public Health (Scotland) Act, 1897 (60 and 61 Vict. cap. 38), enacts :—

Sec. 103. "The local authority shall have power to construct within their district, and also when necessary for the purpose of outfall or distribution or disposal or treatment of sewage, without their district, such sewers as they may think necessary for keeping their district properly cleansed and drained, and may carry such sewers through, across, or under any public or other road, or any street or place, or under any cellar or vault which may be under the foot pavement or carriageway of any street or road, and after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary), into, through, or under any lands whatsoever, and from time to time to enlarge, lessen, alter, arch over or otherwise improve, or to close up or destroy, all sewers vested in them, provided no nuisance is created by such operations; and if any person is thereby deprived of the lawful use of any sewer, the local authority shall provide another sufficiently effectual for his use. The local authority shall cause their sewers to be so constructed, maintained, kept, and cleansed as not to be a nuisance,

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The pursuers pleaded, *inter alia*;—(2) The defenders' operations complained of being without any statutory authority or other legal warrant, *et separatim*, the defenders having failed to comply with the provisions of any statute conferring powers upon them for the construction of sewers or drains within or upon the property of the pursuers, the pursuers are entitled to have the said operations interdicted as concluded for.

The defenders pleaded, *inter alia*;—(4) The pursuers having consented to the operations now complained of, *et separatim*, having acquiesced in said operations during the progress of the work, decree should be refused, with expenses. (5) The defenders' whole operations having been proceeded with under and in virtue of the powers conferred on them by the Public Health (Scotland) Act, 1897, and they having complied with the requirements of said Act, or, alternatively, the pursuers having waived any objection competent to them on the

and for the purpose of cleansing and emptying them may construct and place, either above or under ground, such reservoirs, sluices, engines, or other works as may be necessary, and may, subject to the provisions of the Rivers Pollution Prevention Acts, cause such sewers to communicate with and be emptied into such places as may be fit and necessary either within their district, or, if necessary for the purpose of outfall or distribution or disposal or treatment of sewage, without their district, and to cause the sewage and refuse therefrom to be collected for sale or for any purpose whatsoever, but so as not to create a nuisance."

Sec. 109. "In case it shall become necessary to enter, examine, or lay open any lands or premises for the purpose of making plans, surveying, measuring, taking levels, examining works, ascertaining the course of sewers or drains, making or repairing, altering or enlarging sewers or drains, or other purposes ancillary to the powers herein given as to sewers and drains, and the owner or occupier of premises refuses or withholds access and leave to perform the said operations, the local authority may, after written notice to such owner and occupier, apply to the Sheriff, who, if no sufficient cause be shewn to the contrary, shall grant warrant to the local authority, their officers and others thereby authorised, to enter and do all or any of the works or operations foresaid at all reasonable times in the daytime."

Sec. 190. "Except in so far as expressly provided, nothing in this Act shall prejudice or affect the provisions . . . of the Burgh Police (Scotland) Act, 1892, as amended. . . ."

The Burgh Sewerage, Drainage, and Water-Supply (Scotland) Act, 1901 (1 Edw. VII. cap. 24), enacts:—

Sec. 1. "Where sums of money have been borrowed or are owing by the town-council or commissioners of a burgh under any Act for purposes of sewerage and drainage or water-supply, the town-council as the authority under the Burgh Police (Scotland) Act, 1892 (hereinafter referred to as the principal Act), as amended by the Town-Councils (Scotland) Act, 1900, shall provide the sums necessary for repaying the principal and paying the interest of such sums out of the assessments hereinafter mentioned. . . ."

Sec. 2. "In any burgh, or in any special or separate drainage district formed therein under any Act, the expense incurred either before or after the passing of this Act for sewerage and drainage or water-supply, as the case may be, within the same, or for the purposes thereof, and the sums necessary for repayment of any money borrowed therefor either before or after the passing of this Act, together with the interest thereof, shall be paid out of a sewer assessment or water assessment, as the case may be, which the town-council of the burgh shall raise and levy on and within such burgh or (in the case of the sewer assessment) within such special or separate district, in the same manner, and with the same remedies and

ground that the requirements of said Act had not been complied with, Nov. 12, 1907.
the defenders should be assoilzied, with expenses.

Proof was allowed and led.

The material facts proved are set forth in the foregoing narrative.

On 6th July 1906 the Lord Ordinary (Dundas) pronounced this interlocutor:—"Finds that the defenders' whole operations complained of were lawfully instituted and proceeded with under and in virtue of the powers conferred upon them by the Public Health (Scotland) Act, 1897, and that they have validly complied with the requirements of the said Act: Sustains the first alternative branch of the fifth plea in law for the defenders; assoilzies them from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses as

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modes of recovery and incidents, as are provided for the public health general assessment therein."

Sec. 3. "All special or separate drainage districts that may have been formed in any burgh under any Public Health Act shall, subject to the provisions of this Act, be deemed to be drainage districts under the principal Act."

Sec. 5. "The powers and duties of the town-council of any burgh, as the authority under the principal Act, with reference to sewerage and drainage or water-supply shall extend to the whole area of the burgh as existing for the purposes of the Public Health (Scotland) Act, 1897, and the town-council of any burgh, as the authority under the principal Act, in addition to the powers conferred upon them by the principal Act, or any other Act, shall, with reference to sewerage and drainage or water-supply within such area, have the same rights, powers, and privileges as are conferred by the Public Health (Scotland) Act, 1897, upon local authorities under that Act in districts other than burghs, with the exception of the rights, powers, and privileges conferred by sections 122 and 131 of the last-mentioned Act, to which sections the present section shall not apply, and in so far as necessary for giving effect to this enactment the last-mentioned Act and the Acts and parts of Acts incorporated therewith are, subject to the necessary modifications, incorporated with the principal Act.

"Provided that all costs and charges incurred by the town-council in the exercise of such rights, powers, and privileges shall be provided for out of the sewer assessment or water assessment before mentioned, as the case may be, and that where it shall be necessary for the town-council to borrow money for the purposes of sewerage and drainage, or water-supply, they shall be entitled to do so on the security of the sewer assessment or water assessment hereinbefore mentioned, in lieu of the assessments mentioned in the principal Act, or the Public Health (Scotland) Act, 1897, as the case may be."

Sec. 7 repeals the Acts specified in the schedule to the extent therein mentioned "in so far as the same apply to burghs to which this Act applies from its commencement." The schedule does not include sec. 103 or sec. 109 of the Public Health Act, 1897.

The Public Authorities Protection Act, 1893 (56 and 57 Vict. cap. 61), enacts:—

Sec. 3. "This Act shall not apply to any action, prosecution, or other proceeding for any act done in pursuance or execution, or intended execution, of any Act of Parliament, or in respect of any alleged neglect or default in the execution of any Act of Parliament, or on account of any act done in any case instituted under an Act of Parliament, when that Act of Parliament applies to Scotland only, and contains a limitation of the time and other conditions for the action, prosecution, or proceeding."

The Public Health (Scotland) Act, 1897 (60 and 61 Vict. cap. 38), enacts:—

Sec. 166. "The local authority and the board shall not be liable in

Nov. 12, 1907. between agent and client, in terms of section 1 (b) of the Public Authorities Protection Act, 1893 (56 and 57 Vict. cap. 61)." *

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damages for any irregularity committed by their officers in the execution of this Act, or for anything done by themselves in the *bona fide* execution of this Act; and every officer acting in the *bona fide* execution of this Act shall be indemnified by the local authority under which he acts in respect of all costs, liabilities, and charges to which he may be subjected; and every action or prosecution against any person acting under this Act shall be commenced within two months after the cause of action shall have arisen. . . ."

* "OPINION.—The pursuers are proprietors of certain lands and of mills, &c., thereon lying upon the east bank of the River Tyne, and within the royal burgh of Haddington. By their summons they ask for declarator that they are heritable proprietors of the whole of the *solum* or *alveus* of the said river between Victoria Bridge and Spoutwell Brae within the said royal burgh, or otherwise, that they have a right of common interest therein. In the argument, the first of these alternatives was not insisted in. Declarator is then asked to the effect that the defenders, who are the Town-Council of Haddington, have neither right nor title to construct any works or buildings upon the *solum* or *alveus* of the said river between the said points, or otherwise to encroach upon or to interfere with it. Conclusions then follow for interdict, and for the restoration of the bed or flood channel of the river between the said points to the condition in which it existed prior to certain recent operations by the defenders. It is common ground that, for some years past, the Town-Council of Haddington have had under consideration a scheme or schemes for the improvement of the drainage of the burgh, and that, in 1905, they did in fact execute certain operations with the view of securing this end. These operations, to describe them quite briefly and generally, consisted in, or rather included, the lifting and relaying of an existing 12-inch pipe, and the construction of a new 18-inch pipe, from Victoria Bridge northwards down to Spoutwell Brae. It is not, I think, maintained either that remedial works were unnecessary, or that any better scheme of improvement could have been devised than that which has been executed—that is from the point of view of the public interest, and apart from all questions of legality or interference with private rights.

"A proof has been led which was of unnecessary length, and, in parts, of doubtful relevancy; and, in the argument which followed, an immense variety of topics was canvassed with great zeal and ability. In the view which I take of the case, it may, I consider, be disposed of with reasonable brevity, and upon simple and distinct grounds.

"The main issue, or at least one of the most important issues raised, was whether or not the defenders gave to the pursuers 'reasonable notice in writing' within the meaning of section 103 of the Public Health (Scotland) Act of 1897 before proceeding to execute the works complained of. The defenders allege that they did give such notice, viz.—by the Town-clerk's letter of 20th June 1905, which is fully printed in the record, and the plan which accompanied that letter. I need not pause to consider the preliminary point which was maintained by the defenders to the effect that no such notice was, in the circumstances, required, looking to the terms of the earlier branch of section 103, and to the position of the pursuers in regard to the *locus* of the operations. I assume, as the Town-clerk did, that 'reasonable notice in writing' was necessary, and, so assuming, I am of opinion that it was duly given to the pursuers by the said letter and plan. The pursuers' counsel argued strenuously to a contrary effect. His argument was based principally upon the grounds that neither the letter nor the plan sent with it disclosed at what level it was intended to lay the sewers; that the plan shewed the proposed works incorrectly in certain respects; and

The pursuers reclaimed.

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The case was heard before the Second Division on 18th, 19th, 26th, and 27th June, and 2d July 1907.

Argued for the pursuers and reclaimers;—(1) The Town-Council, as the sewerage and drainage authority in a burgh, had no power to carry out the operations in question under sec. 103 of the Public Health (Scotland) Act, 1897, but were bound to proceed under the Burgh Police (Scotland) Act, 1892, and subject to the conditions imposed by that Act. This clearly appeared from a consideration of the sections of the statutes undernoted.¹ It was not pretended that the defenders complied with the provisions of secs. 217, 220, and 221 of the Burgh Police (Scotland) Act, 1892. (2) Even if the defenders were entitled to proceed under sec. 103 of the Public Health (Scotland) Act, 1897, the effect of the Burgh Sewerage, Drainage, and Water-Supply Act, 1901, secs. 3 and 5, was that they could only pro-

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that the pipes, as laid, are *de facto* to some extent further out riverward than as indicated upon the plan. The premises of their argument may be taken to be substantially correct, but it fails, in my opinion, as proceeding upon an erroneous view of the kind and character of notice which the statute contemplates. I find no warrant for holding that the Local Authority is bound to supply persons affected, or likely to be affected, by their scheme with complete details of what it is proposed to do, under penalty, if they fail to do so, of their notice being held to be inept. The power of the Local Authority to construct sewers, into, through, or under lands is a very wide and drastic one. The notice to be given must be 'reasonable,' but I do not think that that infers a duty to disclose the scheme precisely and in detail. It is, I apprehend, sufficiently complied with if the party to whom notice is given is informed generally, in reasonably distinct terms, of the nature of the intended work in so far as it is to be situated upon or to pass through his lands. The case is not, I think, like that of a notice to treat for the compulsory acquisition of land. It is obviously proper and convenient that notice of some sort should be given to those having sufficient title and interest to receive it in order that they may not be taken unawares, and also to allow them opportunity of endeavouring, after a demand for and receipt of fuller details, to arrange with the Local Authority for such alteration or variation of the proposed works as they may desire, and the Authority may be prepared to concede. These are, I think, probably the principal reasons why notice is required to be given. In this case the Town-clerk in his letter of 20th June, after describing 'the leading features of the scheme,' expressly added, 'I shall be very glad to give you any further information.' I may here note that the proof involves, *inter alia*, a lengthy and keenly fought controversy as to what plan it was which was sent to the pursuers along with the letter of 20th June. The defenders' evidence is to the effect that it was No. 8 of process. The pursuers contend that it was No. 33 of process, or, at all events, that it was not No. 8. The matter is, to my mind, involved in great obscurity; and I confess that even now I am not certain whether the plan sent was No. 8 or not, although I think that the balance of proof is in favour of the view that the plan which was sent was in fact No. 8 of process. But the point seems to me to be quite

¹ Public Health (Scotland) Act, 1867, secs. 3, 7, 24, 71, 72, 73, 76, and 93; Burgh Police (Scotland) Act, 1892, secs. 4, 7-12, 21, 23, 42, 43, 215, 217-221, 224, 226, 237, 339, 361, 362, and 363; Public Health (Scotland) Act, 1897, secs. 3, 12, 101, 103, 104, 109, 113, 114, 122, 131, 133, 134, and 190; Town-Councils (Scotland) Act, 1900, sec. 8; Burgh Sewerage, Drainage, and Water-Supply (Scotland) Act, 1901, secs. 1-5, 7, and Schedule; Burgh Police (Scotland) Act, 1903, sec. 3.

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ceed under sec. 103 subject to the conditions imposed by the Burgh Police (Scotland) Act, 1892, and particularly sec. 217 thereof. They had not, as required by sec. 217, obtained the consent of the pursuers. (3) In the case of *Brown v. Magistrates of Kirkcudbright*¹ the effect of the Burgh Sewerage, Drainage, and Water-Supply Act, 1901, had not been properly pleaded to or considered by the Court. That decision was consequently pronounced under a misapprehension, and it was erroneous, and ought to be reconsidered. (4) Even assuming that the defenders were entitled to proceed under sec. 103 of the Public Health (Scotland) Act, 1897, without complying with any of the requirements of the Burgh Police (Scotland) Act, 1892, they had not even fulfilled the requirements of sec. 103. They had not given the pursuers "reasonable notice in writing." The Town-clerk's letter of 20th June 1905 was not "reasonable notice." There was no foundation for the contention that the pursuers had waived this objec-

immateral. I regret that it was elaborated to such an extent; but I did not see my way to exclude or to check *ab ante* the evidence which both sides were eager to tender. It appears to be common ground that the plan sent on 20th June, whether it was No. 8 of process or another, did indicate upon its face two lines of proposed pipes between Victoria Bridge and Spoutwell Brae, in approximately, though not identically, the positions in which the sewers were subsequently laid, although the plan did not disclose the level at which it was proposed to lay them. For the reasons above expressed I do not think that the notice can be held to be invalid or insufficient upon any of the grounds upon which the pursuers' counsel founded, and to which I have already referred. But it was further argued for the pursuers that the letter of 20th June did not amount to a valid notice, because at its date the Town-Council had not in fact come to any absolute and unqualified resolution to proceed with the whole sewerage works which they subsequently constructed. In regard to this point, and to that which I shall immediately after deal with, a good deal of the evidence led was, in my opinion, loose and unconvincing, and some of it incompetent. I refer to what was said by a number of witnesses as to what passed at the various meetings of Town-Council, the minutes of which are produced. Parole evidence may well be adduced to explain the language of any minute of a public body where its terms are ambiguous and require explanation, but not, in my judgment, in order to contradict the resolution which a minute records as having been passed at any meeting, nor to prove that some resolution was verbally arrived at although not recorded. I may refer on this matter to the recent case of *School Board of Tarbert v. Aird*, February 17th, 1905, 42 S. L. R. 373. The question, however, is not of real importance in the view which I take of the matter. It is, I think, clear enough that at 20th June 1905 the Town-Council had not committed themselves to the construction of the whole scheme. They had had some consideration of an alternative proposal to execute a cheaper, because less extensive, programme; and a final decision was, I think, left open, pending the ascertaining of what was at 20th June still a matter of uncertainty, viz., the cost of the undertaking. That this was so appears, I think, from the minutes themselves, the engineers' reports, the specification, and the correspondence. Assuming that this was the actual position, and discarding the parole evidence given to the effect that the defenders had come before 20th June 1905 to a verbal resolution to proceed with the whole scheme, I am unable to see that the pursuers take any material benefit. It is not, I apprehend, a condition precedent of giving a valid notice under section 103 that the Local Authority shall be committed or bound to go on with and

¹ 1905, 8 F. 77.

tion. (5) The obstruction placed by the defenders in the river without any statutory authority was highly detrimental to the pursuers, and gave them as riparian proprietors a good ground of action.¹ (6) The pursuers were entitled to have the pipes removed.² (7) In any case the defenders were not entitled to expenses as between agent and client under the Public Authorities Protection Act, 1893. This case fell within the exception of sec. 3 of that Act in respect of the provisions of sec. 166 of the Public Health (Scotland) Act, 1897.

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Argued for the defenders and respondents;—(1) The Town-Council were entitled to proceed under sec. 103 of the Public Health (Scotland) Act, 1897, without complying with the requirements of the Burgh Police (Scotland) Act, 1892. This case so far was ruled by *Brown v. Magistrates of Kirkcudbright*.³ It clearly appeared from the arguments as reported in that case that the Burgh Sewerage, Drainage, and Water-Supply Act, 1901, was brought under the notice of the

complete the whole works contemplated, or that they shall have formally resolved to proceed with the whole and not merely with a part of the scheme. Here, again, I think that the pursuers' conception of the sort of notice required, and of the purposes for which it is required, is based upon error. The same remark is, in my judgment, applicable to the next point which it was endeavoured to establish for the pursuers. This was that at 20th June 1905, when the letter and plan were sent, the Town-clerk had not been specially authorised by his Council to serve this or any other notice in the matter. Assuming the fact to be so—and I rather think that it was—the pursuers' case does not appear to me to be advanced. The Town-clerk was in the month of July duly authorised in that behalf; and I think that, as in a question with the pursuers or any other third party, the previous notice was thus clearly validated, so far as any want of authority was concerned. The objection is one which, in my judgment, could be pleaded only by the Town-Council themselves. I may refer upon this point to the English case of *Cheetham*, 1875, L. R., 10 C. P. 249.

“In my opinion, therefore, the defenders did give the pursuers ‘reasonable notice in writing’ within the sense and the language of the Act. If this view is well founded, then I need not consider or decide the further defences based upon alleged consent, or agreement, or acquiescence by the pursuers, with which a considerable portion of the proof was occupied. Nor, of course, do the conclusions for interdict, and for restoration of the *solum*, and the defenders' answers to these, arise for consideration.

“Only one matter, I think, remains as to which I ought to say something. An argument was advanced and pressed, which does not seem to me to be sufficiently pleaded upon the record, and which I understood to be given up by the pursuers' counsel in the Procedure-Roll discussion (at all events so far as the Outer-House is concerned), but which, if it were well founded, would apparently afford a conclusive answer to the defenders' whole case. It was maintained, with reference to section 217 of the Burgh Police (Scotland) Act, 1892, that the works complained of were fundamentally illegal and unwarranted, because the defenders have proceeded to ‘interfere with’ a ‘stream’ or ‘river’ ‘in which the owner . . . of any lands, mills . . . or machinery . . . have right and interest, without the consent in writing of the person legally entitled to grant the same.’ In my judgment, this argument, even assuming that it is properly before me,

¹ *Menzies v. Breadalbane*, 1828, 3 W. & S. 235; *Jackson v. Marshall*, 1872, 10 Macph. 913; *Bicket v. Morris*, 1866, 4 Macph. (H. L.) 44.

² *Krehl v. Burrell*, 1878, 7 Ch. D. 551, 1879, 11 Ch. D. 146; *Grahame v. Magistrates of Kirkcaldy*, 1882, 9 R. (H. L.) 91.

³ 8 F. 77.

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Court. But even if the matter was not concluded by authority, and the case of *Brown*¹ was open to reconsideration, it was rightly decided. This appeared from a consideration of the sections founded on by the pursuers. The Act of 1901 enlarged, and did not restrict, the powers of town-councils as sewer authorities in burghs. (2) The defenders had given the pursuers "reasonable notice," within the meaning of sec. 103 of the Act of 1897, by the Town-clerk's letter of 20th June 1905. The defenders were not restricted to carrying their sewers under ground.² (3) The pursuers were neither owners nor occupiers of the bed of the river, and so were not entitled to receive notice. They had given up their claim to the *alveus*. As riparian proprietors they were not entitled to notice. Further, this was only a repair and alteration of sewers, not a construction of new sewers, and therefore no notice was required. (4) Even if notice was required, and no sufficient notice had been given, the Court would not order the work to

cannot be given effect to. In the first place, I gravely doubt whether the section referred to, when carefully read in its entirety, and in conjunction with the surrounding context of the Act, amounts to an absolute prohibition against any interference by Police Commissioners with any stream in which owners of land or mills are interested, unless the latter are willing to grant a written consent. In the second place, if such consent by the present pursuers were necessary, I am not sure that it is not to be found in their letter of 23d June 1905, which was written after receipt of and in reply to the Town-clerk's letter of 20th June and relative plan. Whatever the pursuers may have understood or misunderstood as to the proposals of the Town-Council, they could not, I think, have failed to see that the intention of the latter was to 'interfere,' in the manner generally indicated, with the 'river' Tyne in the immediate vicinity of their 'mills.' And the pursuers say,—'We quite approve of the scheme so far as it affects our property.' But in the third place, I do not think that the section referred to has any place in, or reference to, the case with which we are here dealing. The defenders gave what I have held to be 'reasonable notice in writing,' under the Public Health Act, 1897, and they proceeded to carry out their works under the powers and provisions conferred upon them by that Act. Now, it was decided in the recent case of *Brown v. Magistrates of Kirkcudbright*, 17th November 1905, 8 F. 77, that 'the procedure prescribed by the Act of 1897 for a Local Authority in the making of sewers was a code complete in itself, and that a Local Authority was entitled to exercise the powers given by the Act for the making of sewers in conformity therewith, without regard to the procedure prescribed by the Burgh Police Act.' Lord Adam, in that case, said,—'The proceedings in this case were taken by the Local Authority under the Public Health Act of 1897, and the powers conferred by that Act are, I agree with Lord M'Laren, entirely independent of any powers that may be granted under the Burgh Police Act or other Acts.' What Lord M'Laren had said was as follows,—'I think it is impossible, on a fair reading of the Public Health Act, 1897, to come to any other conclusion than that the procedure there authorised was intended to be complete in itself. . . . I cannot conceive that, in applying the powers of the Act to burghs, the Legislature intended to put upon the administrators of the burgh the impossible task of carrying out constructive works under the provisions of two codes, each of which deals completely, but in a different way from the other, with the subject in hand. In availing themselves of the powers given by the Public Health Act, 1897, I think that the Magistrates and Council are within their rights if they

¹ 8 F. 77.

² *Roderick v. Aston Local Board*, 1877, 5 Ch. D. 328.

be undone merely to cure an informality, when, upon its being undone and proper notice given, it could be at once reinstated.¹ (5) The pursuers (*a*) had consented, (*b*) had acquiesced in the work being carried out as it was, and (*c*) had waived any objection on the ground of want of notice. (6) The works here produced no sensible effect on the flow or level of the river, and therefore could not be objected to by the pursuers as riparian proprietors.² (7) The defenders if successful were entitled to expenses as between agent and client. Sec. 166 of the Public Health Act, 1897, contained no "other conditions" in the sense of sec. 3 of the Public Authorities Protection Act, 1893.

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The authorities undernoted were also referred to.³

At advising on 12th November 1907,—

LORD STORMONTH-DARLING.—After mature consideration I have come to the conclusion that the Lord Ordinary's judgment in favour of the Burgh of Haddington is right, and should be adhered to. The conduct of the case

comply with the requirements of that statute, and they are not required, as part of their duty under that Act, to refer to the provisions of previous Acts of Parliament under which cognate powers are conferred.' The pursuers' argument was based upon an ingenious application of the Burgh Sewerage, Drainage, and Water-Supply (Scotland) Act, 1901. Prior to that Act there existed, of course, two separate and independent statutory codes of procedure in regard to the sewerage of drainage districts in burghs, viz.—(*a*) Under the Police Acts, 1862 and 1892; and (*b*) under the Public Health Acts, 1867 and 1897. Section 3 of the Act of 1901 provides that 'All special or separate drainage districts that may have been formed in any burgh under any Public Health Act shall, subject to the provisions of this Act, be deemed to be drainage districts under the principal Act,' i.e., the Act of 1892. It was contended that the intention and effect of this provision were to transfer all existing drainage districts which had been formed under the second of the codes above mentioned so as to place them under the Police Act code. Then section 5 of the 1901 Act was referred to, by which, *inter alia*, it is enacted that the Town-Council of any burgh, as the Authority under 'the principal Act,' in addition to the powers conferred upon them by that Act, or any other Act, shall have the same rights, powers, and privileges as are conferred by the Act of 1897 upon Local Authorities under that Act in districts other than burghs, with certain exceptions, 'and in so far as necessary for giving effect to this enactment the last-mentioned Act and the Acts and parts of Acts incorporated therewith are, subject to the necessary modifications, incorporated with the principal Act.' The pursuers urged that, under the Act of 1901, the Town-Council, while they have the powers of the Public Health Act, have them only by way of incorporation with those of the 'principal' Act of 1892; that section 217 of that Act stands unrepealed, and is an integral part of and limitation upon the Town-Council's powers, whether they profess to proceed under the 'principal' Act or under the Public Health Act, and

¹ Phillips v. Dunoon Police Commissioners, 1884, 12 R. 159; Hutchings v. Seaford Urban District Council, 1898, 43 Solicitors' Journal, 41.

² Bicket v. Morris, 1866, 4 Macph. (H. L.) 44; Orr-Ewing & Co. v. Colquhoun's Trustees, 1877, 4 R. (H. L.) 116; Jackson v. Marshall, 10 Macph. 913, *per* Lord Justice-Clerk, at p. 917; M'Gavin v. M'Intyre Brothers, 1890, 17 R. 818, *per* Lord Trayner, at p. 824.

³ Lewis v. Weston-super-Mare Local Board, 1888, 40 Ch. D. 55; Cheetam v. The Mayor, &c., of the City of Manchester, 1875, L. R., 10 C. P. 249; Police Commissioners of Kirkintilloch v. M'Donald, 1890, 18 R. 67; Swanston v. Twickenham Local Board, 1879, 11 Ch. D. 838.

Nov. 12, 1907. throughout has been marked by an ability which has only been equalled by its keenness. Now, where private interests conflict with an admitted public benefit, and the question comes before a Court of law, the Court, in my opinion, ought to be strict to mark any neglect of the private interest which amounts to a failure to make compensation for the property either taken or injuriously affected. But where, as here, there is no case of that kind, but only a difference of opinion as to the precise method by which the public benefit is to be conferred, and a criticism of the legal machinery which has been invoked in attaining it, I do not think that any such duty arises. Of course the public authority charged with the execution of the work must proceed according to law, but it is not every captious objection to their procedure that is to be listened to, particularly if it results in no serious or even sensible injury to the person objecting. And that, in my view, is a fair description of the kind of injury alleged here.

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The case for the pursuers is, not that an improved system for the drainage of Haddington was altogether unnecessary, or even that the system actually projected and partially carried out was not a "great improvement" in the public interest; they admitted as much by their letter of 23d June 1905, p. 30 of the joint print. Their case as now presented, after a great part of the work has been done, is that they did not discover till 10th November of that year that the defenders were interfering with the *alveus* of the River Tyne, which, at the place in question, is their property, or in which at least they have a common interest with others, the interference consisting, not in the discharge of sewage into the river, but in the laying of certain drain pipes *on* the surface of the *alveus*, instead of *in* the bed of the river, and thereby affecting the natural flow of the river opposite their mills; that the defenders could not, under the 217th section of the Burgh Police Act, 1892, interfere with the stream without the pursuers' consent in writing, that they gave no such consent, and that, even if the defenders were justified in proceeding under the Public Health Act, 1897, alone, they did not follow the directions of that Act, because they failed to give reasonable notice to the pursuers, as required by section 103, of their intention to carry their sewers through the property of the pursuers, and, in particular, did

that the proceedings here complained of have been gone about in violation of section 217. They say that this point was not raised or decided in *Brown's* case. That is so far true, because in *Brown's* case section 217 does not seem to have been referred to, and had, indeed, so far as appears, no application in the circumstances there existing. But the Act of 1901 was before the Court, as is shewn by the reported arguments of counsel, and it was upon a consideration and construction of that Act and of the other Acts that the case was decided, and the opinions were pronounced which I have already sufficiently quoted. I think that, in view of these opinions, the question now raised can scarcely be held to be open, at all events so far as the Outer-House is concerned. As I have before stated, it is not, I think, properly raised upon the record, but, as the point was ably and strenuously argued by the pursuers' counsel, I have thought it right to express my views in regard to that.

"The result of the whole matter is that, in my opinion, the defenders' operations have been gone about lawfully, and in compliance with their statutory powers. The action therefore fails, and the defenders must be assoilzied."

not send to them the report of a surveyor to the effect that such a course was necessary. The practical conclusion of the summons is that the defenders ought to be ordained to lift all their pipes and other structures, and restore the channel of the river to its former condition. It will thus be seen that the nature of the case leading to these rather startling conclusions is both complicated and involved. It means that, where a burgh is situate on a running stream, the town-council of that burgh cannot improve its drainage, however desirable in the public interest, if the scheme involves any interference with that running stream, without the consent in writing of everybody who can qualify any sort of right or interest in that part of the stream. It also means that the administrators of a burgh must make up their minds, before they set a drainage scheme on foot, which of two extant and possibly inconsistent codes they are to follow, under penalty that if they make a slip they may be called upon, months after the work has been done, to undo it at great public detriment and expense. This *may* be the result of too much legislation on a particular subject, or of want of care in framing the legislation; but it is not a result to be readily adopted.

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The Lord Ordinary finds a sufficient justification for the interlocutor which he has pronounced in the recent First Division case of *Brown v. Magistrates of Kirkcudbright*,¹ in which it was held that the procedure prescribed by the Public Health Act, 1897, for a Local Authority in the making of sewers was a code complete in itself, and that a Local Authority was entitled to exercise the powers given by that Act (as the Magistrates of Kirkcudbright did) without regard to the procedure prescribed by the Burgh Police Act. That conclusion was necessary to the judgment, and none of the Judges expressed any dissent from it. Undoubtedly it justified the decision in this case, so far as the Outer-House was concerned, if the Lord Ordinary was of opinion, as he was, that the notice here given was in fact reasonable. *Brown's* case¹ would not be equally binding on us, for we might take measures for the reconsideration of the point if we thought such a course desirable. But, so far as I personally am concerned, I am quite satisfied with the decision in *Brown's* case.¹ I have no fault to find with it of any kind, and it was a unanimous judgment of the First Division.

It was urged by Mr Clyde for the pursuers that, while the defenders might have had an option to proceed either under the Act of 1892 or under the Act of 1897 before the passing of the Burgh Sewerage and Water-Supply Act of 1901, they had no such option after the passing of that Act, and that *Brown's* case¹ would have been, or ought to have been, decided otherwise than it was, if the provisions of the Act of 1901 had been properly brought before the First Division. I do not think so. The First Division had the Act of 1901 in view when they pronounced their judgment, and I do not see that it makes the great difference for which Mr Clyde contends. No doubt by section 1 it calls the Act of 1892 "the principal Act"; and, where sums of money have been borrowed for purposes of sewerage or water-supply, it lays upon town-councils the duty of providing the sums necessary for repaying the principal and for paying interest on such sums out of a special assessment to be made under the Act of 1892, with certain

¹ Nov. 17, 1905, 8 F. 77.

Nov. 12, 1907. limitations as to amount, and certain provisions as to approval of the Local Government Board for Scotland in the case of such prescribed amounts not being sufficient to meet the expenditure. It is also true that by section 5 of the Act the town-council of any burgh, in addition to the powers conferred upon them by the Act of 1892 or any other Act, with reference to sewerage and water-supply, are to have the same rights, powers, and privileges as are conferred by the Public Health Act of 1897 upon Local Authorities under that Act in districts other than burghs, with certain specified exceptions. Further, it is true that to make these provisions harmonise with the course of legislation, sections 101, 113, 133, 134, and 137 of the Act of 1897 are repealed. But all that does not get over the fact that section 103 of the Act of 1897 is not repealed; and so long as it was left standing it does not seem to me that it was in any respect *ultra vires* of the defenders to proceed under section 103, which gave them the power to construct within their district (which this extention undoubtedly was) "such sewers as they might think necessary for keeping their district properly cleansed and drained." *They* were made the judge of the necessity of such operations, at least in the first instance, and if the pursuers meant to challenge the necessity, or to demand a report by a "surveyor" in addition to the plan (whatever it was) which was sent with the letter of the Town-clerk dated 20th June 1905, then was the time, in my judgment, for the pursuers to have formulated their demand. I agree with all that the Lord Ordinary says in his opinion on this part of the case; and, particularly in view of the Town-clerk's offer to give the pursuers "any further information," I think it is too late now for the pursuers to complain that they did not get reasonable notice. I am satisfied that the pursuers on receipt of the letter of 20th June and its accompanying plan knew perfectly well that the defenders intended to carry a new drain "into, through, or under" the pursuers' lands, and that, their reply having been an express approval of the scheme without any qualification either as to the level of the new drain or otherwise, they must be held to have been satisfied of its necessity and of the sufficiency of the notice generally. It is clear from the decision of the case of *Roderick v. Aston Local Board*¹ in 1877, under the corresponding English Public Health Act of 1875, that a power to carry sewers "into, through, or under any lands whatsoever" cannot be read as if those words meant only "under."

In reaching the conclusion that the Lord Ordinary's judgment is right, I confess I do not share the doubts which, I understand, my brother Lord Low has as to the soundness of the Lord Ordinary's finding that the pursuers "have validly complied with the requirements of the Public Health Act, 1897." These doubts are, as I understand, founded on the view that the Town-clerk failed to disclose, either by his letter of 20th June, or by the plan which accompanied it, that the two proposed new pipes were not to be laid at the same level as the old single pipes, and that this omission, though not due to carelessness or a desire to conceal anything, was yet such as to justify the pursuers' assumption that the two new pipes were to be so laid. But that assumption (the justification of which I doubt, particularly looking to the

¹ 5 Ch. Div. 328.

note on the plan, No. 8 of process, that the old 12-inch pipe was "to be lifted and relaid") ought only in my view to have led to an inquiry for more information, which, be it observed, had been proposed in the Town-clerk's letter. At all events, it does not seem to me to negative what is the main issue on this part of the case, viz :—Whether the defenders gave "reasonable notice in writing" of the works which they proposed to execute upon private property.

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It remains for consideration whether the proceedings of the burgh of Haddington have been gone about in violation of section 217 of the Act of 1892,—the section which provides that "nothing in this Act contained shall be construed to authorise the Commissioners" to do certain things, including using, injuring, or interfering with any watercourse, stream, river, dock, basin, wharf, quay, or towing-path, in which the owner or occupier of any lands, mills, mines, or machinery, or the proprietors of any canal or navigation, shall have right and interest, "without the consent in writing of the person legally entitled to grant the same." It might be enough to rely, as the Lord Ordinary does, on the judgment in *Brown's case*¹ as settling that the defenders did not require to resort to the Act of 1892 as authorising them to use, injure, or interfere with the River Tyne, inasmuch as section 103 of the Public Health Act of 1897 gave them the required authority, and all that section 217 says is that "nothing in this Act contained," i.e., the Act of 1892, shall be construed to authorise the Commissioners to do certain things. But, even if this were not so, I greatly doubt whether section 217 applies to this case at all. Reading the section as a whole, it looks to me very much as if the protection of the private owner was carried so far as to entitle him to withhold his consent altogether (instead of merely entitling him to receive compensation) for the reason that, in the exceptional cases specified, any interference with these "private sewers or watercourses," as the side-note calls them, might defeat the object aimed at by some local or private Act of Parliament, and not at all that, in the very common case of a river bordered by a town, any exceptional protection was thought to be necessary to guard against any, even the smallest, interference with the flow of the stream. The danger of pollution is dealt with separately in the Public Health Act by reference to the Rivers Pollution Prevention Acts; but I never understood that the high doctrine of *Morris v. Bicket*,² which related to building operations by an opposite neighbour on the *alveus* of a stream, was thought to be within the purview of sanitary or drainage statutes.

Moreover, if the pursuers were to insist on the view that their consent in writing was a necessary preliminary to any interference with the River Tyne, they ought in my opinion to have tabled their proposition at once, instead of reserving it till the works were well advanced. My belief is that the applicability of section 217 was a pure afterthought on the part of the pursuers, due to the ingenuity of their legal advisers.

I have not adverted to any of the oral evidence in the case, because I consider it almost entirely beside the question. And I cannot help observing that, in my opinion, municipal authorities deserve some commiseration for

¹ 8 F. 77.

² 4 Macph. (H. L.) 44.

Nov. 12, 1907. having to pick their way through such a tangle of redundant legislation as

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LdStormonth-Darling. With regard to the point which was made as to the application of the Public Authorities Protection Act, 1893, and as to which the Lord Ordinary has given effect to the defenders' demand, I agree that that part of his Lordship's interlocutor must be recalled, on the short ground that the Act itself declares, by section 3, that it shall not apply "to any action, prosecution, or other proceeding . . . on account of any act done in any case instituted under an Act of Parliament, when that Act applies to Scotland only, and contains a limitation of the time and other conditions for the action, prosecution, or proceeding." Now, the Public Health Act, under which this action must be held to have been instituted (on the assumption that the defenders are to get their expenses) does contain, by section 166, a limitation of the time within which such action shall be commenced, and it also contains (at the beginning of the same section) "other conditions" applicable to the action.

LORD LOW.—The first question to be determined in this case seems to me to be whether it was competent for the defenders to proceed under the powers conferred upon Local Authorities by the 103d section of the Public Health Act, 1897.

I am of opinion that that question must be answered in the affirmative, because the section applies to all Local Authorities, whether in burgh or in landward districts, and it has never been expressly repealed, nor, in my judgment, can it be held to have been repealed by implication.

After the passing of the Public Health Act, 1897, a somewhat anomalous condition of matters arose in regard to public sewers and drains in burghs, because the Burgh Police Act, 1892, contained a complete code in regard to these matters within burgh, and the Public Health Act also contained a complete code which was applicable to burghs as well as to other districts; and further, the assessments authorised by the two Acts differed both as to amount and as to the persons liable.

It was for the purpose of remedying, or at all events of partially remedying, that state of matters that the Burgh Sewerage, Drainage, and Water-Supply Act, 1901, was passed. That Act, by amending certain sections of the Act of 1892, and repealing (as regarded burghs) certain sections of the Act of 1897, did away with the double method of assessment authorised by the two last-mentioned Acts, and established one method of assessment for burghs. It further declared that as regards burghs the Act of 1892 should be the principal Act, and it incorporated with that Act certain sections of the Act of 1897, and repealed certain sections of the latter Act.

That being the scheme of the Act of 1901 I think that one would have expected that all the provisions in the Act of 1897, which it was intended should still apply to burghs, would have been incorporated in the Act of 1892, and that all provisions which it was intended should no longer apply to burghs, would have been (*quoad* burghs) repealed. If that had been done, burgh authorities would have found the whole code applicable to them in the Act of 1892 as amended, together with the incorporated sections of the Act of 1897. But the course actually adopted by the Legislature was

very different. As I have said, certain sections of the Act of 1897 were repealed, and other sections were incorporated into the Act of 1892, but there were also a number of sections in the former Act which applied to burgh as well as to other authorities which were neither incorporated nor repealed. It is true that a good many of these sections contained provisions identical, or practically identical, with what had already been enacted as regarded burghs in the Act of 1892, and so far as these sections were concerned it was immaterial that they were neither incorporated nor repealed. But there are also sections which contain provisions which have no equivalent in the Act of 1892. The 103d section itself may be taken as an example. That section, *inter alia*, authorises all Local Authorities to construct sewers for the purpose of outfall or disposal or treatment of sewage without their district. It was admitted that (whatever may be said as to the other powers given in the section) no such power as that which I have quoted is conferred upon the Local Authority in burghs by the Act of 1892, and therefore, unless the 103d section is still applicable to burghs, the Local Authority in a burgh has been deprived of a very important power which has been conferred upon all other Local Authorities. No reason was, nor, I imagine, could be, suggested for denying such a power to burghs; and indeed I should expect that it would be more frequently expedient or necessary that sewage should be disposed of outside the area under the control of the Local Authority in the case of a burgh than in the case of a country district. I therefore see no reason for holding that section 103 (and the remark applies to other sections in a similar position) does not apply to burghs, because, although it is not incorporated with the Act of 1892, it is not repealed. In taking that view I am confirmed by the judgment of the First Division in the case of *Brown v. Magistrates of Kirkcudbright*.¹

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There is, however, another ground for holding that section 103 is still in force as regards burghs. By the 5th section of the Act of 1901 it is provided that "the Town-Council of any burgh, as the authority under the principal Act, in addition to the powers conferred upon them by the principal Act, or any other Act, shall, with reference to sewerage and drainage or water-supply within such area, have the same rights, powers, and privileges as are conferred by the Public Health (Scotland) Act, 1897, upon Local Authorities under that Act in districts other than burghs, with the exception of the rights, powers, and privileges conferred by sections 122 and 131 of the last-mentioned Act, to which sections the present section shall not apply."

Now, the two excepted sections are in express terms limited to districts of a "Local Authority, not being the Local Authority of a burgh," and in the part of the Act dealing with "sewers, drains, and water-supply" there are other sections (at all events in regard to water-supply) whose application is limited in the same way. It is plainly the powers contained in the latter sections which are conferred upon burgh authorities in addition to powers already possessed by them. The object, therefore, of the enactment is to add to and not to diminish the powers of burgh authorities, and the powers to

¹ 8 F. 77.

Nov. 12, 1907. which the addition is made are described as those conferred "by the principal Act" (that is the Burgh Police Act, 1892), "or any other Act." Now the Act of 1897 is another Act which confers powers upon burgh Local Authorities which they did not possess before (as, for example, by the 103d section), and it seems to me to be plain that the Act of 1901, so far from taking away any powers conferred upon burgh authorities by any prior Act, conferred upon them powers which they did not previously possess.

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I am therefore of opinion that the defenders were entitled to proceed, as they did in fact proceed, under the powers of section 103.

The next question is whether the defenders followed the procedure prescribed by that section. The part of the section applicable to this case is that which enacts that a Local Authority may construct a sewer "after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary) into, through, or under any lands whatsoever." The pursuers did not found upon the clause in regard to a surveyor's report, but they maintained that "reasonable notice" of the works proposed was not given to them. Notice was, in fact, sent to the pursuers by the letter of the Town-clerk of 20th June 1905, and the pursuers' complaint is that the information given as to the character of the proposed sewer was not reasonably adequate in that not only did it not disclose that the new pipes were to be laid upon the surface of the bed of the stream instead of under the surface (as was the case with an existing pipe), but the inference from the letter was that the new pipes were to be laid upon the same level as the existing pipe.

It seems to me that there are substantial grounds for that objection. The state of matters which existed when the notice was given was that a 12-inch pipe ran down the bed of the river from the Victoria Bridge to Spoutwell Brae, and the plan which was sent to the pursuers along with the letter of 20th June shewed that pipe, and alongside of it an 18-inch pipe. In the letter it was said that "the existing 12-inch water-closet sewage pipe" (which I understand to be the pipe which ran down the bed of the river) "will remain," but nothing was said about the 18-inch pipe shewn on the plan. The explanation of that I take to be that it did not occur to the Town-clerk that the laying of pipes in the bed of the river below the Victoria Bridge could in any way affect the pursuers, and what he desired to make clear in the letter was what the proposed sewage arrangements above Victoria Bridge were—a matter in which he was aware that the pursuers were interested. The weir of the dam which supplies the pursuers' mills is immediately above Victoria Bridge, and the pursuers had objected to a discharge of sewage which under the existing system was made into the dam. By the proposed scheme that discharge was discontinued, and all the sewage was taken down the river by means of the two pipes, and what the Town-clerk desired to make clear was that the proposed scheme did away with a state of matters to which the defenders strongly objected. But although the Town-clerk did not refer in the letter to the 18-inch pipe, he sent a plan which shewed that pipe, and accordingly the pursuers were notified that if the scheme were carried through, an additional and larger pipe would be taken down the bed of the stream. The plan, however, shewed nothing in regard to the level at which the pipes were to be laid;

but as the Town-clerk said that the 12-inch pipe would remain, I think that the pursuers were justified in assuming that the 18-inch pipe would not only be laid alongside of it, as shewn on the plan, but would be upon the same level.

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Now, I think that it is established by the evidence that the 12-inch pipe was embedded in the channel of the river, and did not shew above the level of the river bed, but to what extent that state of matters was due to the manner in which the pipe had been originally laid, and to what extent to sagging or sinking of the pipe, it seems to be impossible to ascertain with certainty. I think, however, that the pipe most probably was originally laid under the river bed. One thing seems to be clear, and that is, that neither the defenders nor the men of skill by whom they were advised ever considered the question of the level of the new pipes as compared with the level of the old pipe. It does not seem to have occurred to them that there was any question of that kind which required consideration, and for this reason: There were two fixed points between which the old pipe ran and between which the new pipes were to run, and did run when laid, the one point being an opening in the abutment of the Victoria Bridge through which the pipes were passed, and the other an iron pipe which crossed the river at Spoutwell Brae, and with which the pipes in question were connected. Now, obviously the natural and most efficient way to lay the pipes between these two points was to lay them upon a uniform gradient, that is to say, in a straight line from the one fixed point to the other, and it never occurred to the engineers to inquire whether the old pipe had or had not been originally laid in that way.

The failure, therefore, of the defenders to inform the pursuers that the new pipes would be above ground was not due to any desire on their part to conceal anything, nor can the Town-clerk be charged with carelessness in not having brought the matter to the pursuers' notice. On the other hand, the pursuers were, as I have already said, in my opinion justified in assuming that the new pipes would be in the same position as the old, that is to say, below the surface of the river bed, and it is not surprising that they felt aggrieved when they found that instead of the bed of the river remaining free from obstructions, two large pipes were laid upon it, and covered with cement, thereby forming a structure of from 4 to 10 feet in breadth. The pursuers aver, and they have adduced some evidence in support of the averment, that that structure renders their mills more liable to be flooded than they were formerly, and although I do not think that they have made out a strong case, it seems to me to be impossible to say that the risk of flooding may not have been to some, although probably to a very slight, extent increased.

Now, assuming that the pursuers did not get that reasonable notice of the works proposed by the defenders which is required by the 103d section, what is the result? The pursuers' demand, and it is their only demand so far as this action is concerned, is that the pipes should be removed. In order to determine whether or not that is a remedy which is open to the pursuers I shall consider what the position of matters would have been if the pursuers had received notice of the precise way in which it was proposed to lay the pipes, and had objected. It seems to me that notwith-

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Lord Low. standing an objection on the pursuers' part, the defenders could have proceeded with the works and laid the pipes exactly as they have done, because the 103d section does not say that the consent of the persons to whom notice must be given is required, or that they may object to the proposed sewer. All that seems to be contemplated is that persons through whose lands it is proposed to take a sewer should have an opportunity of considering the matter, and stating their views to the Local Authority.

In expressing that opinion I am not leaving out of view the provisions of the 109th section of the statute, which enacts that "in case it shall become necessary to enter, examine, or lay open any lands or premises" for the purpose of making plans, surveying, taking levels, and the like, and, *inter alia*, for the purpose of making sewers, "and the owner or occupier of premises refuses or withholds access and leave to perform the said operations, the Local Authority may, after written notice to such owner and occupier, apply to the Sheriff, who, if no sufficient cause be shewn to the contrary, shall grant warrant to the Local Authority, their officers and others thereby authorised, to enter and do all or any of the works or operations foresaid at all reasonable times in the daytime." In terms of the 157th section of the Act any order made by the Sheriff is final, and not subject to review.

In the case of *Brown v. Magistrates of Kirkcudbright*¹ there was some difference of opinion in regard to the power conferred upon the Sheriff by that section, Lord M'Laren taking the view that the Sheriff was empowered to consider and determine whether the operations proposed by the Local Authority ought or ought not to be allowed, while Lord Adam was strongly of opinion that the Sheriff's powers were limited to questions of procedure, and that he had no authority to consider whether the proposed sewer was necessary or not. I agree with Lord Adam. I think that the main function of the Sheriff is to regulate the way in which the work is to be proceeded with, so as to be as little burdensome as possible to the owner or occupier. No doubt it is made imperative on the Sheriff to grant warrant to the Local Authorities to enter the lands only "if no sufficient cause be shewn to the contrary," which implies that if sufficient cause be shewn to the contrary the Sheriff may refuse the warrant. I do not however think that that is inconsistent with the view which I take of the scope of the enactment, because there may be cases in which the Sheriff would be justified in refusing a warrant without considering or dealing in any way with the question whether or not the works were necessary. Suppose, for example, that a Local Authority proposed to construct a sewer through private lands in the exercise of the powers in the 103d section, and attempted to enter the lands and commence operations without having given previous notice in writing to the owner or occupier, and without having obtained a report from a surveyor that the sewer was necessary, I have no doubt that the Sheriff would be entitled to refuse a warrant and to dismiss the application in respect that the Local Authority had not followed the statutory procedure. I am accordingly of opinion that the 109th section does not aid the pursuers, and indeed I did not understand their counsel to found upon that section.

I am therefore of opinion that if the defenders were entitled to proceed

¹ 8 F. 77.

under the powers conferred by the 103d section of the Act of 1897, without Nov. 12, 1907. any limitation of these powers, except those contained in the section itself and in the 109th section, the pursuers are not entitled to have the pipes in question removed. I take it that the Court will not order removal of a structure which can be immediately replaced, especially where, as here, there was no radical defect in the title of those who erected it, but merely an unintentional failure to comply with certain statutory formalities.

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The question remains, however, whether the powers conferred by the 103d section are not limited and qualified by the 217th section of the Act of 1892? By that section it is enacted "that nothing in this Act contained shall be construed to authorise" the Local Authority, *inter alia*, "to use, injure, or interfere with any watercourse, stream, river, dock, basin, wharf, quay, or towing-path in which the owner or occupier of any lands, mills, mines, or machinery, or the proprietors of any canal or navigation, shall have right and interest, without the consent in writing of the person legally entitled to grant the same."

It seems to me that if that enactment is applicable to the present case, and if it is to be construed literally, it is conclusive in the pursuers' favour, because the defenders did, without the pursuers' consent, use and interfere with a river in which the pursuers not only had an interest as owners and occupiers of mills, but of the *alveus* of which they were proprietors, either from bank to bank or *ad medium filum*, at the part where the pipes in question are laid.

The Lord Ordinary suggests that even if the section is applicable, the pursuers gave their consent in writing. I cannot assent to that view, because although the pursuers did in writing express their approval of the scheme, they did so in the belief, which they were justified in holding, that the pipes were to be laid underground. If they had been aware that the pipes were to be laid above ground they would certainly not have approved of the scheme, nor given their consent to it.

But however that may be, I am of opinion that the 217th section does not apply to the present case. In the first place, the section in terms only applies to operations carried out under the powers conferred by the Act of 1892. That appears from the opening words of the section, which are—"Nothing in this Act contained shall be construed to authorise."

In like manner the language of the 103d section seems to me to negative the idea that the powers thereby conferred are subject to any limitation. The power which is in question in this case is to construct a sewer "into, through, or under any lands *whatsoever*." The word "*whatsoever*" is plainly unnecessary except for the purpose of emphasis, and the inference appears to me to be that it was used in order to make it clear that the generality of the power was to be subject to no exception. I am therefore of opinion that it would be contrary to the declared intention of the Legislature to hold that the power conferred has been limited and curtailed, in the case of burghs, so as to be excluded altogether as regards the subjects enumerated in the 217th section.

If I am right in the view which I have already expressed that the 103d section is not repealed by implication *quoad* burghs by the Act of 1901, the only ground upon which it could be contended that the 217th section

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applies to operations under the 103d section would be that the Act of 1901, by declaring the Act of 1892 to be the principal Act, placed the 103d section of the Act of 1897 in the position of an enactment which merely added to the powers conferred by the principal Act, and therefore fell to be read along with and as part of that Act. Now, the Act of 1901 has left the 103d section, along with the group of sections of which it is one, in a very anomalous position, because, while it makes the Act of 1892 the principal Act, and incorporates with that Act certain sections of the Act of 1897, and repeals other sections of the latter Act, it simply leaves the group of sections to which I have referred standing, without either repealing them or incorporating them with the principal Act. In these circumstances I do not think that it is legitimate to infer that the Legislature intended that the wide powers conferred upon all Local Authorities by the 103d section should be limited in the case of burgh authorities alone by reading into that section the 217th section of the Act of 1892. To make that inference would be to construe the Act of 1901 either as incorporating the 103d section with the Act of 1892, or as declaring that it should be read along with and as forming part of that Act. The section has certainly not been incorporated, and I do not think that there is enough to imply a direction that it shall be read as part of the Act of 1892. Accordingly I am of opinion that the pursuers cannot found upon the 217th section.

Upon the whole matter, therefore, I have come to the conclusion that the interlocutor of the Lord Ordinary should be affirmed in so far as it assoilzies the defenders. I am not, however, prepared, for the reasons which I have given, to assent to the finding that the defenders have validly complied with the requirements of the Public Health Act.

With regard to the question of expenses raised under the Public Authorities Protection Act, I need only say, without going into details, that an examination of the Act has led me to the same conclusion as that expressed by Lord Stormonth-Darling.

LORD ARDWALL.—I concur entirely in the opinion of my brother Lord Low, which I have had an opportunity of considering.

- LORD JUSTICE-CLERK.—I have very little to add. This case has seemed to me to be attended with considerable difficulty. But I have come to the view that the judgment should be as proposed. I cannot say that I think the giving of notice under the Act was done with that clearness and formality which would be expected when notice was being given by a public authority proposing to interfere with a piece of property in which private proprietors had a substantial interest. I think that the procedure was loose, and not by any means a model for imitation by any public body. But it was treated by the pursuers as a notice without objection. Accordingly the work proceeded in the knowledge and under the observation of the pursuers. It seems to me that knowing that important works were going on under the notice, the pursuers were not acting as they should have done in allowing these expensive works to be carried on and completed without taking steps to vindicate any rights they had which they saw were being encroached upon. Except upon the strongest grounds I could not hold that merely upon a question of notice an objector could come forward and

require that the works erected should be removed, thus making a work involving great cost abortive, and compelling the adoption of some new and probably more expensive expedient. I agree with Lord Low in thinking that if the pursuers had objected they could not have made good their objection to the works being executed under section 103 of the Public Health Act, if that Act applied. But, further, in this case I have formed a very decided opinion that the pursuers have failed to prove in any reasonable degree that the works which were executed could cause any damage to their interests.

I do not add anything upon the question of application of the statutes. I entirely agree in the opinion that the authority proposing to make the alterations were entitled to proceed under section 103 of the Public Health Act, and I agree with Lord Low in the views he has expressed as to the 217th section of the Act of 1892, in holding that the pursuers cannot found on that Act.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor (of 6th July 1906) in so far as it finds the defenders entitled to expenses as between agent and client in terms of the Public Authorities Protection Act, 1893 (56 and 57 Vict. cap. 61), sec. 1 (b): *Quoad ultra* refuse the reclaiming note: Adhere to the said interlocutor reclaimed against, and decern: Refuse the defenders' motion for expenses as between agent and client, in terms of the said Public Authorities Protection Act, 1893, and find them entitled to expenses on the ordinary terms."

T. S. PATERSON, W.S.—JOHN C. BRODIE & SONS, W.S.—Agents.

WILLIAM DOUGALL, Pursuer (Respondent).—*M^cClure, K.C.*—*A. M. Anderson.*

No. 26.

PROVOST, MAGISTRATES, AND COUNCILLORS OF DUNFERMLINE, Defenders (Reclaimers).—*Dickson, K.C.*—*C. D. Murray.*

Nov. 20, 1907.

Dougall v.
Magistrates of
Dunfermline.

Warrandice—Eviction—Expenses of unsuccessful action to prevent eviction.—The Magistrates and Councillors of the burgh of Dunfermline let a farm, part of the Common Good, bounded on one side by a stream and loch, to A, reserving the privilege of fishing "by themselves or others having written authority from them," and granted absolute warrandice.

A subsequently complained to the lessors that he had sustained partial eviction by anglers, who had no written authority from the lessors, invading the banks of the stream and loch. The lessors having declined to take action, A raised an action for interdict against B and others, who had used the banks for angling without written authority from the lessors. The Lord Ordinary found that the defenders, as members of the community and rate-payers in the burgh, had right to use the banks for the purpose, and refused interdict. This judgment was not reclaimed against.

In an action subsequently raised by A against the lessors, the Lord Ordinary (Dundas) held (1) that A had sustained partial eviction, and was entitled to an abatement of rent, and (2) that A was entitled to payment of the expenses incurred by him, and those for which he had been found liable in the action for interdict.

The defenders having reclaimed against the judgment on the second point, the Court *adhered*.

By lease dated 29th November and 8th December 1904, the 2^d Division Provost, Magistrates, and Councillors of the royal burgh of Dunfermline—Lord Dund

Nov. 20, 1907. line, for themselves and as representing the whole body and community of said burgh (hereinafter called the proprietors), let to William Dougall the farm of Highholm, near Dunfermline, for nineteen years from and after Martinmas 1903 at an annual rent of £150; "Reserving always to the proprietors and their successors in office, representing as aforesaid . . . the whole game and fishings of every description (the tenant having all the privileges conferred by the Ground Game (Scotland) Act, 1880), with the privilege of fowling, hunting, sporting, and fishing on the lands hereby let by themselves or others having written authority from them . . . Which tack, with and under the reservations, provisions, and conditions before and after mentioned, the proprietors bind and oblige themselves and their successors in office to warrant from fact and deed only, and they bind the said burgh and community thereof to warrant the same at all hands and against all mortals, as law will."

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The farm formed part of the Common Good of the burgh, and was bounded on the north partly by a stream called Loch Fitty Burn, and partly by Loch Fitty, into which the burn flowed.

In June 1905 Dougall brought an action against James Lowe and seven other persons resident in Townhill, Dunfermline, the Provost, Magistrates, and Councillors of Dunfermline, as representing the whole body and community of said burgh, being also called as defenders for any interest they might have. The summons concluded for declarator that the pursuer was entitled to the peaceable possession and enjoyment of the subjects let to him during the full remaining period of his lease, and for interdict against the individual defenders to have them stopped from interfering with the pursuer in the peaceful possession of the said subjects, and, in particular, from entering and trespassing on the said lands, or walking over the same.

In that action the pursuer averred:—(Cond. 4) "Since the pursuer has had possession of the farm numerous members of the public have been in the habit of trespassing on the farm for the purpose, *inter alia*, of fishing in the loch known as Loch Fitty, and in a burn flowing into it, known as Loch Fitty Burn."

The individual defenders lodged defences. The Magistrates and Town-Council of Dunfermline did not defend.

The compearing defenders answered:—(Ans. 4) " . . . Admitted that members of the community of Dunfermline have been and are in the habit of fishing in the said loch and burn, and of walking on the banks thereof for this purpose. *Quoad ultra* denied. Explained that the property of the said farm forms part of the Common Good of the burgh of Dunfermline, and that the inhabitants of Dunfermline and the villagers of the town's lands of Townhill and Kingseat have enjoyed the right and privilege of fishing in the said loch and burn, and of using the banks thereof for that purpose, from time immemorial without let or hindrance."

The pursuer pleaded, *inter alia*;—(2) The pursuer being the tenant of the said farm, and the first-named defenders having unlawfully entered and trespassed thereon, interdict should be granted as craved, with expenses.

The defenders pleaded, *inter alia*;—(2) The pursuer's material averments, so far as affecting these defenders, being unfounded in fact, they are entitled to absolvitor, with expenses. (3) These defenders, not having trespassed on the said lands let to the pursuer, should be assoilzied from the conclusion for interdict, with expenses. (5)

The said lands of Highholm forming part of the Common Good of the burgh of Dunfermline, and the inhabitants of the said burgh having exercised the right of fishing thereon from time immemorial, these defenders as members of the said community are entitled to fish in said loch and burn, and for that purpose to have access to the banks thereof, and interdict as against them should accordingly be refused.

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After a proof the Lord Ordinary (Dundas), on 3d February 1906, pronounced this interlocutor:—"Finds . . . (3) that the compearing defenders, as members of the said community and ratepayers in the said burgh, are entitled to enter upon and use the banks of said burn and loch respectively," (so far as forming part of said farm) "for the said purpose of angling; (4) that the pursuer has failed to prove that the said defenders, or any of them, have trespassed upon the said farm and lands, or have broken down, injured, or in any way interfered with the gates and fences upon and surrounding the same, or have injured or destroyed the pursuer's stock or crops upon the same: Therefore sustains the second, third, and fifth pleas in law stated for the said defenders: Assoilzies them from the conclusions for interdict, and decerns: Finds it unnecessary to deal with the conclusions of the summons for declarator: Finds the said compearing defenders entitled to expenses against the pursuer."

The pursuer did not reclaim against this interlocutor, which consequently became final.

In May 1906 Dougall raised the action now reported against the Provost, Magistrates, and Councillors of the burgh of Dunfermline, concluding for declarator "that the pursuer has been evicted from the full and peaceable possession of a portion of the subjects let by the defenders to the pursuer by lease entered into between the defenders and the pursuer, dated the 29th day of November and 8th day of December 1904, and that the pursuer is entitled accordingly to an abatement of the sum of £30 per annum from the rent stipulated for in the said lease during all the years of the currency thereof," and for decree for payment, *inter alia*, of (3) the sum of £450, 18s. 7d.

The pursuer averred:—(Cond. 6) "The pursuer through his agent complained to the defenders of the annoyance to which he was put, and of the damage which he was suffering, through the exercise of the said alleged right on the part of the public, and called upon the defenders to protect him in the possession of the subjects which they had let to him. The defenders, however, declined to take any action in the matter, and informed the pursuer that he must take such steps as he might consider necessary to protect himself against damage by trespassers." The pursuer then referred to the proceedings in the former action, and averred:—(Cond. 9) "The pursuer duly intimated to the present defenders the various steps which were taken in the said action, and informed them of the progress thereof, besides furnishing them with copies of the pleadings. The present defenders, however, beyond denying that they had conferred any right on the inhabitants of Dunfermline to fish in the said stream and loch, uniformly declined to take any part in the matter, although the pursuer intimated to them that in the event of the alleged public right being established he would hold them liable for breach of warrandice and all expenses incurred." (Cond. 10) "In consequence of the establishment of the said public right over the said farm of Highholm the pursuer has been evicted from the peaceable and exclusive posses-

Nov. 20, 1907. **Dougall v. Magistrates of Dunfermline.** sion of a material part of the subjects let to him by the defenders, who are consequently in breach of the warrandice granted by them in the said lease. . . . The annual value of the farm to the pursuer has been seriously diminished, and he accordingly maintains that he is entitled to an abatement of £30 per annum from the rent of £150 stipulated in the said lease during the whole term of its currency. . . . The defenders are also liable to relieve the pursuer of the legal expenses for which he has been found liable, and decree for which has been granted against him, and also those incurred by him in raising and prosecuting the said action, which together amount to the sum of £450, 18s. 7d., being the sum third concluded for in the petitory conclusion of the summons."

The defenders answered:—(Ans. 6 and 9) "The correspondence between the pursuer's agent and the Town-clerk of Dunfermline is referred to for its terms. *Quoad ultra* denied." (Ans. 10) " . . . Denied. The pursuer has not been and will not be evicted by the exercise of the right of fishing."

The pursuer pleaded, *inter alia*;—(1) The pursuer having been evicted from the peaceable enjoyment of a material part of the subjects let to him by the defenders is entitled to a corresponding abatement of rent in terms of the declaratory conclusion of the summons. (2) The defenders being in breach of the warrandice granted by them in the said lease in favour of the pursuer, are bound to indemnify the pursuer for the loss which he has in consequence sustained. (5) The pursuer having incurred the legal expenses condescended on in vindication of the subjects let to him by the defenders, and in consequence of the defenders' said breach of warrandice, is entitled to payment thereof from the defenders as concluded for in the third head of the petitory conclusion of the summons.

The defenders pleaded, *inter alia*;—(4) The pursuer not having suffered loss and damage through any breach of warrandice on defenders' part, or otherwise through the actings of the defenders, the defenders should be absolved from the petitory conclusions of the summons. (5) The pursuer not having been evicted from the subjects let, or any part thereof, decree of absolvitor should be pronounced. (6) In the circumstances the pursuer has no claim against the defenders for the sum third concluded for.

A proof was allowed and led.

The import of the evidence sufficiently appears from the opinions of the Lord Ordinary (Dundas) and Lord Ardwall.

On 8th January 1907 the Lord Ordinary pronounced this interlocutor:—"Finds, declares, and decerns in terms of the declaratory conclusion of the summons to the extent and effect that the pursuer has been evicted from the full and peaceable possession of a portion of the subjects let by the defenders to the pursuer, by lease," &c., "and that the pursuer is entitled accordingly to an abatement of the sum of £5 per annum from the rent stipulated for in the said lease, during all the years of the currency thereof; and with regard to the petitory conclusions of the summons . . . (Third) With regard to head (3) of said conclusions, finds that the defenders are liable to pay to the pursuer the amount of the taxed account No. 35 of process, viz., £213, 10s. 7d., and also the amount of the accounts Nos. 68 and 69 of process respectively, as the same may be taxed by the Auditor of the Court of Session, to whom remits the said accounts to tax and to report accordingly: Continues the cause pending such

taxation and report: Reserves all questions of expenses; and grants Nov. 20, 1907. leave to reclaim." *

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* "OPINION.—(After considering questions not in dispute in the Inner-House)—The remaining question to be decided involves a considerable amount of money, and is not unattended with difficulty. The pursuer seeks to recover from the defenders, as specific damages, the expenses which he incurred in the action Dougall v. Lowe and Others, already referred to. In order to arrive at a decision, one must, in the first place, examine the defenders' attitude and conduct towards the pursuer prior to the raising of that action, as shewn by their minutes and correspondence. It is clear enough that for years before the Town-Council had been divided in opinion as to whether or not the public had a legal right to fish in this loch and burn. The minutes, however, of 13th and 22d September 1897, and of 3d February 1898, shew that at that time they had gone far towards conceding the existence of such a right. The pursuer's complaints about 'trespassers' began, as I have said, about March 1904. The defenders took up the position that, upon proper and sufficient evidence being submitted to them by him, they would prosecute offenders. Investigation was made in several cases, but no prosecution followed, for the reason, as appears from the minutes of 6th October and 10th November 1904, that it seemed doubtful 'whether the person alleged to have trespassed did more than fish along the banks of Loch Fitty Burn,' and that this was 'a privilege claimed as having been exercised for many years,' and apparently conceded by the Town-Council as owners of the land. (See minutes of Council of 13th September 1897, and of the Property Committee of 3d February 1898.) This reason does not appear to have been made known to the pursuer. On 18th March 1905 the Town-clerk, in answer to a complaint by the pursuer's agent, replied that the Town-Council had not 'granted the ratepayers and others in the district any permission to fish in the Loch Fitty Burn.' On 20th April the pursuer's agent wrote that 'it seems to have got abroad that the public have a right to fish in the Loch Fitty Burn, and to trespass upon his' (the pursuer's) 'farm in doing so, and he suggests that you, as Town-clerk, should insert a notice in the local papers that all trespassers will be prosecuted, as they have no right to go upon his farm as stated. Mr Dougall is willing to pay the cost of the advertisements.' At a meeting of the Property Committee on 1st May, 'the Town-clerk was instructed to reply that the Committee are not disposed to take any action in the matter, and that Mr Dougall must himself take such action as he may consider necessary to protect himself against damage by trespassers.' The Town-clerk, in his letter of 2d May, somewhat amplified the terms of the above instruction. He wrote that 'the Committee are not disposed to question the right of the public to fish in the Loch Fitty Burn, but such right does not imply any right to trespass on the farm lands, fishers being restricted to walk along the banks of the burn. The Committee do not propose to take any action in the matter, and Mr Dougall must just take such steps as he may consider necessary to protect himself against damage by trespassers.' It might perhaps have been better if the pursuer's agent had pressed the Town-clerk more closely as to this rather ambiguous reply; but it seems, to say the least, highly improbable, looking to subsequent events, that the Town-clerk, if so pressed, would have admitted that the public had a legal right of fishing. Be this as it may, the pursuer was, I think, justified under the circumstances in reading the Town-clerk's letter as an intimation that the defenders were not to take any action either to establish or to negative the existence of a right in the public which they were 'not disposed to question,' or as to the matter of trespass, and that he must expiscate the whole affair for himself. He accordingly raised an action on 8th June 1905 for this purpose. The summons was not, I think, framed in the most artistic manner, but it had at least this effect, that the individual defenders

Nov. 20, 1907. The defenders reclaimed, and at the hearing stated that they reclaimed against the Lord Ordinary's interlocutor only in so far as it found them liable in the expenses of the first action.

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Argued for the defenders;—Even if the case was taken as an ordinary case of breach of contract, the defenders were not liable in the expenses of the former action. The fair result of the correspondence shewed that the defenders admitted the right of the community of Dunfermline to fish in the burn and loch. If after such admission the pursuer chose to litigate the question, he could not saddle the present defenders with the expense of the litigation. But the case was not an ordinary case of breach of contract; it was an action laid on breach of warrandice, and the rule laid down in *Hadley v. Baxendale*,¹ and applied in subsequent cases,² did not apply to breach of warrandice. All that could be recovered for breach of warrandice was indemnification for eviction,³ which did not include the expenses

against whom interdict was craved as 'trespassers,' distinctly raised in their answers the case that the 'farm forms part of the Common Good of the burgh of Dunfermline, and that the inhabitants of Dunfermline and the villagers of the town's lands of Townhill and Kingseat have enjoyed the right and privilege of fishing in the said loch and burn, and of using the banks thereof for that purpose from time immemorial without let or hindrance. The said right and privilege has been expressly recognised and conceded by the Provost, Magistrates, and Town-Council of Dunfermline, as their minutes bear, and the said farm was let by them to the pursuer subject to this existing right on the part of the community.' The pursuer's agent forthwith, on 8th July 1905, wrote to the Town-clerk, enclosing a print of the open record, drawing special attention to the defenders' averments above quoted, and desiring to be informed whether or not the latter were substantially true. He further intimated that if the defence in question was sustained, the pursuer would 'look to the town to recompense him for all loss and damage he may suffer or has suffered,' and that, if in the course of that process it should appear that the Town-Council had done anything to derogate from their lease to him, he would hold them liable to pay all the expenses incurred by him in that action and those for which he might be found liable. This was, I think, a very plain intimation to the Town-Council that, if the alleged public dedication,—which they had never admitted, though they 'were not disposed to question' it,—should be established, as it was by my interlocutor of 3d July 1906, the pursuer would (a) claim an abatement of his rent, as he is now doing, and also (b) seek payment from the town of all expenses incurred by him in the action then pending. On 12th June 1905, the Property Committee 'agreed to recommend that the Council do not enter appearance to defend the action'; and on 11th July the Town-clerk replied to the pursuer's agent that 'the Town-Council have not at any time conferred right on the inhabitants of Townhill or others to fish in the loch and burn; . . . but they took no steps to prevent fishing.' This non-committal reply did not, as it appears to me, fairly meet the pursuer's request to be informed whether or not the defenders' averments were, to the Town-Council's knowledge, well founded. The pursuer was still left without any knowledge as to how long the public had been in use to fish, or any means of knowing whether they

¹ 1854, 9 Exch. (W. H. & G.) 341.

² *Straiton Estate Co., Limited, v. Stephens*, Dec. 16, 1880, 8 R. 299; *Hammond & Co. v. Bussey*, 1887, L. R., 20 Q. B. D. 79; *Agius v. Great Western Colliery Co.*, L. R., [1899] 1 Q. B. 413.

³ *Welsh v. Russell*, May 19, 1894, 21 R. 769.

caused by resisting eviction.¹ (2) The present action was truly an action for relief. In such an action, to be successful, the sum claimed in relief must be commensurate with the original liability,² which here it was not, for in the former action two questions were raised—(a) the question as to the right of the community to fish, and (b) the question as to trespass, and with the latter the present defenders had nothing to do. They could not have taken the pursuer's place in an action laid on trespass. At all events, only the expenses connected with the question as to the right to fish should be allowed.

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Argued for the pursuer;—(1) As the defenders did not question the declaratory finding of the Lord Ordinary's interlocutor, the case must be taken on the footing that there had been eviction. A non-committal attitude having been taken up by the defenders, the pursuer was entitled to protect himself; and the pursuer having been evicted was entitled to all damages naturally resulting from the

had or had not a legal right to do so. On 2d November 1905 the pursuer's agent again wrote to the Town-clerk, intimating that a proof had been allowed by the Lord Ordinary as to the alleged right of fishing, and that the pursuer did not intend to reclaim against the interlocutor, but that he would do so, if the Town-Council so desired, at their expense; and repeating in clear language the position taken up in his earlier letter of 8th July. The answer of the Town-Council was to the effect that they did not intend to do anything in the matter. The proof in the action was led, and judgment pronounced by me on 3d February 1906, adversely to the pursuer. On 7th February, the pursuer's agent sent to the Town-clerk a copy of the interlocutor and relative opinion; intimated once more his claim in respect of eviction; and added that 'the pursuer does not at his own hand propose to reclaim the judgment, and if the town desire to appear in the process now, or if they wish my client to proceed further at the town's expense, I shall be glad to hear from you within the next few days.' On 13th February the Town-clerk replied that 'the Council decided to take no action in the matter.' The interlocutor of 3d February was accordingly allowed to become final. The present action was raised on 1st May 1906.

"In this state of matters, I think that the pursuer has a good claim against the defenders for the taxed amount of the expenses incurred by him in the former action. Two of the accounts, which have not been taxed, must, of course, be remitted for taxation. The pursuer's account for the expenses of the defenders in *Dougall v. Lowe and Others* has been taxed. There were, so far as I am aware, no additional or separable expenses incurred by the pursuer's unsuccessful attempt to prove that the individual defenders were in fact trespassing upon his farm, even on the assumption that they were entitled by law to fish in a legitimate and proper manner; and I see no reason for incurring further expense by remitting that account for retaxation. Subject to these observations, the pursuer's claim upon this head of the case appears to me, as I have said, to be well founded. I think that, looking to the defenders' attitude towards him, he was entitled, at their expense, to attempt to vindicate his rights when these were challenged by third parties; and it seems plain that his claim for abatement of rent, which I have held to be well founded in principle, is based upon, and could only be decided after, a determination as to the alleged right by the inhabitants to fish in the loch and burn. The subject-matter of the first action appears to me to lie at the very root of the present case; and both actions arise out

¹ Bell's Prins., sec. 895; *Stephen v. Lord Advocate*, Nov. 30, 1878, 6 R. 282.

² *Caledonian Railway Co. v. Colt*, Aug. 3, 1860, 3 Macq. 833; *Ovington v. M'Vicar*, May 12, 1864, 2 Macph. 1066.

Nov. 20, 1907. breach, including the expenses incurred in resisting eviction, in so far as reasonably incurred.¹ The statement in Bell's Principles,² on which the defenders founded, was inconsistent with other authorities,³ and was not supported by the case of *Inglis*⁴ on which Mr Bell based the statement, for in *Inglis*⁴ there had not been any eviction. (2) The former action was truly upon trespass, for the issue there was as to whether the defenders of that action were entitled to fish and to have access for that purpose, or were trespassers. It was impossible to separate the question of the right to fish from the question as to trespass.

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LORD ARDWALL.—By lease dated 29th November and 8th December 1904 the defenders let to the pursuer the farm of Highholm, near Dunfermline, for nineteen years from and after Martinmas 1903 at the rent of £150. The farm forms part of the Common Good of the burgh, and is bounded on the north partly by the Loch Fitty Burn and partly by Loch Fitty, into which the burn flows. The lease contains a clause reserving to the "proprietors," which word is therein defined as meaning "the Provost, Magistrates, and Town-Councillors, for themselves and as representing the whole body and community of the said burgh," the whole game and fishings on the lands let "with the privilege of fowling, hunting, sporting, and fishing on the lands hereby let by themselves or others having written authority from them." It is matter of admission that the fishings in the said burn and loch are the only fishings to which the above reservation can refer. The lease contains the usual clause of absolute warrandice.

Shortly after the pursuer entered the farm he found that members of the community of Dunfermline, and the public generally, were in the habit of entering upon the subjects let for the purpose of fishing in the said burn

of the fact that the pursuer has not obtained full possession of the subjects let to him by the defenders. The defenders relied upon the case of *Ovington*, 1864, 2 Macph. 1066, and the earlier decision in *Colt*, 1859, 21 D. 1108, rev. 1860, 3 Macq. 833. I do not think that these cases apply here at all. In *Ovington*, for example, the pursuers had settled a claim of damages against them by the representatives of a deceased employee, and then sued the defenders for relief upon the ground that the chain supplied by the latter—through the breaking of which the deceased had been killed—was defectively made. The Court held the action to be irrelevant. A sufficient ground for that judgment was afforded by the fact that the payment made by the pursuers in the first instance was one which they were not under any legal obligation to make; but it was also pointed out by the Court that 'the original claim, and the claim of relief must be, to a certain extent at least, commensurate and must be founded upon the same kind of liability.' I do not think that there is anything in the law so laid down to prevent the present pursuer from recovering as specific damages the expenses to which he was put in the former action. He was, in my opinion, entitled to fight that action to an issue, because the present defenders would neither do it for him nor distinctly admit or deny the existence of the public right in question. I therefore think that the former case was a logical and necessary prelude to his claim in this action."

¹ *Hammond v. Bussey*, L. R., 20 Q. B. D. 79; *Agius v. Great Western Colliery Co.*, L. R., [1899] 1 Q. B. 413.

² Bell's Prin., sec. 895.

³ *Straiton Estate Co. v. Stephens*, 8 R. 299; *Ersk. Inst.* ii. 3, 30, 32; Bell's *Lect. on Conv.*, 3d ed., vol. i. pp. 217, 219.

⁴ *Inglis v. Anstruther*, 1771, M. 16,633.

and loch. He challenged them, but was met with the contention that they were entitled as members of the community of Dunfermline to fish there, and to enter on his lands for that purpose. The pursuer complained about trespassers to the defenders about March 1904, and there have been produced in process a number of minutes and correspondence, the effect of which is very clearly set forth by the Lord Ordinary in the opinion delivered by him on 8th January 1907. I entirely agree with the conclusion at which the Lord Ordinary has arrived that the pursuer was justified in reading the Town-clerk's letter of 2d May 1905 as an intimation that the defenders were not to take any action either to establish or to negative the existence of a right in the public which "they were not disposed to question" or as to the matter of trespass, and that he must take such steps as were necessary to defend himself. The pursuer accordingly raised an action on 8th June 1905 craving interdict against certain individual defenders molesting or interfering with him in the peaceable possession and enjoyment of his lands, and from entering and trespassing on the same or injuring and destroying his crops. To this action the present defenders were also called for their interest. A proof was led in that action, and upon considering the same the Lord Ordinary, by interlocutor, dated 3d February 1906, found, *inter alia*, (3) that the compearing defenders, as "members of the said community and ratepayers in the said burgh, are entitled to enter upon and use the banks of the said burn and loch respectively so far as aforesaid" (that is, so far as lying within the farm of Highholm) "for the said purpose of angling; and (4) that the pursuer has failed to prove that the said defenders, or any of them, have trespassed upon the said farm and lands, or have broken down, injured, or in any way interfered with the gates and fences upon and surrounding the same, or have injured or destroyed the pursuer's crops upon the same." He accordingly assoilzied the defenders, and found them entitled to expenses.

Besides having called the present defenders for their interest in that action, the pursuer's agent, on 8th July 1905, wrote to the Town-clerk enclosing a print of the open record, drawing special attention to the defenders' averments to the effect that they had enjoyed an immemorial right and privilege of fishing in the loch and burn on the town lands, and of using the banks thereof for that purpose, and desiring to be informed whether or not these statements were substantially true. He further intimated that if the defences were sustained the pursuer would look to the town to recompense him for all loss and damage he might suffer or had suffered, and that if in the course of the process it should appear that the Town-Council had done anything to derogate from their lease to him he would hold them liable to pay all the expenses incurred by him in that action and those for which he might be found liable. This was a very plain intimation that if the pursuer failed in that action he would make the claims which he does in the present against the Town-Council. On 12th June 1905 the Property Committee of the Town-Council had agreed to recommend that the Town-Council should not enter appearance to defend the action, and on 11th July the Town-clerk replied to the pursuer's agent that "the Town-Council have not at any time conferred right on the inhabitants of Townhill or others to fish in the loch and burn, but

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Nov. 20, 1907. they took no steps to prevent fishing." This was a very evasive answer, and left the pursuer without any knowledge as to how long the public had been in use to fish, or whether they had or had not a legal right to do so. Again, on 2d November 1905 the pursuer's agent wrote to the Town-clerk intimating that a proof had been allowed in the action as to the alleged right of fishing, that the pursuer did not intend to reclaim against the interlocutor allowing the proof, but would do so if the Town-Council so desired at their expense. The Town-clerk answered practically that they did not intend to do anything in the matter, and subsequently they declined to reclaim against the interlocutor of the Lord Ordinary of 3d February 1906 already referred to, which has become final, and which the defenders, for the purposes of this action, admitted must be held to be well founded in fact and in law.

After intimating his claims to the Town-Council, who refused to recognise them, the pursuer raised the present action. (His Lordship then adverted to the conclusions of the summons and to the interlocutor of the Lord Ordinary.)

It is against the Lord Ordinary's findings with regard to the third of the petitory conclusions, namely, that for the defenders' and pursuer's expenses in the former action, that the defenders reclaim.

I entirely agree with the view that the Lord Ordinary has taken of this matter. The lands were let to the pursuer with no other reservation as regards fishing except of the right of the defenders and those having written authority from them. When he discovered that great numbers of the community of Dunfermline, without any such written authority, trespassed over his lands in pursuance of this alleged right of fishing, he naturally considered this a derogation from his rights under the lease and a partial eviction from the peaceable enjoyment of the subjects let. But on his complaining to the defenders they would neither admit nor deny the right of members of the community to fish in the said burn and loch; and as I have above explained under reference to the Lord Ordinary's opinion and to the minutes and correspondence, they practically told him that he must defend himself. He did so, and in my opinion he was entitled to do so, with the view of vindicating his rights which were challenged by third parties. It was necessary for him to do so if he were to make a claim for abatement of rent, because, as I shall afterwards point out, he could not make such a claim successfully unless it had been judicially determined that he had suffered eviction. If the defenders had frankly admitted—and it was a fact which was within their knowledge, or ought to have been—that the community had exercised from time immemorial a right of fishing in the said burn and loch, the pursuer could then have brought his action directly against them; but I do not think he was safe to do so, looking to the attitude they adopted without first endeavouring to protect himself against eviction. If he had been successful in that attempt he would have had no claim against the Town-Council, because there would, in that event, have been no eviction; but having failed in the action without any fault on his part in the conduct of the process or otherwise, he is in the position of a person who has suffered eviction and who is therefore entitled to recompense.

The Court had the benefit of an able argument on both sides with regard Nov. 20, 1907.
to the law applicable to this claim for expenses in the former action, and I
propose shortly to examine the authorities on the point.

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There is no doubt of the general principle, that where there has been a
breach of contract the party who suffers from such breach of contract is Lord Ardwall.
entitled to damages against the party responsible for it; and such damages
include not only the actual damage immediately and directly caused by the
breach of contract, but also all damage arising out of it which might have
been expected by the parties to the contract naturally to arise out of a
breach, and such damage has been held to include, *inter alia*, legal expenses
reasonably incurred in consequence of the breach of contract. See the cases
of *Straiton Estate Company, Limited, v. Stephens*,¹ *Hammond & Company*
v. Bussey,² and *Agius v. Great Western Colliery Company*.³

But it was maintained that where an action is founded on warrandice, the
expenses incurred in unsuccessfully defending a claim involving total or
partial eviction from the subject warranted are not recoverable from the
granter of the warrandice. For this proposition the defenders relied almost
entirely upon certain *dicta* contained in section 895 of Bell's Principles.
That passage begins with stating that "warrandice is not an obligation to
protect, but only to indemnify in case of eviction." Taken by itself this
would seem to imply that the indemnification must include expenses reason-
ably incurred in defending the claim; but then the author goes on to say,
"Thus there is no action of warrandice till judicial eviction, unless the
ground of demand be unquestionable and proceeding from the fault of
the seller." This passage, again, would seem, in doubtful cases such
as the present, to justify judicial resistance to the claim, as until that
was settled the obligation of warrandice would not arise. But further on
the author continues thus—"The person bound in warrandice is entitled to
have notice of the claim or attempt to evict, but the buyer is not bound to
enter into a litigation in defence of the right, provided he give due notice.
If he undertake the defence without notice, and omit the proper plea, the
seller will be free. The seller is not bound to defend against the claim, and
if the buyer choose to do so while the seller declines it, and fails, he is not
entitled to the expense of litigation."

It is the last clause that is founded on by the defenders. But the authority
cited by Professor Bell for the clause is the case of *Inglis v. Anstruther*.⁴ Now,
in that case the action concluded for reimbursement of expenses incurred in
defending a commission to a certain office. The challenge was unsuccessful,
so there was no eviction, and it was held that eviction is the sole founda-
tion for an action upon warrandice, and that the pursuer had no claim for
reimbursement of expenses, as there had been no eviction. It is manifest
that this decision does not support the doctrine laid down in the text.
But the doctrine laid down in the decision is, I think, quite undoubted,
and is supported by other decisions, the reason of it being that if an
unfounded claim is made against the subject warranted, that is not a matter
for which the granter of the warrandice is in any way to blame; it is only

¹ 8 R. 299.

² L. R. [1900], 1 Q. B. 413.

³ L. R., 20 Q. B. D. 79.

⁴ M. 16,633.

Nov. 20, 1907. the misfortune of the person who is in possession of the subject that a third party has preferred an unfounded claim against such possession, and
 Dougall v. Magistrates of Dunfermline. he has no recourse for expenses except against the person who attacked him, in the usual way. This doctrine was also laid down in the case of
 Lord Ardwall. *Stephen v. The Lord Advocate*,¹ where the Crown having, by a separate action of declarator, succeeded in having its right to the use of certain piers and accesses sustained, was held not responsible for the expenses of an unsuccessful defence which its tenant had maintained in the Small-Debt Court in answer to a claim for the use of these piers and accesses, the ratio of this decision also being that the Crown having given the tenant possession of a subject from no part of which he had been legally evicted, they were not liable for the loss caused to him by a groundless but successful action having been brought against him and wrongly decided in the Small-Debt Court. Neither of these decisions militates against the pursuer's claim for expenses in the present action; indeed they seem in a negative sense to support it, because the ground of refusing expenses in both cases was that there was no eviction, and therefore no loss for which the granter of the warrandice could be held in any way to blame. In the case of *Welsh v. Russell*² it was held that there was a case of partial eviction, similar in some respects to what occurred in the present case, the eviction there consisting in the imposition of a right of way upon a heritable subject purchased by the pursuer, but otherwise the case does not seem to have much bearing on the present, the pursuer's case being there thrown out because he claimed compensation for total eviction and not damages for partial eviction.

In Erskine's Institutes, ii. 3, 32, in dealing with the question of warrandice, the following passage occurs:—"Yet intimation of distress is not precisely necessary, for the purchaser's right of recourse continues competent to him without such intimation, if evidence is not brought that in the action of eviction he had submitted to some irrelevant defence or subjected himself to an incompetent means of proof—*Clerk*³"; and the same author in his Principles, ii. 3, 13, states the law as follows:—"Regularly the grantee, when the eviction is threatened, ought to intimate his distress to the granter that he may defend the right granted by himself; but though such intimation should not be made, the grantee does not lose his right of recourse, unless it shall appear that in the process of eviction he has omitted a relevant defence or subjected himself to an incompetent means of proof."

The last passage quoted from Bell's Principles, it seems to me, is itself obscure, is not supported by the decision on which it professes to be founded, and is at variance with the doctrine that warrandice is a contract of indemnity and with the general doctrine applicable to breaches of all contracts.

It falls, however, to be noticed that the passage quoted from Professor Bell comes under the general head of "sale of land." His doctrine of warrandice as regards leases is to be found in sections 1208 and 1253 of the Principles, where he deals with the implied warrandice contained in the

¹ 6 R. 282.

² 21 R. 769.

³ 1681, M. 16,605.

contract of lease, the warrandice being that the subject exists, shall be made Nov. 20, 1907. effectual to the tenant and fit for its purpose; and, so far as I know, an action of damages for breach of such warrandice in leases covers all loss caused by the breach, unless it be indirect and consequential.

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A passage from Professor Montgomerie Bell's Lectures on Conveyancing, Lord Ardwall. 3d edition, pp. 217 and 219, and in the 1st edition at p. 207, was quoted by the counsel for the pursuer to shew that in the view of that able and experienced practitioner the party evicted was entitled to the expenses of an unsuccessful defence. He says,—“It will be observed that the party against whom eviction is threatened has in some views a better claim if he is unsuccessful than if he prevails, because though unsuccessful in defending the subject, he will get his expenses, besides the value of the subject evicted, from the granter of the obligation of absolute warrandice, whereas if successful, he indeed preserves to himself the subject but does not get his expenses”; he then proceeds to give some very good advice as to what the granter of the warrandice should do in such a case.

It appears to me that the true result of the authorities is that if an action of eviction be properly defended, and if, notwithstanding such defence, eviction follows, the granter of the warrandice will be liable, not only for the direct loss caused by the breach of warrandice, but for all expenses properly and reasonably incurred in defending the rights which he and the grantee alike had an interest to defend.

It was strongly contended by counsel for the defenders that at all events full expenses in the other action should not be allowed, because, it was said, there were two branches of that action, one concerning the right of the public to fish, and their presence on the pursuer's farm in pursuance of that right, and the other concerning ordinary trespass unnecessarily committed by persons founding on their fishing rights, but which trespass was not necessary for the exercise of these rights; and it was maintained that, according to the Lord Ordinary's judgment, the pursuer had not made out a case of damage by trespass, and therefore that all the expenses applicable to that part of the case should be disallowed, and that this should be done by way of modification of the total expenses.

The Lord Ordinary disregarded this argument, and I think he has done rightly. In the first place, the witnesses who spoke to the latter branch of the case were necessary to the former part, and indeed it is no easy matter, as a question of fact, to say when what may be called legitimate trespass ended and illegitimate trespass began; and, in the second place, it is certain that both kinds of trespass arose from the alleged right of fishing which the Lord Ordinary has found to exist.

For these reasons I do not think that any useful distinction can be drawn between the one part of the expenses and the other, and having regard to what was the origin of the whole proceedings, I do not think the pursuer should be deprived of any part of his expenses.

I accordingly propose that the Court should adhere to the Lord Ordinary's interlocutor of 8th January 1907 reclaimed against, and find the defenders liable to the pursuer in expenses since the date of the said interlocutor, and remit the account thereof to the Auditor to tax and to report to the Lord Ordinary, with power to the Lord Ordinary to decern for the

Nov. 20, 1907. taxed amount thereof, and remit the cause to the Lord Ordinary to proceed therewith.

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The LORD JUSTICE-CLERK and LORD LOW concurred.

LORD STORMONTH-DARLING was absent.

THE COURT adhered.

JOHN STEWART, S.S.C.—MORTON, SMART, MACDONALD, & PROSSER, W.S.—Agents.

No. 27. MRS MARION MAY DUNCAN OR M'DONALD OR M'LENNAN, Petitioner
(Reclaimer).—*D.-F. Campbell—Macmillan.*

Nov. 21, 1907.

HERBERT ALEXANDER M'LENNAN, Respondent.—*Sol.-Gen. Ure—
M. P. Fraser.*

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M'Lennan.

Husband and Wife—Jus Administrationis—Wife living apart from her husband "with his consent"—Married Women's Property (Scotland) Act, 1881 (44 and 45 Vict. cap. 21), sec. 5.—The Married Women's Property (Scotland) Act, 1881, sec. 5, enacts:—"Where a wife is deserted by her husband, or is living apart from him with his consent, a Judge of the Court of Session or Sheriff Court, on petition addressed to the Court, may dispense with the husband's consent to any deed relating to her estate."

Circumstances in which—in a petition by a wife praying the Court to dispense with her husband's consent to the granting of certain deeds by her—the Court held that the wife was in fact living apart from her husband with his consent, although he had repeatedly protested against her continuing to live apart, and granted the petition.

1st Division.
Ld. Salvesen.

ON 28th May 1907 Mrs Marion May Duncan or M'Donald or M'Lennan, residing at Maybank, Sauchiehall Street, Glasgow, wife of Herbert Alexander M'Lennan, residing at 1 Buckingham Street, Hillhead, Glasgow, presented a petition praying the Court to dispense with the consent of her said husband to such deeds of transfer as might be necessary to convey to a purchaser a certain business carried on by her. The petitioner averred, *inter alia*, that she had been twice married, and that she had carried on for over twenty years a bill-posting business which she had inherited from her first husband, Daniel M'Donald: that owing to her present state of health she was desirous of disposing of it, and had received various advantageous offers for the sale thereof, but that her present husband refused to consent to the sale. She also averred that she was living apart from her said husband, and the application was made in virtue of section 5 of the Married Women's Property (Scotland) Act, 1881.*

Answers were lodged for her husband, the said Herbert Alexander M'Lennan, in which he averred:—

"The respondent in 1888, when nineteen years of age, went to the Argentine, South America, to engage in cattle ranching. He returned in 1893 to Glasgow on a visit of three weeks. At that time he first met the petitioner, having been introduced to her by a mutual friend. The petitioner invited him to call upon her and he did so, and got every possible encouragement from her to spend time in her society. The result was that the parties became attached to one another, and before the respondent's three weeks' visit expired the parties became

* Quoted in rubric.

engaged to one another. At this date the respondent was twenty-four years of age, and the petitioner a widow, and about forty years of age, of attractive personality, and a smart business woman. The petitioner was well aware at the time that the respondent had no independent income or business to enable him to set up house, and she herself had the business described in the petition, and other means. She was also aware that the respondent had been in the Argentine for several years earning his own living. The respondent was not aware of the petitioner's pecuniary position, and did not inquire, as his affection for her was too sincere. He knew that she carried on a bill-posting business, but understood this to be of trifling dimensions. The respondent thereafter returned to South America, but before going the petitioner made arrangements with him that on his return to Glasgow he would marry her. Nov. 21, 1907.
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"At the date of said engagement the petitioner explained to the respondent that, although she went by the name of Mrs M'Donald, she had also the name of Mrs G., the latter being the name of a Frenchman, Mr G., who was a musical composer, whom she had married after her former husband's death, but who had been unfaithful to her and ill-treated her, and whom she had divorced. She also said that her marriage to the respondent could not take place for some time, till the divorce became effectual. She clearly led the respondent to believe that Mr G., who had managed her business for some years, had been her lawful husband, and the respondent, fully trusting her, felt sympathy with her for having been badly used. She also impressed upon respondent that she was very much afraid of Mr G., who was still alive, and this made it necessary that she should continue to be known as Mrs M'Donald, and that their engagement should be kept secret. It now appears that the petitioner was never married to Mr G., although she lived with him as husband and wife for several years, and she never required to and never did divorce him. In point of fact G. constantly blackmailed her, and she paid him hush-money to leave the country.

"The respondent returned to South America in December 1893, and remained there till he returned to Glasgow about April 1895. During his absence the parties corresponded on affectionate terms. On the respondent's return to Glasgow in 1895 it was arranged that the parties should get married. As already stated, the marriage was wholly arranged by the petitioner, and carried out in London with the utmost secrecy. The reason the petitioner gave for such secrecy was her previous marriage to G., and her fear of him, and also that her marrying a third time would hurt her bill-posting business, which had, she explained, been previously carried on by her first husband. She was at this date called by some of her friends Mrs M'Donald, and by other Mrs G. The respondent being very much in love with the petitioner, and believing that she had been badly used by G., allowed himself to be persuaded to keep their marriage secret, especially as he was returning to South America. After a brief honeymoon in London the parties returned to Glasgow, and, in accordance with petitioner's request, resumed, so far as the public were concerned, their former lives, though the respondent saw as much of the petitioner as possible, including visits to her at her coast house. No one, not even the parties' relatives, knew they were married.

"At the time of said marriage it was arranged that the respondent should return to South America at the close of the summer of 1895,

Nov. 21, 1907. **M'Lennan v. M'Lennan.** and that the petitioner should, as soon as possible, dispose of her business and go out and join him as his acknowledged wife. The respondent acted as agreed on, and the parties corresponded on affectionate terms. The respondent pressed the petitioner to join him as promised, but she put him off saying she could not dispose of her business. She never asked the respondent to set up house in this country, but always gave respondent to understand she would join him in South America.

"The respondent became dissatisfied with this state of affairs, and about the end of 1895 returned to this country and urged the petitioner to take up house either in South America or in this country, but she was decidedly opposed to the latter proposal, and said she could not possibly settle here on account of G. It was then that, for the first time, the petitioner disclosed to the respondent that she had never been legally married to G., although they had lived as husband and wife, and she had been known as Mrs G. This disclosure caused the respondent great pain, and he threatened to leave the country on account of the petitioner's deceit. The petitioner implored the respondent to say nothing about the matter, and she used all her arts of persuasion and affection to get him to condone her deception. The respondent having a real love and affection for the petitioner, and she having acquired a great influence over him, ultimately agreed to let the matter pass.

"The petitioner still desired the marriage to be kept secret, urging as her reason her fear that G. would blackmail her. As the situation was so uncomfortable, it was arranged that the respondent should again return to South America, and the petitioner promised to join him there later on without fail. She did not do so, and the respondent being heartily sick of the position of matters, returned to this country in the early summer of 1896 to fix up matters one way or another. On his arrival he found his father, who was a wholesale wine and spirit merchant in Glasgow, in ill-health, and he had to enter his business, and on his death in November 1896, to take up that business and carry it on. The respondent always informed the petitioner of his affairs, and then again offered to take up house with her and let the marriage be known. The respondent repeatedly urged her to adopt this course, and end what he regarded as an intolerable position, but she always declined, and laid the greatest possible stress upon the consequences of the exposure of her past life with G. The petitioner is by religion a Roman Catholic, and she also gave the respondent to understand that if her past life was known, she would incur the displeasure of that Church.

"In the autumn of 1902 the petitioner informed the respondent she was going to South Africa for a trip, and consulted him about a will she proposed to make. The respondent informed her that she could do what she liked with her own money, and suggested the names of certain of her relatives whom she should not forget. The petitioner then informed the respondent that she did not intend to employ her Glasgow law-agent, as it would never do for him to know she was married, and that she was going to Edinburgh to get a strange lawyer. She subsequently informed the respondent that she had consulted Messrs Cowan & Dalmahey, W.S., Edinburgh, had sworn one of the partners to secrecy, and got him personally to write out her will, so that there would be no chance of the secret leaking out. She also informed the respondent that said lawyer had told her that her husband

should sign the will merely as a matter of form, and asked him to do so. The respondent informed her that he did not want to read the will, or interfere in any way, but as she pressed him to sign, he resolved to consult a lawyer, having never previously asked legal advice as to his position. He accordingly consulted Mr Hugh Duncan, of Messrs Russell & Duncan, writers, Glasgow, in October 1902, and, out of loyalty towards his wife, put only an A B case before him, and was advised that, in the circumstances, the husband should not sign. He accordingly refused to do so, and this annoyed the petitioner." Nov. 21, 1907.
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With regard to the proposed sale of the business he averred:—"Not known as to the reasons for disposal and offers here referred to. The respondent has not been consulted or informed as to any of the proposed transactions. He has never been asked to accede or consent to any particular proposal. All he has been asked to do was to sign, as a matter of form, a general letter prepared by the petitioner's law-agent authorising the petitioner to do what she liked with her business. Acting on the advice of his said law-agent he declined to do so. The respondent has been informed, and believes and avers, that the petitioner has been so investing or disposing of her means and estate as to defeat his legal rights in the event of her predeceasing him."

With regard to section 5 of the Married Women's Property Act,* he averred:—"The section is referred to for its terms. Denied that said section applies to the circumstances of the parties to this petition. Denied that the petitioner has been deserted by the respondent. The petitioner and the respondent have all along been constantly in one another's society. Denied that she is living apart from him with his consent. Explained that, on the contrary, the respondent has all along objected to the petitioner's refusal to reside with him as husband and wife, and has persistently offered to make a home for her, and urged her to live openly with him as married persons."

On 6th November 1907 the Lord Ordinary (Salvesen) allowed a proof.†

* Quoted in rubric.

† "OPINION.—The petitioner in this case is the wife of the respondent, from whom she is living apart. She proposes to sell a bill-posting business which she has been carrying on for a number of years, and she has asked her husband's consent, so as to enable her to grant a valid conveyance to the purchaser. This consent he refuses to give; and the prayer of the petition is that the Court should dispense with his consent, and so enable her to deal with her property in the same way as if she were unmarried.

"The application is made in virtue of section 5 of the Married Women's Property (Scotland) Act, 1881, the terms of which are quoted on page 5 of the petition. It is a condition of the petitioner succeeding under this section that she should instruct either that she has been deserted by her husband, or is living apart from him with his consent; and her counsel urged me without inquiry to come to the conclusion that it sufficiently appeared from the pleadings that the petitioner was living apart from the respondent with his consent; and if so, that this was obviously a proper case for the Court exercising its power of superseding the respondent's curatorial rights. On the latter point I should not have much difficulty, because I do not think it is a good reason why the husband should refuse his consent to the sale of the separate business carried on by his wife, that she may thereby be enabled more readily to defeat any legal rights of succession that he

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M'Lennan.

The petitioner reclaimed, and argued;—No proof was necessary, for a proof could establish nothing more than was averred, and, on the facts as averred by the respondent here, the petitioner was entitled to decree. The respondent's averments shewed that the petitioner was living apart from him with his consent. There was no averment that she was in desertion, or that he had provided a home for her, or that he had raised an action of adherence; and in the absence of such averments his consent must be presumed.¹ His averments also shewed that this was not a case for the Court to exercise its discretion by refusing the petition. They shewed that the petitioner was experienced and successful in the conduct of her business, and the only objection set forth to the granting of the deeds was that they might alienate property from the husband. That was not a valid consideration in the exercise of curatorial powers, the sole object of

might have in her estate if she predeceased. *Prima facie* the curatorial power of the husband ought to be exercised with a view to the wife's benefit and the protection of her estate, and not in order to protect his rights of possible succession, or—as the petitioner suggests—with a view to coercing her to make payment to him of a substantial sum of money as the price of his consent. It is admitted here that the petitioner is a clever business woman; and as she has managed this bill-posting business without her husband's interference with much success, it would seem that she may well be trusted to dispose of it on advantageous terms.

“The other question, however, is primarily one of fact, and I have to consider whether there are sufficient admissions by the respondent to justify me in holding that the petitioner is living apart from him with his consent. The Dean of Faculty, for the petitioner, maintained that it was sufficient for his purpose that there were no relevant averments in the answers that the petitioner had deserted her husband; and if so, it followed that she must be living apart from him with his consent in the sense that he acquiesced, whether reluctantly or not, in her so doing. I confess that I would gladly have reached that conclusion, because the broad facts of the case appear to be best explained on this footing. The parties were married in 1895, and since the end of 1896 they have been both resident in Glasgow; and both have had ample means to enable them to take up house together. They have been apparently seeing each other from time to time, and communicating on friendly terms, and yet all the time the petitioner has been living under the name of her first husband in her own house, while the respondent has been residing with his mother. On carefully considering the respondent's answers, however, I am unable to take that *prima facie* view of the case. He says that in November 1896 he ‘again offered to take up house with her, and let the marriage be known. The respondent repeatedly urged her to adopt this course, and end what he regarded as an intolerable position, but she always declined.’ Again, the respondent denies that the petitioner has been deserted by him; and his answers proceed as follows:—‘The petitioner and respondent have all along been constantly in one another's society. Denied that she is living apart from him with his consent. Explained that, on the contrary, the respondent has all along objected to the petitioner's refusal to reside with him as husband and wife (*sic*), and has persistently offered to make a home for her, and urged her to live openly with him as married persons.’ I was at first disposed to think that the absence of any allegation that the respondent had taken a house for his wife to which he had invited her to come might indicate that his alleged offer was not such as she was bound to accept; but, on the other hand, it may well be that the respondent was not

¹ Niven, May 19, 1883, 20 S. L. R. 587.

which was to preserve the property for the wife.¹ The petition, Nov. 21, 1907: therefore, should be granted without a proof.

Argued for the respondent;—A proof should be allowed here, as ^{M'Lennan v.} ~~M'Lennan.~~ had been done in the cases of *Niven*² and *Gibson*.³ The respondent had made relevant averments that the petitioner had continued to live apart from him without his consent. It was not necessary that he should take such an extreme step as raising an action of adherence, nor was it necessary that he should provide a home for her, when it was clear from her attitude that she would refuse to come to it. He had done all that was necessary when he had taken every other means to induce her to live with him. It was clear on the averments that the wife was the recalcitrant party. It would be a dangerous precedent to hold that the mere fact that the spouses were living apart gave rise to a presumption that they were doing so by mutual consent.

LORD PRESIDENT.—This is an application to the Court by a married lady, who has for some years conducted a business, to dispense with the consent of her husband to a deed relating to that business, namely, a deed in which she proposes to sell it. Her husband has refused to give that consent, and she makes this application under the 5th section of the Married Women's Property Act, 1881. The answer that is made by the husband, who appears, is that she is not within the words of that section, the words of the section being—that “where a wife is deserted by her husband, or is living apart from him with his consent,” then such dispensation may be granted by the Court. The husband says that she is not a wife who is either deserted by her husband, or is living apart from him with his consent. The Lord Ordinary has thought it necessary to allow a proof upon that matter, but in the argument before your Lordships counsel for the petitioner have asked your Lordships' judgment upon the facts as disclosed by the respondent, the husband. That is to say, they are content to put their case as if everything which the respondent says in his answers were proved upon a proof. I think they are quite entitled to take that position, and I do not think that the respondent can ask that we should go through the trouble of a proof in order simply to put in the mouth of witnesses what he has put in his statement. He cannot expect to prove more than he has averred, and if what he has averred is taken for the purposes of the argument as true, it surely is not for him to complain. Taking all that is averred as absolutely true, it seems to me that this lady is in the position which is contemplated by section 5, because I think she is a wife who is living apart from her husband with his consent. The state of affairs, as disclosed by the husband's answers, and I look at

bound to interrupt his present mode of life or to go to the useless expense of taking and furnishing a house if he was assured that his wife would not join him there. I have therefore with some reluctance come to the conclusion that I cannot dispose of this application without inquiry; although I fully realise that it might be in the interests of both parties that many of the matters which are dealt with in the petition and answers should not be made public property.”

¹ Bryce's Trustee, March 2, 1878, 5 R. 722.

² Niven, May 19, 1883, 20 S. L. R. 587.

³ Gibson, Nov. 18, 1893, 1 S. L. T. p. 323.

Nov. 21, 1907. nothing else, is that these parties, who were married secretly, have as a matter of fact never lived openly as husband and wife before the world.

M'Lennan v. M'Lennan. There were certain reasons as to why they should be married secretly originally. There may have been, and I assume that there was, a different view between the spouses at a subsequent time as to the cogency of these reasons as preventing a change of their position, and as preventing their taking up life as married people in the face of the world. Whatever the view may be as to who was right as to the cogency of the reasons, the fact is that no change was *de facto* made, and that this separate life went on just as it had commenced. In fact, as disclosed to us, the parties, except for a short honeymoon when they were married, have never lived together as man and wife; and according to the two tests of living as man and wife—that is to say, living at bed and board, as the expression is—they have lived at neither, although, as a matter of fact, they seem to have actually seen each other very frequently. It seems to me when one looks at the section of the statute, and the reason why it is put there, one sees that in a case of this sort the Court is not called upon to go into the matter in the way in which it would have to go into it in a purely consistorial case; that is to say, if parties were asking for divorce for desertion, or for separation, a different class of inquiry would require to be made. What seems to me to be desiderated by the statute is that the wife is *de facto* living apart from the husband, and that *de facto* the separation from the husband is due either to the husband's desertion or to his consent, which I really think comes to no more than a *non renitentia* on the part of the husband to the state of affairs. It has been urged by Mr Fraser, and I take his statement as we are bound to do, that the husband on many occasions objected to this state of affairs, but I think the fallacy of the argument based thereupon rests in this, that a person may often consent to a thing to which he greatly objects and against which he protests. You may consent in fact to something which you do not at all like, and which you would much sooner have otherwise. Upon the circumstances as disclosed by the husband himself I think it is perfectly clear in this case that there was consent in fact by the husband to the wife living apart from him as she did.

In granting this petition your Lordships are really just exercising the curatorial power from the same point of view as the husband, and the only proper point of view of the husband in exercising his curatorial power is not how it will affect himself but how it will affect his wife's interests. It is shewn to us that this lady has had a successful business in the city, and not being in very good health she wishes to turn her business into money. That seems perfectly right from the point of view of the wife, and I cannot doubt that any prudent husband would give his consent. Accordingly, I think we ought to recall the Lord Ordinary's interlocutor and grant the prayer of the petition.

LORD M'LAREN.—I am of the same opinion.

LORD KINNEAR.—I also agree with your Lordship.

LORD PEARSON.—I concur.

STEPHEN H. PAYNE, Pursuer and Nominal Raiser.
JAMES MORTON, Defender, Real Raiser and Claimant (Appellant).—
Spens.
JAMES FRENCH AND ANOTHER, Defenders and Claimants (Respondents).
—A. M. Anderson.

No. 28.
Nov. 21, 1907.
Morton v.
French.

Writ—Authentication—Signature by Mark—"Writing under his hand"
—Friendly Societies Act, 1896 (59 and 60 Vict. cap. 25), sec. 56 (1).—The Friendly Societies Act, 1896, enacts, sec. 56 :—" (1) A member of a registered society . . . may, by writing under his hand . . . nominate a person to whom any sum of money payable by the society or branch on the death of that member, not exceeding £100, shall be paid at his decease."
Held that a nomination authenticated by the member's mark only (she being unable to write) and by the signatures of two instrumentary witnesses, was not a writing under her hand within the meaning of the above enactment, and that being of a testamentary character and unsigned it was of no force or effect in law.

In February 1906 an action of multiplepinding was raised in the Sheriff Court at Glasgow, in the name of Stephen H. Payne, agent in Glasgow for and on behalf of the Liverpool Victoria Legal Friendly Society, whose registered office was in St Andrew Street, Holborn Circus, London, to determine, *inter alia*, the right to a sum of £36, 8s., due under a policy of insurance with the Society on the life of Mrs Mary French, and on her death payable to her representatives or nominee.* She had died on 7th January 1906.

A claim was lodged (1) by James Morton, real raiser. He claimed in virtue of a nomination in the following terms:—

"I, Mary French, of 57 Jamieson Street, Govanhill, Town of Glasgow, not being under the age of sixteen years, hereby revoke all previous nominations, if any, made by me, and do hereby nominate James Morton, of 32 Carfin Street, Govanhill, Town of Glasgow, to receive the money payable on my death on insurance dated 25/6/04 (5316782) (as per ordinary branch policy) in accordance with the table of assurance and rules of the above-named Society in use at the date of such assurance and any alterations or amendments of the said rules.

"Signed by me in presence of two disinterested witnesses this twenty-first day of June one thousand nine hundred and five,

Signature

her
Mary × French.
mark

(In case of a female, state if single,
married, or a widow.)

Widow.

* The Friendly Societies Act, 1896 (59 and 60 Vict. cap. 25), enacts :—
Sec. 56. " (1) A member of a registered society (other than a benevolent society or working men's club) or branch thereof, not being under the age of sixteen years, may, by writing under his hand, delivered at, or sent to, the registered office of the society or branch, or made in a book kept at that office, nominate a person to whom any sum of money payable by the society or branch on the death of that member, not exceeding one hundred pounds, shall be paid at his decease."

Nov. 21, 1907. The person nominating must here state what relation, if any, he or she is to the person nominated.

Morton v.
French.

First witness

Friend.

Address

William Shearer,
9 Kelvingrove Street, Glasgow.

Second witness (who must be the agent or collector)

Address

Geo. Evans,
111 Allison Street, Glasgow.

" I hereby certify that the signatures of the witnesses and member are genuine, and that they are in the handwriting of the persons named, and that I was present when they attached their signatures, and that I signed my name at the same time as witness.

Signature (of agent or collector)

Geo. Evans,

District

Glasgow.

Agent

Stephen H. Payne,
143 West Regent St.

Collector's name

Geo. Evans,

Collector's address

111 Allison Street, Glasgow."

A claim was also lodged (2) by James French and Mrs Elizabeth French or Macdonald, the children and next of kin of the late Mrs French. They pleaded, *inter alia*;—(1) The nomination under which the said James Morton claims not being a writing under the hand of said Mary French, is of no effect.

A proof was allowed and led. The evidence was mainly directed to questions not now reported. The claimant Morton adduced evidence to shew that the Society were in the practice of passing nominations signed with a mark only.

On 30th June 1906 the Sheriff-substitute (Davidson) held that the nomination in favour of the claimant Morton was valid and effectual, and ranked and preferred him accordingly.

On appeal the Sheriff (Guthrie), on 21st December 1906, without deciding the question as to whether the nomination was a writing under the hand of Mrs French, ranked and preferred the next of kin upon a ground not necessary to be here explained.

The claimant Morton appealed, and argued;—The nomination here in question was not a document to which the ordinary rules as to the authentication of deeds applied. It was a privileged document—privileged, that was to say, because of the special objects of the Friendly Societies Act, one of which was to do away with unnecessary technicalities, *e.g.*, subscription by notaries. There could not be any doubt that the mark here was Mrs French's mark, because it was attested by two instrumentary witnesses, and the document was a writing "under her hand," because subscription by mark was the only way in which she could execute a writing under her hand. The practice of the Society was to accept nominations subscribed by mark only. The Court would have regard to the practice of such a society with regard to assignation or transfer of obligations against the Society,¹ and that was the nature of nominations like the present. In England, even in the case of an ordinary contract, subscription by mark was sufficient.²

Argued for the claimants the next of kin of Mrs French;—The

¹ Marino's case, 1867, L. R., 2 Ch. App. 596.

² Baker v. Denning, 1838, 8 Ad. & Ell. 94; Addison on Contracts, 10th ed., p. 38.

question was to be settled by the law of Scotland and not by the law of England, and the law of Scotland was clear. Except in the case of documents *in re mercatoria*, or in the case of express statutory relaxation, subscription by mark was not effectual—the subscription must be notarial.¹ This was not a document *in re mercatoria*,² it was of the nature of a will,³ and the Friendly Societies Act, 1896, did not contain any express relaxation such as that contained in the Marriage Notice (Scotland) Act, 1878.⁴ The nomination therefore was invalid.

Nov. 21, 1907.
Morton v.
French.

LORD JUSTICE-CLERK.—I think that the document founded on in this case is not one which can receive effect. In my opinion it is not legally signed and authenticated. I am satisfied that this is a case in which no relaxation can be allowed of the rule of law as to the authentication of deeds. Our law has always been very strict in that matter, and it does not depend on custom, but on distinct statutory enactment. In certain cases where formality is not required authentication by mark has been allowed. I allude to the class of writings known as writings *in re mercatoria*, but we are not here dealing with a document *in re mercatoria*. The document here is a deed which is practically testamentary in its nature. It is a revocable deed, and one which the party who signs can set aside. It has been held in England that a document such as that before us is testamentary in its character, and with that I agree. The only remaining question is—Does the case fall within any special expression as to the mode of authentication contained in the Act? In some cases, *e.g.*, under section 16 of the Marriage Notice (Scotland) Act, 1878, a person who is unable to write is allowed to exhibit his signature by a cross or other mark. But here the words of the statute simply are “by writing under his hand,” without specifying the mode of signing. Where a relaxation in the rule as to signing is allowed, it has been specifically done by Act of Parliament. Here we have no such relaxation by the Friendly Societies Act, under which alone we are. We must therefore follow the universal rule of law, to which no exception has been made.

I propose that the first plea in law for James French should be upheld.

LORD STORMONTH-DARLING, LORD LOW, and LORD ARDWALL concurred.

THE COURT recalled the interlocutors of the Sheriff and the Sheriff-substitute; found that the nomination was not a writing under the hand of the deceased Mrs Mary French, was not duly signed by her, and was of no force or effect in law, therefore sustained the first plea in law for the claimants the next of kin of Mrs French, and ranked and preferred them accordingly.

J. S. MORTON, W.S.—MACPHERSON & MACKAY, S.S.O.—Agents.

¹ *Graham v. M'Leod*, Nov. 30, 1848, 11 D. 173; *Crosbie v. Wilson*, June 2, 1865, 3 Macph. 870; *Stirling Stuart v. Stirling Crawford's Trustees*, Feb. 6, 1885, 12 R. 610; *Ersk. Inst.* iii. 2, 7-8; *Bell's Conveyancing*, vol. 1., p. 49; *Conveyancing Act*, 1874 (37 and 38 Vict. cap. 94), sec. 41.

² *Bell's Com.* i., p. 342.

³ *Baxter, L. R.*, [1903] P. 12.

⁴ 41 and 42 Vict. cap. 43, sec. 16.

No. 29.

ALEXANDER MACKAY, Pursuer (Reclaimers).—*A. M. Anderson—Hendry.*

Nov. 21, 1907.

GEORGE ROSIE, Defender (Respondent).—*Sol.-Gen. Ure—Constable.*Mackay v.
Rosie.

Reparation—Master and Servant—Personal Exception—Election—Election inferred from acceptance of weekly payments—Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), sec. 1 (2) (b).—In defence to an action of damages at common law for personal injuries, brought by a workman against his master, the master pleaded that the action was barred, in virtue of sec. 1 (2) (b) of the Workmen's Compensation Act, by the pursuer having elected to take compensation under the Act. On a proof it appeared that at the end of the week in which he was injured the workman was paid a sum in lieu of wages, and was told that for the next two weeks he would get nothing, but after that he would be paid half wages. He subsequently, for a period of about six months, received each week a sum amounting to slightly more than half his average weekly wage. These payments were at first made at his house, but afterwards, when he had partially recovered, he called for them regularly at his employer's office. No receipts were taken for these payments.

Held (aff. judgment of Lord Johnston) that the pursuer had elected to accept, and had accepted, compensation under the Workmen's Compensation Act, and was thereby barred from raising this action.

1st Division.
Ld. Johnston.

ON 18th May 1907 Alexander Mackay, mason, Dumbiedykes Road, Edinburgh, brought an action against George Rosie, builder, East Crosscauseway, Edinburgh, concluding for payment of £500. He sought to recover that sum as damages at common law for personal injuries suffered by him as the result of an accident incurred while working in the employment of the defender on 20th November 1906.

In defence the defender made the following statement of facts:—"From the date of his accident until the beginning of May 1907 the pursuer was regularly week by week paid by the defender half his average weekly wage as compensation under the Workmen's Compensation Act.* He was well aware of the provisions of the said Act, and accepted the sums paid to him as compensation thereunder. He thus elected to take compensation under the statute in question, and is barred from now setting up a claim of damages against the defender."

The defender pleaded;—(2) The pursuer having elected to accept, and having accepted, compensation under the Workmen's Compensation Act, is barred from raising the present action.

On 18th June 1907 the Lord Ordinary (Johnston) allowed a proof of the averments contained in the statement of facts for the defender.

* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), enacts, sec. 1 (2) (b):—"When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid."

The material facts established at the proof will be found set forth in Nov. 21, 1907. the opinion of the Lord Ordinary, *infra*.

On 18th October 1907 the Lord Ordinary pronounced this interlocutor:—"Finds that the actings of parties between the date of the accident and 4th May 1907 infer an agreement between them whereby the pursuer elected to take compensation under the Workmen's Compensation Act, on the footing of his average wage being taken at 36s. a week: Therefore sustains the second plea in law for the defender, dismisses the action, finds neither party entitled to expenses, and decerns."*

Mackay v.
Rosie.

* "OPINION.—I do not think that it is necessary to delay giving judgment in this case. The pursuer is not a foreigner; he is not even what I may call an illiterate workman. He is a Scotsman, he is a member of one of the skilled trades of this country, and from his appearance, I am justified in saying that he is one of the best representatives of that trade. On the other hand, the defender is a man of really much the same station as the pursuer. He is now an employer, but he began as a workman—so much so that the present pursuer actually worked under him when he was merely a foreman in the employment of others. I regard them in point of education and in point of intelligence—and I say so not merely as matter of inference but from their appearance in the witness-box—though one is workman and the other employer, very much as equals.

"Now, the pursuer's counsel's contention practically comes to this—that there is a duty imposed upon the employer to take charge of the interests of his workmen. I cannot conceive a case in which such a rule would operate greater injustice than the present, where I find that the employer and the workman are men of similar origin, similar upbringing, similar education, and, as far as I can judge, of similar capacity, only that the one being about eighteen years older than the other, has developed into a small employer, which there is no reason the other should not also do in his turn. But there is no such rule. The employer must not take advantage of the position of his workman, must not take advantage of his ignorance and want of education, must not take advantage of the physical condition to which a serious accident has for the time reduced him. But when they meet on equal terms and at arm's length, I hold that there is no more obligation on the employer to take charge of the interests of his workman in the matter of compensation for accident than there is on any other contracting party to charge himself with the interests of the party with whom he is contracting.

"What then are the circumstances here? The pursuer meets with, I assume, a serious accident. His employer acts with perfect consideration to him. I cannot conceive of any more appropriate or more considerate action on the part of an employer. He sends his son at once to see him, and at the end of the week in which the accident occurs sends him again to make payment of, not the precise amount of wages which were due, but a liberal allowance in lieu of the balance of wages. The actual sum paid is a matter with which I have no concern, but I have a concern with this, that on the day on which it was paid the defender's son said to him 'That is to cover anything that is due to you at present, you will get nothing for the next two weeks, and after that you will get half wages.' Now, I am prepared to hold it as proved by irresistible implication that both parties were perfectly aware what the meaning of this was. I am not going to take it off the pursuer's hands that a Scottish workman of his position and his capacity at this time of day knows nothing about the Workmen's Compensation Act. If there be an idea abroad among workmen that they may pose as in ignorance of the statutes which have been passed to provide for their protection, it is high time that that idea was dissipated. I am pre-

Nov. 21, 1907.

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Rosie.

The pursuer reclaimed, and argued;—The *onus* was on the defender to prove election on the part of the pursuer, and he had failed to prove it. He had established nothing but the acceptance of weekly payments, and that alone was not sufficient.¹ It was necessary under the Act that the workman should “claim” compensation, and he had made no claim here. Further, he had granted no receipts for these payments. The payments themselves were not the proper payments under the Act, *i.e.*, they were not half the average weekly wages. The pursuer was ignorant of his precise rights under the Act, and in these circumstances there was nothing to shew that he had “elected” to take his rights under the Act, and to abandon any other claim competent to him.

Argued for the respondent;—The Lord Ordinary was right. This was a question of fact merely, and the facts clearly shewed that the pursuer had exercised his option of taking compensation under the

pared to hold that a British workman is bound not merely to know something about his rights, but to take proper steps to ascertain what his rights are, and that as I have already said when he deals with his employer on even terms and at arm's length, there is no more obligation upon the employer to take charge of his interests than there is on any other contracting party to take charge of the interest of the party with whom he is contracting.

“Now, it is clear that the pursuer knew perfectly well that, in the first place he was entitled by a statute, even if he did not know by what precise statute, to nothing for the first fortnight and to half wages during the subsequent time of his disablement. He knew perfectly well that his employer was under obligation, imposed upon him by a statute, to make that payment; and, for the space of nearly six months, he accepted and allowed his employer to continue paying him half wages, or what was understood to be half wages, although it turned out, on an accurate calculation, to be somewhat more. For a period of nearly six months half wages were paid as matter of obligation and of statutory obligation, and accepted as matter of right and of statutory right, and there being no question of advantage taken, I think it is impossible to do otherwise than infer an agreement to make and accept compensation in this statutory form. I cannot accept the pursuer's contention that he is now entitled to come here and say ‘I knew it was under some statute, but I did not know under what statute it was that this payment was being made; moreover I did not take the trouble to ascertain what was the statutory condition of my accepting this payment.’ He is not a child, he is not a foreigner, he is not an illiterate, he is an educated workman. He was not during those six months on a bed of sickness or otherwise incapacitated. He was not in any sense in a position in which it could be said that the parties were not meeting on equal terms, and were not acting at arm's length. To sustain the pursuer's contention would be to write out of the law of Scotland the principle that *ignorantia juris neminem excusat* in favour of the workman, but of the workman only, where he transacts with his employer in the matter of compensation for personal injury.

“In the case of *Valenti*, 1907, S. C. 695, referred to, the parties were not on equal terms. There you had the employer, a large company, acting through its officials, and the workman, an Italian, knowing little or nothing of English. Even under these circumstances, had there been anything like the facts which you have got here, an agreement would, I think, have been implied. But there there was only one interview and two

¹ *Little v. P. & W. MacLellan, Limited*, Jan. 16, 1900, 2 F. 387; *Fowler v. Hughes*, Jan. 31, 1903, 5 F. 394; *Valenti v. William Dixon, Limited*, 1907, S. C. 695.

Act. It was not necessary that there should have been a written claim, a claim could be inferred from acceptance of payments.¹ *Esto* that an unsuccessful claim made in error would not bar a subsequent claim on a different ground,² these were not the circumstances of the present case. It was impossible to attribute the long-continued receipt of weekly payments here to anything but an acceptance of them as compensation due under the Act. The alleged ignorance of the pursuer as to his rights under the Act was not made out, and in any event the maxim *ignorantia juris neminem excusat* was a sufficient answer to that argument.

Nov. 21, 1907.
Mackay v.
Rosie.

LORD PRESIDENT.—This is an action at the instance of a workman against his employer for damages at common law in respect of an injury which he received while working in his employment.

receipts, which, *ex hypothesi*, the man could not read, which he only authenticated by his mark, and about which no practical explanation was given to him. Again in the case of *Fowler*, 5 F. 394, also referred to, you have the parties also not on equal terms, through another cause. The workman there met with an injury which so affected one of his eyes that it ultimately had to be removed. While he was lying suffering acutely from the inflammation in the eye, before the operation, he was asked to sign one single receipt. Quite unable to read, and in a bodily condition in which it is not to be presumed that he was capable of applying his mind to what he was doing, he signed the receipt at a place which was pointed out to him, and without explanation. In neither of these cases were the two parties dealing on equal terms, and their circumstances were quite different from those of the present case. But I think there is another point which differentiates them. In *Fowler's* case there was one receipt, and one receipt only. In *Valenti's* case there were two. But here there were about five-and-twenty payments, spread weekly over a period of nearly six months, made and accepted. It is quite true that the master, through his son, came to the workman and openly told him what he was bound to pay and the workman entitled to receive. The master did, in a certain sense, volunteer the payments at the start, and continued to forward them for a month or six weeks; but for the next three or four months, the pursuer, quite content with the situation, regularly went and applied for the payment. Mr Anderson contended that he made no claim. It seems to me that there is quite ample claim to satisfy the statute, if a man comes to the office to ask and receive the payments which had been made to him for a month or six weeks at his own house, and continues to do so from about the beginning of January until May. It seems to me that that distinguishes the case from *Fowler's* and *Valenti's* cases, and brings it very much more nearly on all-fours with the case of *Little*, 2 F. 387, where receipts were signed for six months.

"I venture to say that there is no distinction in the principle here to be deduced from the fact that no receipts were actually signed. If the pursuer is justified in his contention here, I do not think he would have been foreclosed even had he signed receipts. He is paid and he receives half his wages admittedly as a matter of statutory right and obligation. Would it have made it any stronger if he had signed a receipt in which it was stated:—'I accept the sum which you are paying me as statutory compensation, or

¹ *Powell v. Main Colliery Co.*, L. R., [1900] A. C. 366; *Wright v. John Bagnall & Sons, Limited*, L. R., [1900] 2 Q. B. 240; *Kilpatrick v. Wemyss Colliery Co., Limited*, 1907, S. C. 320.

² *McDonald v. James Dunlop & Co., Limited*, Feb. 25, 1905, 7 F. 533; *Rouse v. Dixon*, L. R., [1904] 2 K. B. 628.

Nov. 21, 1907. The preliminary answer is made that the workman has accepted compensation under the Workmen's Compensation Act, and that under the provisions of section 1, subsection 2 (b), he cannot now make a claim at common law. The Lord Ordinary has given effect to that contention, and dismissed the action.

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Rosie.

Ld. President.

The facts on which that plea is based are that for a long period a sum of 18s. a week was admittedly paid to the pursuer and accepted. Parties, however, are not at one as to the footing on which these payments were made and received. The case so far differs from those of *Valenti*,¹ *Fowler*,² and *Little*,³ which were cited to us, in that there is here no written receipt, and indeed no writing at all, to which appeal can be made. I am of opinion, however, that the fact of there being no written receipt is by no means conclusive. After all a receipt is no more than a piece of evidence, and though a receipt bearing to be in respect of sums paid under the Workmen's Compensation Act would be very difficult to get over, it is of value as an item of evidence and nothing else.

But I think the question before us is a question of fact, and fact alone. The Lord Ordinary, who saw the witnesses and considered the whole circumstances, has found that the pursuer accepted the payments as compensation under the Workmen's Compensation Act, and I am not prepared to disagree with his determination. I do not propose to say more, because I look on this case as raising solely a question of fact. I am content to say that I agree with the Lord Ordinary's view that the payments in question were made and accepted as compensation under the Act.

LORD M'LAREN.—I have come to the same conclusion. I think it must be taken as matter of common knowledge among persons in the class of life of

even, as compensation under the Workmen's Compensation Act'? I think not, because, in the knowledge of both parties, the sum was paid and was received under statute, if not specifically under the Workmen's Compensation Act. If that is so, can it be admitted that a man should come and claim and accept a payment which is due to him under statute, and not be held to take it with all the statutory conditions? Is the master, because the transaction happens to be between a master and a servant—is the master bound to say, 'Oh, I cannot pay you this until I am quite sure that you know what the statute is under which we are transacting, and that you know everything that is in the statute, not merely that you are entitled to this payment, not merely that you are receiving this payment under the statute, but that you know all the conditions which will follow your receipt?' I know no law which makes such a difference between contracts between employers and workmen and contracts between other people. If the one party does not choose to know his rights, I am prepared to say that the same law must be meted out to him, though he is a workman, as would be meted out to anybody else were the contract other than a contract between master and workman.

"What concludes the matter to my mind is this, if the one party is bound, both parties are. It seems to me that it would have been futile for the master, in the circumstances of this case, to have turned round and said, 'No; I am not going to continue these payments.' If the master is bound, so must the employee.

"I shall therefore sustain the second plea in law for the defender, and dismiss the action. . . ."

¹ 1907, S. C. 695.

² 5 F. 394.

³ 2 F. 387.

the pursuer that a claim of damages founded on fault is a claim for a single Nov. 21, 1907. payment. It follows, I think, that when a person having such a claim has ^{Mackay v.} accepted weekly payments for many weeks—unless he has taken them as ^{Rosie.} charity, and there is no suggestion of that here—he may be presumed to ^{Lord M'Laren.} have accepted these as payments under the Workmen's Compensation Act, the only law which creates an obligation to make compensation by means of weekly payments. Very clear evidence would be required to displace that presumption, and I fail to see anything in the evidence here antagonistic to the plain inference that follows the acceptance of weekly payments.

LORD KINNEAR.—I agree with your Lordship in the chair.

LORD PEARSON.—I also agree.

THE COURT adhered.

JOHN S. MORTON, W.S.—SIMPSON & MARWICK, W.S.—Agents.

DAVID JUGURTHA THOMSON, Pursuer (Respondent).—*Constable—Pringle.*

No. 30.

MATILDA LAWSON STEWART or THOMSON, Defender (Reclaimer).—*Orr Deas—Fenton.*

Nov. 22, 1907.

ARTHUR BRIGHT, Co-Defender.—*Lyall Grant.*

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Thomson.

Husband and Wife—Divorce—Lenocinium.—A husband who was not on good terms with his wife, and had reason to suspect her conduct, was informed that she intended to visit a man at Gateshead, with whom he knew she had been corresponding, and he instructed detectives to watch her movements. His wife informed him that she desired to visit friends at Stirling, and asked if she should go. She also asked for money. He replied, "Certainly go," and gave her £2. She went to Gateshead, where an act of adultery was committed. *Held* (aff. judgment of Lord Salvesen) that the facts did not support a plea of *lenocinium*, and decree of divorce granted.

Expenses—Husband and Wife—Wife's Expenses of reclaiming note.—*Per curiam* (after consulting Judges of the Second Division)—Where in an action of divorce a wife has been unsuccessful in the Outer-House, and then presents a reclaiming note, the question whether she is entitled to her expenses, if she is again unsuccessful, must depend on whether the case was a fair one to bring before the Court. The *prima facie* view of the case is that the Lord Ordinary is right, and therefore it is for the wife to shew that the case was a fair one for reclaiming.

Circumstances in which the Court *allowed* a wife, against whom decree of divorce had been pronounced by a Lord Ordinary, the expenses of a reclaiming note, although the Court adhered to the Lord Ordinary's judgment.

On 5th August 1898 David J. Thomson and Matilda L. Stewart ^{1st Division.} were married at India Buildings, Edinburgh, by declaration before ^{Lord}Salvesen. witnesses.

On 18th June 1906 Thomson raised an action of divorce against his wife on the ground of adultery, calling as co-defender Arthur Bright, variety artist.

Defences were lodged by the defenders. The charge of adultery was admitted on record, but the defender Mrs Thomson pleaded;—The pursuer having been guilty of *lenocinium* or connivance with regard to the act of misconduct founded on, is barred from suing for divorce in respect thereof.

Nov. 22, 1907. The facts on which the plea of *lenocinium* were based are fully stated in the opinion of the Lord Ordinary (Salvesen).

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On 10th January 1907 the Lord Ordinary pronounced the following interlocutor:—"Finds facts, circumstances, and qualifications proven relevant to infer that the defender has committed adultery: Finds her guilty of adultery accordingly: Therefore divorces and separates the defender from the pursuer, his society, fellowship, and company in all time coming, and finds and declares in terms of the conclusions of the libel, and decerns: Finds the defender entitled to expenses; allows an account thereof to be given in, and remits the same when lodged to the Auditor to tax and to report: Further, finds no expenses due to or by either party as between the pursuer and the co-defender." *

* "OPINION.—The parties to this action were married on 5th August 1898, after having cohabited for more than a year before marriage. The defender even at that time was admittedly addicted to drink; and although she verbally promised to give it up on her marriage she failed to keep her promise except for a few months. The pursuer on the other hand was a man of loose morality; and it is not surprising that a union thus inauspiciously contracted did not prove a happy one. The only child of the marriage was born in November 1902, but died at birth. Since that time the pursuer and defender have been entirely estranged, owing partly to the defender's habits of intemperance and partly to the pursuer's open preference for the society of other women. Since May 1902 the marriage home has been in Portobello, where during most of the period they resided in a house consisting of three rooms and a kitchen. For at least a year before the events founded on in the present action they occupied separate apartments, the pursuer occupying the chief bedroom, having as his companion a bulldog that his wife disliked and feared, and the defender sleeping in the other bedroom with the general servant.

"Although the parties lived in the same house they saw little of each other. The pursuer generally remained in bed till about two o'clock in the afternoon, and was generally out the rest of the day. He often left Portobello on short trips which sometimes occupied a good many weeks. He never took his wife with him on these trips, nor did he ask her to be his companion at any of the places of amusement which he frequented when at home. Except that he provided her with board and lodging, and even received her mother and sister as his guests, he did not discharge any of the duties of a husband towards her. His excuse is that she was constantly the worse of liquor; but although there is no doubt that the defender was much addicted to intemperance, I am satisfied that the pursuer has greatly exaggerated her conduct. At all events, he took no means to try to cure her of the liquor habit, but on the contrary allowed her to order from the grocer at his expense as much whisky as she pleased. The truth seems to be that the pursuer had absolutely ceased to care for his wife, and would have been glad to be rid of her; and I have no doubt he so expressed himself on many occasions during their matrimonial squabbles. The pursuer himself took full liberty to indulge in disreputable intrigues with other women, and was quite indifferent as to his wife's happiness or moral welfare.

"In July 1905 the defender was on a visit in Perth for some time along with her mother; and she there became acquainted with the co-defender, who is by profession a variety artist. They were frequently together, and in the course of conversation confided to each other their domestic troubles. The result was that an attachment sprang up between these two persons, both of whom were married; and during the winter and spring of 1905-6 they kept up a continuous correspondence. The defender collected picture

The defender reclaimed, and argued;—Divorce was a remedy granted to an injured party, and a husband could not be considered an injured party if he had encouraged and promoted his wife's adultery.¹ To support the plea of *lenocinium* it was enough to prove conduct on the part of the husband which made him the "wilful tempter and inciter of his wife to the commission of adultery," or which "conduced directly" to the act complained of.² In the present case the pursuer was on bad terms with his wife, and was having her movements watched in the hope of detecting her in an act of adultery; it was also an element in the case that he knew that her self-control was weakened by her drinking habits. He knew of the intimacy between his wife and the co-defender, and that she had accepted an invitation to visit him at Gateshead. When she asked if she might go away, he said, "Certainly go," and gave her money, which, in the circumstances, was a direct act of incitement and

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post-cards, and the co-defender sent her during that period no less than eighty-seven such cards. They all bore a greeting or affectionate message in his handwriting, and were signed 'Annie' (in one instance 'Alice'), or with the initials 'A. B.' The defender says that the pursuer must have known from these post-cards that she was on friendly terms with the co-defender, but I think there is no evidence to support this. In ordinary course the pursuer would only have the opportunity of seeing a very few of the post-cards, and as they bore a female signature they were not calculated to excite suspicion. The co-defender says he assumed the name 'Annie' because that was a nickname that had been given him owing to the success of a song called 'Annie More,' which was part of his repertoire. But the co-defender's reputation was not so well known that this fact must be presumed to have been within the knowledge of the pursuer, who had never seen him until the date of the proof.

"The letters which passed between the defender and co-defender have been destroyed on both sides; but from the parole evidence it appears that the correspondence culminated with the co-defender sending an invitation to the defender to visit him at Gateshead, where he was to perform as one of the members of a troupe that had been engaged for the Easter season. There is no doubt that he intended if she accepted the invitation to commit adultery with her. When he engaged his rooms at Gateshead he told the landlady he expected his wife would visit him at the end of the week, and it may be conjectured that the character of the correspondence which had passed between the two convinced the co-defender that she would be willing to pass herself off as such. At anyrate events proved that he was not mistaken. The defender travelled from Edinburgh to Gateshead by the 2.20 train; she was met at the station by the co-defender, who after they had had some refreshment in a public-house, immediately conducted her to his apartments, which they occupied together till the Monday morning. The adultery was capable of such clear proof that it was ultimately admitted upon record by both the defender and co-defender; and it is upon this admitted misconduct that the present action of divorce is based.

"It is not averred that there was any condonation; and accordingly the only defence available was that of *lenocinium*. The *onus* of instructing this very special defence admittedly rests on the defender, but the facts upon which she founds are to a large extent not in dispute. About the end of

¹ Marshall v. Marshall, May 20, 1881, 8 R. 702; Bell's Prin. sec. 1532; Mackenzie's Criminal Law, i. 17, 6.

² Donald v. Donald, March 30, 1863, 1 Macph. 741, *per* Lord Ardmillan, at p. 748; Hunter v. Hunter, Dec. 21, 1883, 11 R. 359, *per* Lord Shand, at p. 368; Munro v. Munro, Jan. 25, 1877, 4 R. 332.

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encouragement, knowing, as he did, that she intended to go to Gateshead. His conduct, at least, amounted to "passive acquiescence in the expectation that his wife would commit the crime," which was sufficient to bar him from obtaining the decree which he sought.¹

Argued for the pursuer;—The plea of *lenocinium* was not founded on the maxim *volenti non fit injuria*,² nor would evidence which would be sufficient to prove condonation be enough to establish connivance.³ It was necessary to shew that the husband had done something to arrange the occasion of the adultery, or to expose his wife to what he knew would be great temptation. The evidence in the present case fell far short of this. A husband who had suspicions of his wife's fidelity was entitled to have a watch set upon her movements.⁴ When the pursuer gave the defender permission to go to Stirling, he had no more than a suspicion that she intended to go to Gateshead, and in setting detectives to watch her, was only providing

March the pursuer had heard a rumour that his wife had been too intimate with some 'actor fellow' in Perth, who on one occasion was said to have assisted her to bed when in a state of intoxication. He seems to have connected this with the frequent post-cards she was receiving; and shortly after, at all events prior to the 9th of April 1906, he learned from the defender's youngest sister that a man called Arthur Bright had invited her to go to Gateshead to see him. On the 9th of April accordingly he instructed his law-agent, with whom he had had two previous meetings, to engage detectives to watch her movements. In the course of the same week he learned from the same source the train by which she proposed to travel on the Saturday. The defender had informed her husband that she wished to spend the week-end at Cumbusbarron near Stirling, where she was in the habit of visiting a female friend. On the morning of Saturday the 14th of April she asked for £1 to pay her railway expenses and he at once handed her £2. She also asked him whether she should go, and he answered 'certainly go,' or words to that effect. The defender had previously had a hint from her brother-in-law that she was being watched, and her mother had endeavoured to dissuade her from going on the projected visit to Gateshead, but she did not take the statement seriously, or else imagined that she was able to elude detection. After the interview at which the money passed, the pursuer went to Edinburgh along with his brother-in-law, and dispatched a telegram to the detectives informing them of the train by which he expected his wife to go. He expected and hoped that the defender would go to Gateshead, and that the detectives would procure evidence which would result in his being able to establish grounds for a divorce. His expectation was based partly upon what his brother-in-law had told him and partly on a suspicion that the defender had on a previous occasion gone to Dumfries when she professed to be going to Stirling, and had done so for the purpose of meeting the co-defender.

"On these facts the defender's counsel argued that the pursuer had contributed to his wife's misconduct by supplying her with funds to visit the co-defender in the knowledge that she contemplated such a visit, and that no more was required to support the plea of *lenocinium*.

"After carefully considering the evidence, I think it is not sufficient to establish this special defence. The pursuer was not in any way responsible for the intimacy which had sprung up between the defender and co-defender; and so far as his wife knew it had been carefully concealed from his know-

¹ Fraser, Husband and Wife, 2d ed., p. 1186.

² Wemyss v. Wemyss, March 20, 1866, 4 Macph. 660.

³ Fraser, Husband and Wife, 2d ed., p. 1193.

⁴ M'Intosh v. M'Intosh, Nov. 14, 1882, 20 S. L. R. 117.

for the possibility of her doing so. Moreover, when expressions used by a husband are founded on as an incitement to commit adultery, it must be shewn that they were understood as such by the wife, that they were acted on, and that they were the immediate cause of the subsequent act of adultery.¹ In the present instance the defender, so far from understanding the pursuer's words as giving her permission to go to Gateshead, did all she could, both before and after her visit there, to keep the pursuer in ignorance of where she had been.

At advising,—

LORD PRESIDENT.—This is an action of divorce at the instance of the husband on the ground of adultery ; the fact of adultery is admitted ; and the only ground on which the wife argues that decree should not be pronounced is her plea of *lenocinium*. The facts on which the plea is founded

ledge. Moreover, she did not believe that he was aware of her intended visit to Gateshead, a visit which she fully intended should not come to his knowledge. With this object she took the train from Gateshead to Stirling on the Monday, and remained there two or three days, and she dispatched post-cards to the pursuer and her own relatives from Bridge of Allan, in order that pursuer might suppose that she had actually gone on the week-end visit for which she had asked her travelling expenses. She does not pretend that if she had informed the pursuer that she was going to visit Bright he would have allowed her to do so. Moreover, it lay entirely with herself whether or not the visit was to result in her committing adultery with Bright ; and she says that she had not made up her mind to do so when she left, although she was apparently easily persuaded when he met her at the station. The defender, therefore, had no ground for supposing that she was acting with the consent or even the acquiescence of her husband in yielding to Bright's persuasions ; and as he had not connived at the original intimacy, or done anything to throw them together, I do not think that it can be said that he was in any sense a party to her guilt. I do not commend his conduct ; but I think it is substantially the conduct referred to by Lord Young in his opinion in the case of *Mackintosh*, 20 S. L. R. 117, which that learned Judge said would not amount to *lenocinium*. The pursuer believed that his wife had already been unfaithful to him ; and in these circumstances I think he was within his legal rights in endeavouring to procure evidence which would establish her guilt.

"I was referred to various reported cases the facts in which bear very little, if any, resemblance to those which we have here. In only one of them, *Marshall*, 8 R. 702, was the plea of *lenocinium* sustained, and that upon grounds which are totally inapplicable to the present case. The pursuer here was alimentering his wife in his own house, in a suitable, and indeed liberal, manner, and there was no reason except her infatuation for the co-defender why she should have made the visit to Gateshead at all. His neglect, and indeed unkindness to her, and his own immorality, may excuse, but they do not justify, her lapse from virtue, or bar him from the remedy which he seeks.

"On the question of expenses the defender is admittedly entitled to have her expenses paid by her husband. The pursuer, however, maintained that the co-defender should be found liable in the whole expenses. These would have been comparatively trifling but for the plea of *lenocinium* stated by the defender, and which could only be stated by her with any prospect of success ; and having regard to this and the pursuer's own conduct I am not

¹ *Hunter v. Hunter*, Dec. 21, 1883, 11 R. 359, *per* L. P. Inglis, at p. 365.

Nov. 22, 1907. are these :—The parties were married in 1898, and after a short time the marriage was not a very happy one. Both parties seem to have been in fault. The husband seems to have been unfaithful, and the wife was addicted to drink. It is quite clear that for some time previous to the events to which I am going to refer, the two had lost all affection for each other; and, so far as the pursuer was concerned, he would have been pleased if the marriage relationship between them came to an end.

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The defender had formed an intimacy with another person, whom she had met at Perth originally, and with whom for some time she had carried on a correspondence. This correspondence does not seem to have been of a very intimate character. It was carried on for the most part on post-cards. A large number of these have been recovered, and are produced in the case; but they contain nothing which is not of the most innocent description. I do not think that any impression could be drawn from the post-cards adversely to the parties. I also think it is the case that for some time at least the pursuer did not know that this post-card correspondence was going on, although at the end he did know that his wife was receiving communications from a man whom he did not know, but about whom he had heard.

The defender had been in the habit of leaving the family home at Portobello and going away for week-end visits; and, prior to the events I am coming to, the defender had gone away for a week-end visit, and it had come to the pursuer's knowledge that she had deceived him as to the place where she had been. It is only human experience to suppose that if a man's wife says that she is going for a visit to one place and goes to another, there is some motive for her doing so, and that the motive is likely to be not a very good one. Accordingly, the pursuer's suspicions were aroused. They were still further aroused by a communication which he received from his sister-in-law to the effect that his wife had received an invitation to visit, or at least to go and see, this acquaintance whom he did not know, and who was staying at a considerable distance. There, again, it is human nature to suppose that a man would have suspicions if his wife, concealing the fact from him, went to visit a man in a far distant town, and he would think she went there for no good purpose. That his suspicions were aroused by this communication is certain, for he went to consult his agents and made arrangements for having his wife watched. In these circumstances the defender came to the pursuer and said that she wanted to go to Stirling for the week-end, and asked for money. The pursuer gave her

disposed to subject the co-defender in these expenses. Prior to the Conjugal Rights Act of 1861 the co-defender could be rendered liable in such expenses only in a subsequent action, and as part of the damages that the injured pursuer had sustained through the seduction of his wife. There can be no question here of the pursuer having suffered damage in the ordinary sense through the co-defender's adultery with the defender, for he was anxious to get rid of his wife, and scarcely sought to disguise his indebtedness to the co-defender for giving him the opportunity of putting an end to the matrimonial relation. It is true that the co-defender's conduct cannot be excused, but I think he is sufficiently punished by the exposure that it has entailed, and the expense to which he has himself been put in the present action. As between the pursuer and the co-defender I shall accordingly find no expenses due to or by either party."

£2. The defender had had a sort of warning from her mother, who had Nov. 22, 1907. got an inkling of what the pursuer was about in setting people to watch his Thomson v. wife, and had advised her daughter not to go away, because she was being Thomson. watched. This had caused an uncomfortable feeling in the defender's Ld. President. mind, and she asked her husband,—“Should I go?” and he said “Yes, certainly go.”

The defender was watched, she went to Gateshead, and there the adultery admittedly took place. She did not come straight back from Gateshead to Portobello, but went first to Cambusbarron, near Stirling, from which place she returned home.

It was argued for the defender that these facts disclosed a case of *lenocinium*: and it was maintained that what was proof of *lenocinium* was in each case a matter of circumstances. In this case the defender relied in particular on two facts:—(1) that the pursuer gave the defender a sum of money to enable her to carry out her purpose, and (2) that he encouraged her by the expression “Yes, certainly go.”

I think I should here leave the facts and consider the law in regard to *lenocinium*. I do not think that the difficulties of the question can be put in more appropriate language than is done by Lord Fraser in his treatise on the Law of Husband and Wife (p. 1186). The title under which it is dealt with is Connivance or *Lenocinium*, and the heading of the passage is,—“Not Connivance if the Husband watch his Wife, whom he suspects.” Lord Fraser says,—“The difficulty is to determine when a husband's conduct ceases to be suspicious and justifiable watchfulness and becomes acquiescence. The husband's suspicions may be aroused, but it is no connivance on his part though he do not disclose his suspicions to his wife. He is entitled to observe her and to track her proceedings, and it is not concurrence in her guilt because he does not tell her what he is doing, and favour her with admonitions. It is possible that a hint from him as to his suspicions might have saved her; but it is not connivance though he did not utter it. It is only where the husband goes beyond this, and gives facilities for the commission of the offence, and creates opportunities, that he is held to connive and to concur. His connivance then involves criminality, because that connivance occasioned or allowed the adultery to take place.” I think these words are a very accurate statement of our law, and that the difficulty arises in the application of the law to each particular state of facts. The same view is supported by the opinion of one who, though not a jurist, is considered an authority on this matter. I refer to the opinion of Sanchez, which is quoted by Lord Fraser on p. 1187 of his work, and is as follows:—“Sed an liceat eo fine offerre occasionem uxori ut adulteratur?” Which question he answers in the negative—“Quia id non solum est permittere sed cooperari et positive concurrere.”

Now, it seems to me that two things are clear. The one is that no Judge will do well by trying to frame a definition of what amounts to *lenocinium*, because each case really depends on its own facts, and it would be impossible to frame a definition which comprehended all cases. The other is, that there must be something on the husband's part of an active character. “Cooperari et positive concurrere,” says Sanchez, and I think that is an accurate description of our law.

Nov. 22, 1907. I am aware that in another portion of Lord Fraser's work he says that
 Thomson v. Thomson. "Passive acquiescence will be sufficient to bar the husband, provided it
 Ld. President. appears to be done with the intention and in the expectation that the wife
 would commit the crime" (p. 1186), and he quotes a passage from Lord
 Stowell's opinion in the case of *Walker*¹ to the same effect.

It has been pointed out by Lord President Inglis in *Wemyss*² that the English doctrine on this matter has not the same historical origin as the Scots doctrine, and one cannot therefore say that an English authority is to be cited as a Scots authority might be, although the two doctrines come very near one another in practical application. After all, the distinction comes to be nearly a question of words. If I may use an expression which seems like a contradiction in terms, I would say that there is a sort of passive acquiescence which is equivalent to active acquiescence. To explain, I may take an analogy from another branch of law which is very familiar to us. There are certain cases where, for instance, in the negotiations for a contract, there is a relation between two parties which puts on one of them a duty of disclosure to the other, and if he fails to discharge this duty, the contract will be set aside because of the silence of the party. There are other cases where there is no duty of disclosure. In these the contract cannot be set aside on the ground that the party did not speak. But in the colloquies between the parties there may be occasions when silence amounts to assertion or representation, and in such a case the contract may be set aside on account of this silent acquiescence. I cannot help thinking that the passive acquiescence of which Lord Fraser speaks would have to be of that character. It is not mere passive acquiescence, but acquiescence in such circumstances as to give it an active character. That there must be something done by the husband I cannot doubt.

Applying that exposition of *lenocinium* to the present case, I think the facts fall short of what is necessary to make out the defence. Here was a husband who did not know the facts, but strongly suspected that his wife had gone wrong. He hears of a project on her part in circumstances in which it is probable that she would commit adultery. I do not think he was bound to disclose his suspicions. I do not think he was barred from taking steps to observe the proceedings of his wife. I do not think so much stress can be laid on his use of the words "Yes, certainly go." We know what was in the wife's mind at the time. She put the question because she thought his answer would shew whether he knew what she intended to do. She took him to mean "Yes, certainly go to the place you say you are going to, viz., Stirling." That seems to me to fall far short of contriving the infidelity or the occasion for it. On the contrary, I believe that the matter was *in dubio* so far as the defender was concerned almost to the last moment.

On the whole matter, I am of opinion that the Lord Ordinary has come to the right conclusion, and that decree must be granted.

LORD KINNEAR.—I agree that the plea of *lenocinium* cannot be supported, and therefore that the Lord Ordinary was right in giving decree of divorce.

¹ *Walker v. Walker*, 3 Hagg. Eccl. R. 59.

² 4 Macph. 660.

LORD DUNDAS.—I agree. I think the proof falls distinctly short of what Nov. 22, 1907. is necessary in law to support the plea of *lenocinium*.

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LORD M'LAREN and LORD PEARSON were sitting in the Extra Division when the case was argued.

Counsel for defender moved for expenses since the date of the Lord Ordinary's interlocutor, and referred to the case of *Hoey v. Hoey*, June 6, 1884, 11 R. 905. Counsel for pursuer opposed the motion, and referred to the case of *Montgomery v. Montgomery*, Jan. 21, 1881, 8 R. 403.

At advising,—

LORD PRESIDENT.—We have consulted with the Judges of the other Division in this matter in order to lay down a general rule in such cases.

When a wife has been unsuccessful in the Outer-House and then presents a reclaiming note, the question whether she is entitled to her expenses, being again unsuccessful, must depend on whether the case was a fair one to try. What I may call the *prima facie* view of the case is that the Lord Ordinary is right. And therefore it is for the wife to shew that the case is a fair one to try.

In this particular case we think that the question was one which it was fair to bring before this Court, and we therefore allow the claimer her expenses.

THE COURT adhered, and found the defender entitled to additional expenses since the date of the interlocutor reclaimed against.

SIMPSON & MARWICK, W.S.—COWAN & STEWART, W.S.—
JOSEPH CHALMERS, S.S.C.—Agents.

MRS MARGARET MACFARLANE OR GRANT AND OTHERS, Claimants	No. 31.
(Respondents).— <i>Watt, K.C.—T. A. Menzies.</i>	
GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY, Defenders	Nov. 22, 1907.
(Appellants).— <i>Macmillan—Garson.</i>	

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Master and Servant—Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), sec. 1, subsec. (1)—Accident arising out of and in course of employment—Onus of proof.—A station policeman in the employment of a railway company was run down by an engine on a siding at the station and died shortly afterwards of his injuries. His widow and children claimed compensation under the Workmen's Compensation Act, 1897, from the railway company. There was no evidence to shew how or why he came to be at the spot where he was injured, but he might legitimately have been there in the course of his duties as station policeman.

Held that the deceased being station policeman the presumption was that he had been injured by accident arising out of and in course of his employment, in the sense of sec. 1, subsec. (1), of the Workmen's Compensation Act, 1897, and that in the absence of evidence to the contrary this must be taken to be the fact.

THIS was an appeal by the Glasgow and South-Western Railway 2^d Division. Company in an arbitration brought in the Sheriff Court at Ayr Sheriff of under the Workmen's Compensation Act, 1897, in which Mrs Mar- Ayrshire. garet Macfarlane or Grant, the widow, and Isabella and Jeanie Grant, the daughters, of Thomas Steele Grant, doorkeeper or station police-

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man at the Ayr passenger station of the Glasgow and South-Western Railway Company, claimed compensation from the Railway Company on account of the death of their husband and father.

The case for appeal set forth that the Sheriff-substitute (Shairp), found, *inter alia*, the following facts to be admitted or proved :—(2) That Thomas Steele Grant at the time of his death was between sixty and seventy years of age, and very deaf; “ (5) that his duties were to go to and from a bank in Ayr with cash-boxes, to dispatch these cash-boxes to different local railway stations of the said Railway Company, to attend in the guards’ room, keep stationery for passenger guards, write up these guards’ train arrival books, make out returns for them to be sent to the superintendent, and to keep unauthorised persons from being on, in, or about the said passenger railway station premises, and the entrances, exits, and platforms of said passenger railway station ”; (7) that in the execution of his duty of keeping unauthorised persons out of the Railway Company’s premises he was entitled to cross certain of the station sidings; (9) that about ten minutes before 10 A.M. on 3d July 1906, “ a railway vanman, in the employment of the said Railway Company, drove the said Thomas Steele Grant and a number of cash-boxes from said railway station to the Ayr branch of the National Bank of Scotland, Limited, which is situated in Sandgate Street, and there delivered the contents of the cash-boxes, and the ” vanman “ thereafter drove his van down High Street, while the deceased Thomas Steele Grant went up that street towards Ayr passenger railway station, and about fifteen or twenty minutes past ten o’clock in the morning of said last-mentioned day, was seen, shortly before he was injured, proceeding on foot in the direction of said passenger railway station along Kyle Street, which joins Smith Street, and that in Smith Street, near its junction with Kyle Street, there is a gate leading to a loading bank for horses and cattle, and said sidings . . . which gate should be locked except when something is being admitted or moved to or from said loading bank, but which gate was open at the time the said Thomas Steele Grant was injured; (10) that nobody saw the said Thomas Steele Grant pass through said gate on said morning, and there is no evidence to shew how or why he came to be at the spot on siding No. 6 where he was injured; and (11) that about 10.40 in the morning of the said 3d day of July 1906, Andrew Watt, one of the said Railway Company’s engine-drivers, felt that the tender of his engine, which was taking carriages from siding No. 6 to make up a train, had passed over something, and stopped his engine, when he discovered that the tender, which was in front of the engine, had passed over the said Thomas Steele Grant, whom he had not previously seen, and that the said Thomas Steele Grant, who was forthwith removed to Ayr County Hospital . . . died in said hospital on the same day from the injuries he had received.”

Upon these admitted or proved facts the Sheriff-substitute “ found that the said Thomas Steele Grant might, in the course of his duties as station policeman, have legitimately been at the spot at which he was accidentally injured, and that it had not been proved that he was there for any other purpose than the discharge of his said duties as station policeman . . . that, accordingly, the said personal injuries which the said Thomas Steele Grant received, and which resulted in his death, were caused by an accident arising out of and in the course of his employment as a station policeman under the said Railway

Company, and that his said employment was one to which the Workmen's Compensation Act, 1897, applied." Nov. 22, 1907.

The question of law was (in addition to a question on which the appellants did not offer any argument):—" (2) Seeing that the spot where the said Thomas Steele Grant met with his injuries was one where he might legitimately and necessarily have been for the discharge of his duties as station policeman, but that it was not proved why he came to be at that spot at the time of the accident, or for what purpose he had gone there, was the arbiter entitled to presume and hold that the deceased was at that spot for the discharge of his duties as station policeman, and that, accordingly, the said personal injuries were caused to him by accident arising out of, and in the course of, his said employment as station policeman by the said Glasgow and South-Western Railway Company?"

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Argued for the appellants;—The *onus* was on the claimants to prove that the accident arose out of, and in the course of, the employment of the deceased. They did not discharge that *onus* by proving that he might have been at the place where the accident took place on business of his employers; it was necessary to prove positively that he went to the place on his employers' business and not on his own. The Sheriff-substitute's finding that the deceased "might have been" at the place where he met his death was the highest deduction that the facts stated justified, and it was not enough.¹

Argued for the respondents;—No doubt the initial *onus* was on the claimants to prove their case, but the *onus* might shift in the course of the proof, if facts were proved which raised a presumption in favour of the claimants. Here the natural and reasonable inference from the facts proved was that the deceased met his death when in the course of his employment.² The Railway Company were entitled to displace that inference by proving other facts of a contrary nature, but they had not done so.

LORD JUSTICE-CLERK.—The way in which this case is stated by the Sheriff as arbiter is rather embarrassing. The facts as disclosed in the statement of the Sheriff are that this man, in accordance with his duty, went out of the station to do a certain thing for his employers, to take, as I understand, money-boxes to the bank, and that he was returning undoubtedly to go back to his duty. In order to go back to his duty he had to go into the station, as it was there his duty was to be done. He might go back by the road round by the entrance to the hotel, or he might go back by the sidings. He might find the way by the sidings the more convenient of the two ways. He might also very well think that as it was part of his duty to prevent loiterers hanging about any part of the station premises, he would go over by the sidings and would take a look round as he came back. All these things are conjectural. All we have found in the case is that he chose to go back to the station by these sidings. There is no case made against him that he was guilty of wilful misconduct. I do not think that could be maintained. Of course there was more risk in crossing the sidings while there may have been shunting operations going on than there was in going

¹ Haley v. United Collieries, Limited, 1907, S. C. 214.

² Mitchell v. Glamorgan Coal Co., Limited, June 7, 1907, 23 T. L. R. 588; M'Nicholas v. Dawson & Son, L. R., [1899] 1 Q. B. 773, at p. 778.

Nov. 22, 1907. by the ordinary entrance to the station. But he was a railway servant and able to look after himself, although sometimes through inadvertence a railway servant meets with an accident, and sometimes a railway servant does not take sufficient care and is killed. But the question really is, Was the deceased when he was on that spot and killed in such a position that the accident which happened arose out of, and in the course of, his employment as a servant of the Railway Company? I should be prepared to affirm that statement, and would be prepared to make that really our answer to the question which is put to us by the Sheriff in a somewhat unfortunate form.

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Lord Justice-
Clerk.

LORD LOW.—I have felt the question at issue to be attended with much difficulty, chiefly by reason of the way in which the case has been stated by the Sheriff-substitute, but in the end I have come to the same conclusion as your Lordship.

No doubt a person claiming compensation under the Act must prove that the injury arose out of, and was sustained in the course of, the injured party's employment. But I agree with Mr Menzies that the *onus* may be shifted, especially when the claim is by a dependant of a workman who has been killed, and whose evidence is therefore not available. If in such a case facts are proved the natural and reasonable inference from which is that the accident happened while the deceased was engaged in his employment, I think that it falls upon the employer, if he disputes the claim, to prove that the contrary was the case.

Here the workman was station policeman at the railway station at Ayr. He had been in the town lodging certain money-boxes at a bank in the performance of his duty, and when last seen alive he was walking along Smith Street (which is near the station) towards the station. The inference is irresistible, that having fulfilled a special duty, he was returning to the station to resume his general duties. The next thing which is known is that he was found mortally injured upon a siding close to the station, having no doubt been knocked down by a train which was being shunted. It cannot be said that the place where he was found negatived the idea that he could have been in the course of his employment when the accident happened. On the contrary, I do not think that it can be disputed that the station siding was, so to speak, within his jurisdiction as station policeman.

Therefore, although the way in which the case is stated, and especially the form of the second question (which is the only one we have to dispose of) is very embarrassing, the main facts are plain enough, and therefore I think that the difficulty may be overcome by answering the question as proposed by your Lordship.

LORD ARDWALL.—I agree with your Lordship in the chair. I consider that the second question as put is unfortunately stated, and that the course to be taken ought to be as your Lordship suggests. The facts here apparently are quite simple, and I have some difficulty in seeing how the Sheriff-substitute could have any doubt as to certain portions of the case. This unfortunate man, now deceased, was what is known as a railway policeman.

But then he had some other duties, and one of them, as stated very distinctly in the case, was to go to a bank in Ayr from the station with cash-boxes and deposits. It is also stated that on the morning on which he was killed he had been attending a vanman to the bank, and after the cash-boxes were deposited the vanman went away to the stables with his horse, and this policeman in the discharge of his duties, having discharged one of them, went back to discharge another of them—namely, the duty of acting as policeman at Ayr Station. In doing so he was seen last in Kyle Street about 10.20, and at 10.40 unfortunately he was run over at a siding. I think it is perfectly evident from these facts, so much so that I may say it is proved, that in returning from his duty of depositing the cash-boxes and going back to his duty as a policeman at the station he took a route which led him across the said siding, and in doing so was run over in the way narrated in the case. Now, he had a right to be on the siding; and furthermore, we can readily imagine, as has been said by your Lordship in the chair, that one reason why he may very reasonably be supposed to have taken this route was that he could take a look round the sidings at the end of the passenger platform to see that no evil-disposed persons or mischievous boys were loitering about. That would be essentially in the discharge of his duty as a policeman; and accordingly I think it is proved, or, if not directly proved, it is a clear inference from the facts which have been held to be proved, that when this accident happened he was in the course of his employment as a station policeman. Now, the Sheriff-substitute has put in a clause in the second question which I do not think it was necessary or proper to put in when he says “that it was not proved why he came to be at that spot at the time of the accident, or for what purpose he had gone there.” In addition to what Lord Low has said in regard to the *onus* shifting, I think a very proper observation was made by Mr Menzies, that while in the general case it would be incumbent upon the claimant in an arbitration of this sort to prove why a deceased person was at a particular place, and to prove that the purpose he had gone there for was a purpose necessarily in the course of his employment, yet that in the case of a policeman the matter is really very different. Of course, every case must be taken upon its own facts. A railway policeman’s duties are to go anywhere about a station for the purpose of seeing whether there are evil-disposed or mischievous persons loitering about, ready either to pilfer articles from carriages or trucks, or damage the Company’s property; and it might be absolutely impossible in many cases for those claiming on the death of a railway policeman to tell what was in his mind in being at a particular place. He would keep that to himself. He might have been drawn anywhere about the station premises in the discharge of his duty, but nobody could tell after his death what was the particular purpose that took him there. I therefore think this case, which is the case of a policeman, cannot be decided on the same footing as an ordinary case would be, and that the same kind and amount of proof is therefore not required, provided the deceased was in a place where he had a right to be, and where it may be reasonably supposed that he would not have gone except in the discharge of his duties as a policeman. I therefore agree with the judgment proposed by your Lordship.

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THE COURT pronounced this interlocutor:—"Answer the two questions of law . . . by declaring that the accident arose out of, and in the course of, the deceased's employment with the appellants: Therefore affirm the award of the arbitrator: Find and declare accordingly, and decern."

HUTTON & JACK, Solicitors—JOHN C. BRODIE & SONS, W.S.—Agents.

No. 32. THE PARISH COUNCIL OF KINLOSS, First Parties.—*C. A. Macpherson*.
Nov. 22, 1907. RACHEL MORGAN AND OTHERS, Second Parties.—*D. Anderson*.
MARGARET MASON AND OTHERS, Third Parties.—*D. Anderson*.

Parish Council
of Kinloss v.
Morgan.

Charitable Trust—Poor—Bequest for "the poor of the parish."—Held that a bequest to the Parish Council of K. "for the benefit of the poor of the parish of K." was not limited in its application to the "legal poor," but might be applied for the benefit of poor persons who were not in receipt of parochial relief.

1ST DIVISION. THE Reverend John Archibald Dunbar Dunbar, of Seapark and Kinloss, in the parish of Kinloss, died on 11th November 1905, leaving a trust-disposition and settlement. The fourth purpose of that deed was as follows:—"I leave and bequeath in the first place for the benefit of the poor of the parish of Kinloss the sum of Two thousand pounds; and in the second place for the benefit of the poor of the burgh of Forres the like sum of Two thousand pounds; declaring that the legacy to the poor of Kinloss parish shall be paid over by my trustees to the Parish Council of that parish to be administered by them for behoof of said poor, and that the legacy to the poor of the burgh of Forres shall be paid over by my trustees to the Town-council of Forres, to be administered by them for behoof of said poor."

Questions having arisen as to the class of poor persons entitled to the benefit of this bequest, a special case was presented to the Court on 14th May 1907, to which the Parish Council of Kinloss were the first parties; Rachel Morgan and others, inhabitants of the parish of Kinloss, were the second parties; and Margaret Mason and others, paupers on the roll of the said parish, were the third parties.

The special case set forth:—"The said deceased Reverend John Archibald Dunbar Dunbar was a clergyman of the Episcopal Church in Scotland. He was proprietor of Seapark and Kinloss in the parish of Kinloss, to which he succeeded on the death of his mother in 1899. On his succession to said estates and from that time until his death he resided permanently at Seapark. He took a great interest in the parish of Kinloss, and being of a charitable disposition he applied a large part of his means generously to the assistance of a great number of poor persons in the village of Findhorn and throughout the parish of Kinloss. This he did by periodical gifts of coal and other comforts, as well as by donations of money. In dispensing this charity, the deceased included as the objects of his bounty both poor persons in receipt of parish relief, who were on the roll of the parish poor, and poor persons, who were not paupers and did not come under the description of legal poor. . . . The second parties hereto are poor persons resident in the parish of Kinloss who came within the latter category, and, in the lifetime of the late Mr Dunbar Dunbar, though

not paupers in receipt of parochial relief, they were in the habit of receiving from the deceased, especially at Christmas time, assistance, usually in the form of gifts of coal. They are parishioners of the parish of Kinloss and resident therein, and have accordingly an interest in the due management and administration of the charitable bequest and legacy above mentioned. The third parties hereto are on the roll of the parish poor, and during Mr Dunbar Dunbar's lifetime, both before and after the date they were placed on the paupers' roll, were in the habit of receiving from the deceased gifts of various kinds. They are accordingly interested in the management and administration of the fund in question."

The contentions of the first and second parties were stated to be as follows:—"The first parties maintain that the bequest being given for the benefit of the poor of the parish, subject to administration by them as the proper parochial authority, is a bequest exclusively for behoof of the legal poor persons entitled to parochial relief. The second parties, on the other hand, maintain that the terms defining the objects of the bequest are open to construction, and that on a sound construction of the clause in question in said trust-disposition and settlement, the intention of the testator was to benefit the occasional poor, or poor persons not in receipt of parochial relief, or at all events to include such within the class of persons entitled to participate in the benefits of the bequest."

The first question of law for the determination of the Court was as follows:—"Is the bequest for the benefit of the poor of the parish of Kinloss contained in said trust-disposition and settlement limited to the poor of said parish who are in receipt of parochial relief? or, are the first parties entitled to apply said bequest for the benefit of poor persons who are not in receipt of such relief?"

There was also a second question as to the method of administration if the bequest was limited to the legal poor, which, in the event, did not fall to be answered.

Argued for the first parties;—"Poor of the parish" presumably meant the legal poor, and that presumption was greatly strengthened where, as here, the bequest was entrusted to the body charged with the duty of administering legal relief in the parish, viz., the Parish Council.¹

Argued for the second and third parties;—"The words "poor of the parish" were not ruled by a presumption, but were always open to construction.² The meaning to be put on them here depended on the intention of the testator. This testator had been in the habit of relieving other poor persons than the legal poor, and also of giving extra relief to those already in receipt of parochial relief, and it might be assumed that he intended this bequest to be administered in the same way. To limit the application of his bequest to the legal relief of the legal poor would mean that his bequest would go, not for the "benefit" of the poor, but for the relief of the ratepayers. That could

¹ Liddle v. Kirk-Session of Bathgate, July 14, 1854, 16 D. 1075; Whyte v. Kirk-Session of Kinglassie, June 14, 1867, 5 Macph. 869; Flockhart v. Kirk-Session of Aberdour, Nov. 24, 1869, 8 Macph. 176; Paterson's Trustees v. Christie, Feb. 1, 1899, 1 F. 508; Poor-Law Amendment (Scotland) Act, 1845 (8 and 9 Vict. cap. 83), sec. 52.

² Whyte v. Kirk-Session of Kinglassie, 5 Macph. 869, Lord Curriehill, at p. 880; Flockhart v. Kirk-Session of Aberdour, 8 Macph. 176, Lord Deas, at p. 182.

Nov. 22, 1907. **Parish Council of Kinloss v. Morgan.** not be assumed to be his intention. The fact that the Parish Council were chosen to administer this bequest did not lead to the presumption contended for by the first parties.¹ The testator wanted to benefit the poor of the parish in which he had lived, and the Parish Council, who administered the affairs of that district, were a very natural body to be chosen to administer this fund.

LORD PRESIDENT.—The late Rev. John Archibald Dunbar Dunbar, of Seapark and Kinloss, by a clause in his trust-disposition and settlement left a legacy in the following terms. He left “in the first place for the benefit of the poor of the parish of Kinloss the sum of Two thousand pounds; and in the second place for the benefit of the poor of the burgh of Forres the like sum of Two thousand pounds; declaring that the legacy to the poor of Kinloss parish shall be paid over by my trustees to the Parish Council of that parish to be administered by them for behoof of said poor.” The question raised before your Lordships by this special case is whether the Parish Council of Kinloss, who are entitled to this legacy of £2000, are bound to administer it for the “legal” poor alone, as that expression has been currently used—that is to say, are they bound to put this legacy into their coffers along with the rates, or are they entitled to administer it as a separate fund, and to apply the benefit of it to any such people as may be held to fall within the description of “poor” in the ordinary significance of that word.

Like all such matters it turns on the question of testamentary intention; and if it had not been for the complication of authority, I should have thought the matter was too clear for argument. The result of putting this legacy into the coffers of the Parish Council would be, not the relief of the poor, but the relief of the ratepayers of the parish. That such was the intention of the testator cannot for a moment be supposed. There is, however, a certain amount of authority on the interpretation of the word “poor,” but on consideration I have come to the conclusion that it does not stand in the way of giving to this bequest the effect which I believe the testator intended.

The decided cases all turned on what sums fell or did not fall to be dealt with under section 52 of the Poor-Law Amendment Act of 1845.² Let me remind your Lordships of what that Act really did. It introduced for the first time into Scotland a thoroughly national system of poor-law administration, and it created powers for a universal assessment for relief of the poor, but it also enabled the new poor-law authorities, who were created by the Act, to make use of any existing funds that were devoted to the relief of the poor. Hence we have section 52, which transferred the existing funds to the new parochial boards. Now, the questions raised on that section were whether certain bequests fell or did not fall within the words of the section. It is to be observed that that section only applied to existing funds, and had no application to any subsequent bequest, and now that it is more than half a century old it is obvious that the questions that

¹ Local Government (Scotland) Act, 1894 (57 and 58 Vict. cap. 58), sec. 30.

² 8 and 9 Vict. cap. 83.

arise under such a destination in modern times are very different from those that fell to be decided under that section. There is this further observation to be made, that the question which is now before us could not have arisen in the old days prior to 1845. For in those days the distinction between able-bodied poor and others, with regard to the right of relief, had not been settled, and if you had used the phrase "legal poor" in these days it would not have been known what you meant. The kirk-session, who were then the only body in charge of the poor, relieved any necessitous person, and did not confine their relief to the legal poor in the modern sense. So that in those former days, when a testator left a bequest for such purposes, it would never occur to him that any distinction could be drawn as to the persons to be benefited according as he left the administration of the bequest to the then poor authority, viz., the kirk-session, or to others. He would believe that, however he destined it, it would be applied for the relief of necessitous persons in the same way. Consequently, if in these decisions the words have got a certain significance, that interpretation has been put on them in the light of what I have been saying, and it will not necessarily apply to a bequest made by a modern testator under totally different conditions of the poor-law.

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There are expressions, particularly in the opinion of Lord Rutherford, in the case of *Liddle*¹ that seem to go the length of laying down the law that the word "poor" means "legal poor" only. I do not think that that view of the law has been adopted in subsequent decisions, and I will only instance the *dictum* of Lord Deas in the case of *Flockhart*,² where he says,—"I do not call in question the principle of the cases of *Bathgate*¹ and *Linlithgow*,³ that the words 'for behoof of the poor' do not necessarily mean those who are called the 'legal poor'—that is to say, the poor who by law may claim relief; and that it is in every case a question of circumstances whether that construction is to be put on the words or not." I think that is a just statement of the law; and, therefore, as far as authority goes, I do not think it can be said that "poor of the parish" is limited to the "legal poor" only.

I also think that the implication that was sought to be drawn from the fact that the body chosen to administer the bequest was the Parish Council loses its force when we consider that the Parochial Board existed solely for the purpose of administering the poor-law, while the Parish Council has many other duties to perform. Where the body chosen existed only for the relief of the poor, the natural implication was that it was intended that the bequest should be administered in the same way as the only other funds in their hands. Here the selection of the Parish Council was no doubt occasioned by the fact that the testator wanted to benefit the people within two areas well known to himself, namely, the parish of Kinloss and the burgh of Forres, and therefore he selected the Parish Council of Kinloss and the Town-Council of Forres to be the administrators, as best defining the areas to be benefited.

I think, therefore, that he used the word "poor" in the sense in which

¹ 16 D. 1075.

² 8 Macph. 176, at p. 182.

³ *Hardie v. Kirk-Session of Linlithgow*, Nov. 15, 1855, 18 D. 37.

Nov. 22, 1907. it is used in ordinary language, and that the word must be held to cover any necessitous person. The second alternative of the first question will therefore fall to be answered in the affirmative.

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LORD M'LAREN.—I agree that the Parish Council, who put these questions to us, are in no way restricted as to the class of persons who may be put on the roll of beneficiaries, except in so far that they must be poor persons in the ordinary sense. In so deciding we are in no way enlarging the meaning of the word "poor." It is the Poor-Law Act and the decisions of the Court which, for the purposes of the administration of public funds, have put a limited meaning upon the word, or perhaps it would be more accurate to say, have divided the poor into two categories—those who from age or physical infirmity are unable to gain a livelihood by industry, and those who are able to work, but who are unable to find employment. The first of these classes is the object of the benefits of the poor-law, the second is not. But in the construction of Mr Dunbar's bequest we have nothing to do with this artificial distinction, because his bequest is to be applied for the benefit of the poor of the parish, a description of persons which includes able-bodied but necessitous poor as well as those who are poor and infirm. I have no doubt that it would be open to this Parish Council to give assistance to persons having a legal claim as an addition to the relief given from the rates as well as to others who have no claim upon the rates. I am of opinion that the second branch of the first question should be answered in the affirmative.

LORD KINNEAR and LORD PEARSON concurred.

THE COURT answered the first alternative of the first question in the negative, and the second alternative in the affirmative.

ROBERT STEWART, S.S.C.—GRIEVE & SIMPSON, W.S.—Agents.

No. 33. THOMAS LOGAN (Archibald Clark's Trustee), Pursuer (Appellant).—*Morison, K.C.—J. Macdonald.*

Nov. 22, 1907. PETER M'ROSTIE, Defender (Respondent).—*Chree.*

Clark's
Trustee v.
M'Rostie.

Trust—Powers of Trustees—Non-gratuitous Trustees—Trust for behoof of creditors—Right of surviving trustee to act—Trusts (Scotland) Act, 1861 (24 and 25 Vict. cap. 84), sec. 1—Trusts (Scotland) Act, 1867 (30 and 31 Vict. cap. 97), sec. 1—Trusts (Scotland) Amendment Act, 1884 (47 and 48 Vict. cap. 63), secs. 1 and 2.—Held that the powers conferred on gratuitous trustees by the Trusts (Scotland) Act, 1861, are extended to non-gratuitous trustees by the Trusts (Scotland) Amendment Act, 1884; and that, consequently, the survivor of two trustees, nominated in a trust-deed for behoof of creditors which contained no clause of survivorship, had a good title to pursue an action on behalf of the trust.

Royal Bank of Scotland, May 31, 1893, 20 R. 741, followed.

1ST DIVISION.
Sheriff of
Perth.

ON 18th May 1906 Archibald Clark, grazier, Perth, granted a trust-deed for behoof of his creditors, whereby he assigned and disposed "to and in favour of Thomas Logan and William Smyttan Davidson, Perth, as trustees for the purposes after mentioned, and to his assignees, All and Sundry, the whole estates, heritable and moveable" belonging or due and indebted to the granter. The deed contained no provision of survivorship in the event of the death of one of the trustees. The

said William Smyttan Davidson died on 29th October 1906, while the trust was still subsisting. Nov. 22, 1907.

On 4th December 1906 an action was raised in the Sheriff Court at Perth by the said Thomas Logan, in which he designed himself as "trustee on the trust-estate of Archibald Clark, grazier, Perth, with the consent and concurrence of the said Archibald Clark." The action was directed against Peter M'Rostie, lately farmer at Findoglen, St Fillans. The sum sued for was £80, 14s., being the balance of an account for wintering sheep alleged to be due by the defender to Archibald Clark.

The defender pleaded, *inter alia*;—No title to sue.

On 7th March 1907 the Sheriff-substitute (Sym), holding that the trust was joint, sustained the plea of no title to sue and dismissed the action.

The pursuer appealed to the Sheriff (C. N. Johnston), and on 10th April 1907 the Sheriff affirmed the interlocutor of the Sheriff-substitute.*

* "NOTE.—I reach with reluctance the same conclusion as the Sheriff-substitute upon the case at common law. The *dicta* in the case of *Dawson v. Stirton*, 2 Macph. 196, have been quoted for forty years as establishing the proposition that a nomination of trustees in a trust-deed for creditors is joint, and that the appointment falls when one of the trustees fails, and I think that these *dicta* are binding in the Sheriff Court. There is force in the pursuer's contention that if the powers to assume new trustees and act by a quorum contained in section 1 of the Trusts Act of 1861 be read into this trust-deed, this displaces the rule, because the rule being based upon presumed intention, the conferring of such powers may reasonably be held to shift the presumption as being indicative that it was not regarded as vital that the trust should be administered by both the two trustees named and by nobody else. I doubt, however, whether it is warrantable in the Sheriff Court to treat a well-established rule of law as displaced by such an implication. Further, it is doubtful whether section 1 of the Act of 1861 applies to such a trust as the present. The matter has been treated as an open one by more than one commentator. It seems to stand thus—the Act of 1867 deals with trusts generally, without specifying that its application is limited to trusts where the trustees act gratuitously. In the case of *Mackenzie*, 10 Macph. 749, it was held (apparently with some difficulty) that the Act is so limited owing to its relationship to the Act of 1861. The Act of 1884 defines trusts for the purposes of the Trusts Acts generally, and it makes the word 'trustee' to include certain officers who do not act gratuitously. It provides, further, that the Trust Acts, 1861 to 1884, are to be read as one Act. Now, in the case of the *Royal Bank*, 20 R. 741, it was held that this is sufficient to get rid of the inferential limitation to gratuitous trusts in the Act of 1867 when that Act speaks of trustees and trusts without qualification. But section 1 of the Act of 1861 deals specifically with 'trusts under which gratuitous trustees are nominated.' It is not clear that reading into the Act of 1861 the definition of a trust in the Act of 1884, it becomes necessary to read the words 'under which gratuitous trustees are nominated' out of the Act of 1861. The question is a narrow one which might be decided either way without obvious error.

"The present case stands thus—There is a judgment of the Sheriff-substitute, the affirmance of which enables the pursuer to take the case to the Court of Session without the expense of further procedure, and does not deprive the interest which he represents of another remedy if he does not think fit to take that course. On the other hand, a reversal of the Sheriff-substitute's judgment infers (1) the disturbance of a hitherto recognised rule of law upon the strength of inferential deductions from statutory provisions not framed with any direct reference to that rule; (2) the decision in pur-

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The pursuer appealed to the Court of Session, and besides an argument on the common law, submitted the following argument on the statutory provisions affecting the question of title:—The *dictum* in *Dawson v. Stirton*¹ that the appointment of joint trustees, in a deed for behoof of creditors with no survivorship clause, lapsed on the death of one of them, whether sound at common law or not, was at anyrate no longer law, having been displaced by the Trusts Acts.* The Trusts Act of 1861 provided for a right of survivorship in the case of gratuitous trustees, and the provisions in favour of gratuitous trustees therein contained were extended to non-gratuitous trustees by the Trusts Amendment Act of 1884. The case of *Mackenzie*² was decided prior to 1884, and turned only on the provisions of the Trusts Act of 1867. The case of the *Royal Bank*,³ which was

suer's favour of what has hitherto been regarded as a narrow question of statutory construction as to the intended application of the Act of 1861; (3) the probability of further procedure and a proof in the Sheriff Court which may be rendered nugatory by a decision of the Court of Session that the pursuer has no title to sue.

"In these circumstances I conceive it to be my duty to affirm the Sheriff-substitute's interlocutor, not being clearly satisfied that the result at which he has arrived is erroneous in law."

* The Trusts (Scotland) Act, 1861 (24 and 25 Vict. cap. 84), sec. 1, enacts:—"All trusts constituted by any deed or local Act of Parliament under which gratuitous trustees are nominated shall be held to include the following provisions, unless the contrary be expressed; that is to say . . . power to such trustee, if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees; a provision that the majority of the trustees accepting and surviving shall be a quorum . . ."

The Trusts (Scotland) Act, 1867 (30 and 31 Vict. cap. 97), which proceeds on the preamble:—"Whereas by the Acts 24 and 25 Vict. cap. 84, and 26 and 27 Vict. cap. 115, certain powers are conferred on gratuitous trustees in Scotland, and it is expedient that greater facilities should be given for the administration of trust-estates in Scotland, . . ." in sec. 1 enacts:—"In the construction of this Act, and of the said recited Acts, the words 'trusts and trust-deeds' shall be held to mean and include all trusts constituted by virtue of any deed or by private or local Act of Parliament; and the words 'gratuitous trustees' in the sense of this Act, and of the said recited Acts, shall mean and include all trustees who are not entitled as such to remuneration for their services, in addition to any benefit they may be entitled to under the trust, or who hold the office *ex officio*, and shall extend to and include all trustees whether original or assumed, who are entitled to receive any legacy, or annuity, or bequest under the trust. . . ."

The Trusts (Scotland) Amendment Act, 1884 (47 and 48 Vict. cap. 63), which in the preamble recites, *inter alia*, the Acts 24 and 25 Vict. cap. 84, and 30 and 31 Vict. cap. 97, enacts, sec. 1:—"This Act may be cited as the Trusts (Scotland) Amendment Act, 1884, and the said Acts and this Act may be cited as the Trusts (Scotland) Acts, 1861 to 1884, and shall be read and construed together." Section 2:—"In the construction of the said recited Acts and of this Act 'Trust' shall mean and include any trust constituted by any deed or other writing or by private or local Act of Parliament, or by resolution of any Corporation or public or ecclesiastical body, and the appointment of any tutor, curator, or judicial factor by deed, decree, or otherwise. . . ."

¹ Dec. 4, 1863, 2 Macph. 196.

² May 28, 1872, 10 Macph. 749.

³ Royal Bank of Scotland, May 31, 1893, 20 R. 741.

directly applicable here, was decided after the passing of the 1884 Act, and in it the Court, applying that Act, arrived at a directly opposite decision on the same point that had been raised in the case of *Mackenzie*.¹ Nov. 22, 1907.
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Argued for the respondent (on the statutes);—The case of *Mackenzie*¹ decided that the Act of 1867 applied only to gratuitous trustees. All that the subsequent case of the *Royal Bank*² decided was that where “trust” was used without qualification in the Act of 1867 it included, by virtue of the provisions of the 1884 Act a non-gratuitous trust. That Act and that decision, however, had done nothing to take away express qualifications of the word “trust,” and therefore had not interfered with the express limitation of the provisions of section 1 of the 1861 Act to gratuitous trusts. Consequently, this not being a gratuitous trust, the provisions of that section could not apply.

LORD PRESIDENT.—I think that this case is exceedingly clear on the statute, although there is a difficult point that might arise at common law which, however, we are not called on to decide. The facts are that a certain gentleman granted a trust-deed for behoof of his creditors, in which he appointed two trustees, but there was no survivorship clause in the trust-deed. One of these trustees has died, and the other trustee, with the consent of the truster, now sues for a debt due to the truster. The plea taken by the defender is the plea of no title to sue, and that plea has been upheld by the Sheriff-substitute and affirmed, though with obvious hesitation and dislike, by the Sheriff, on the ground that where a trust for behoof of creditors is created in favour of joint trustees, and one of them dies, the trust thereupon falls. At common law that situation presents a very difficult question, but I think upon the statutes it is clear. By the Act of 1861 undoubtedly a title was given to a trustee in this position, but that Act was limited by the expression in the first section to those classes of trust-deeds under which gratuitous trustees were appointed. Then came the Act of 1867, and the Act of 1867 probably, in the eyes of its authors, was really meant to extend the scope of the beneficial legislation of 1861 to trusts of a wider class, but unfortunately there was a very slovenly definition clause which one cannot help thinking had not the effect which its authors wished. Among the clauses of the Act of 1867 was a certain clause 12, which provided that when any trustees cannot be assumed under any trust-deed application should be made to the Court. Now, shortly after that a case was brought in this Court—the case of *Mackenzie*¹—where application was made under that section in the case of a trust where the trustees were not gratuitous. The Court there held that although the word “trust” in section 12 was unqualified in that section, yet it was qualified when you took the two statutes of 1861 and 1867 together, and that consequently the application could not be granted. The plain meaning of that was this, that upon the true construction of section 12 of the Act of 1867 you really had to read “trust” as if it repeated the qualification of “trust” given in the Act of 1861—namely, not all trusts, but only trusts such as are constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated. Then came the Act of 1884, and in the

¹ 10 Macph. 749.

² 20 R. 741.

Nov. 22, 1907. Act of 1884 there was a definition of "trust" in a much wider sense. There was a provision that all the Trusts Acts should be read together, and there was not repeated the bungle that had been committed in the Act of 1867. Accordingly, shortly after the Act of 1884, there came the case of the *Royal Bank*.¹ The *Royal Bank* case¹ exactly repeated the application which had been made in the *Mackenzie* case,² but with an entirely opposite result, because the Court in that case held that the Act of 1884 succeeded in enacting what the Act of 1867 did not; in other words, the Act of 1884 by means of its general definition read back the word "trust" in the general sense and took away the qualification of the Act of 1861. That seems to me to settle the matter, because if that qualification is read out, then we have the permissive provision of section 1 of the Act of 1861 applied, not to trusts qualified as they were qualified in that section by the words which I have read, but to trusts amplified by the larger definition of the Act of 1884. I am, therefore, for allowing the appeal and remitting the case to proceed upon the merits.

LORD M'LAREN.—I concur.

LORD KINNEAR.—I agree. I think that the case of the *Royal Bank*¹ is directly in point.

LORD PEARSON.—I also concur.

THE COURT sustained the appeal, recalled the interlocutors of the Sheriff and Sheriff-substitute, dated 10th April and 7th March 1907, repelled the first plea in law for the defender, and remitted to the Sheriff-substitute to proceed.

P. MORISON & SON, S.S.C.—DOVE, LOCKHART, & SMART, S.S.C.—Agents.

No. 34.

MRS MARTHA GERTRUDE BREEZE OR MACKENZIE, Pursuer
(Reclaimer).—*Watt, K.C.—Spens.*

Nov. 23, 1907.

CLUNY HILL HYDROPATHIC COMPANY, LIMITED, Defenders
(Respondents).—*Sol.-Gen. Ure—C. D. Murray.*

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Reparation—Master and Servant—Liability of master for wrongful act of servant—Wrongous Detention—Issue.—A lady, who had been a guest at a hydropathic establishment, brought an action of damages against the proprietors of the Hydropathic, in which she averred that when she was at the Hydropathic she went, at the request of the defenders' manager, to his private room; that she there found a Mr and Mrs R., who were fellow guests; that Mrs R. had conceived an ill-will against the pursuer, and that the defenders' manager knew this; that Mr and Mrs R. placed themselves against the door to prevent the pursuer from leaving the room; that the manager said that he would not allow the pursuer to leave the room until she apologised to Mrs R. for slamming a door in her face—"a thing the pursuer had never done"—and that the manager aided and abetted Mr and Mrs R. in preventing the pursuer from leaving the room for about fifteen minutes.

The defenders pleaded that the action was irrelevant in respect that the pursuer's averments shewed that the manager was not, on the occasion in question, acting within the scope of his employment.

Held (rev. judgment of Lord Salvesen) that the pursuer's averments were relevant.

Form of issue allowed.

¹ 20 R. 741.

¹ 10 Macph. 749.

In October 1906 Mrs Martha Gertrude Mackenzie, residing at 25 Montpelier Park, Edinburgh, brought an action against the Cluny Hill Hydropathic Company, Limited, Forres, concluding for decree for £400 as damages. Nov. 23, 1907.
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The pursuer averred :—(Cond 2) “ On or about 19th August 1906 the pursuer was residing at the defenders’ hydropathic, Forres, owned by the defenders, who are a limited company. The manager thereof at said date was Thomas M’Nair, who was entrusted by the defenders with the management of the hydropathic and the supervision of the comfort of the guests in the defenders’ hydropathic.” (Cond. 3) “ Late in the evening of the date in question the defenders’ said manager went to the recreation-room, where pursuer was, and requested her presence in his private room, saying that a lady, who was ill, wished to see her, and in accordance with the said request the pursuer went to the said private room. The pursuer went to the said room by request of the said Thomas M’Nair, believing as was the fact, that in making the said request he was acting as the defenders’ manager.” (Cond. 4) “ When the pursuer arrived in the said private room she found there a Mr and Mrs Robertson, of 2 Lilybank Gardens, Hillhead, Glasgow, who were her fellow guests in the hydropathic. The said Mrs Robertson had, for some reason or another unknown to the pursuer, conceived an ill-will against her. There were also present Mrs M’Nair, wife of the said Thomas M’Nair, and the said Thomas M’Nair. The pursuer was detained for a considerable period against her will in the said private room, and an assault was committed upon her by the said Alexander Robertson. The said Alexander Robertson also slandered her by calling her a low woman, and alleging she had previously caused disturbances ‘ here.’ The pursuer endeavoured to leave the manager’s room. She put her hand on the handle of the door and the said Alexander Robertson then stepped between her and the door, and struck her hand from the handle. Mr and Mrs Robertson then both placed themselves against the door to keep it shut. The pursuer then pointed out to the defenders’ manager that she was being forcibly detained in the said room, and asked him to see that she was allowed to leave, but this the said manager refused to do. The said manager, for some fifteen minutes, then aided and abetted the Robertsons in preventing the pursuer from leaving the said room in manner aforesaid. The said manager neither ordered nor even requested the Robertsons to let the pursuer out nor did he ring the bell or take any other steps open to him to have the pursuer’s detention ended. Had the defenders’ manager requested the Robertsons to allow the pursuer to leave the room, the pursuer believes and avers they would have done so. Had the manager summoned assistance by ringing the bell, or in any other way, assistance would have been forthcoming, and the pursuer’s detention ended. Although the pursuer was anxious to leave the said room, and so expressed herself to the defenders’ manager, she was nevertheless detained and prevented from leaving the said room for a considerable period (about fifteen minutes) by the said manager, who said he would not allow her to leave the room till she apologised to Mrs Robertson for slamming a door in her face—a thing she, the pursuer, had never done.” (Cond. 5) “ In asking pursuer to go to his private room, and in detaining her there against her will as aforesaid, the defenders’ manager was acting within the scope of his employment and in the supposed furtherance of the defenders’

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interests. He had no right, in the circumstances, to induce the pursuer to go to his room when he knew, as he did, that the Robertsons had an ill-will towards her, and that she would be unprotected, and he was bound to have at once seen that she, the defenders' guest, was allowed to leave the room when she wished to. He failed in his duty, and along with Robertson and his wife, detained her in the said room for a considerable period. Such detention was illegal and improper, and the defenders are liable therefor to the pursuer for the loss, injury, and damage occasioned thereby." (Cond. 6) "Through the illegal actings of the defenders' servant as above condescended on, the pursuer was illegally detained for a considerable period in the defenders' room, and thereafter subjected to assault and slander by the illegal and improper actings of the defenders' said manager in inviting her into the said private room, and thereafter allowing her to be detained there against her will. By the said detention the pursuer suffered in her feelings and health, and was subjected to great indignity, and the matter soon became known in the establishment."

The pursuer pleaded ;—(1) The pursuer having suffered loss, injury, and damage through the wrongous and illegal actings of the defenders' servant as condescended on, decree should be granted as craved. (2) The defenders' servant, acting within the scope of his authority from the defenders, having wrongously induced the pursuer to enter his private room, and thereafter having wrongfully detained the pursuer there as condescended on, decree should be granted as craved.

The defenders pleaded, *inter alia* ;—(2) The pursuer's averments are irrelevant, and insufficient to support the conclusions of the summons.

The pursuer proposed the following issue for the trial of the cause :—"Whether, on or about 19th August 1906, the defenders' manager, Thomas M'Nair, acting within the scope of his employment by the defenders, induced the pursuer to enter his private room in the defenders' hydropathic aforesaid, and wrongously detained or allowed her to be detained there, to her loss, injury, and damage? Damages laid at £400."

The pursuer also raised an action of damages for assault and slander against Mr and Mrs Robertson, and had obtained an award of damages before the reclaiming note in the present action came on for hearing.

On 10th January 1907 the Lord Ordinary (Salvesen) pronounced this interlocutor :—"Finds that the allegations of the pursuer are not relevant and sufficient to support the conclusions of the summons, and decerns." *

* "OPINION.—The pursuer of this action avers that on 19th August 1906 she was a guest in the hydropathic belonging to the defenders, that on the evening of that day she was summoned by the manager to his private room, and that when she arrived there she was slandered and assaulted by two fellow guests—Mr and Mrs Robertson. She has already raised an action against these persons, in which issues have been adjusted—there being no question of the relevancy of her averments as against them. She maintains, however, that she has a separate ground of action against the present defenders on the ground that their manager detained her in the room against her will for a considerable period (about fifteen minutes). She avers that in doing so he was acting within the scope of his employment and in the supposed furtherance of the defenders' interests.

"The injury which the defenders' manager is said to have done to the

The pursuer reclaimed, and argued ;—(1) There was here a relevant averment of an actionable wrong committed by the defenders' manager upon the pursuer. For the manager of a hydropathic to detain a guest at the establishment in his private room because she would not apologise to a fellow guest was, in itself, plainly an actionable wrong. It might be that the pursuer here did not aver that the manager did anything positive in the way of detention, but he was the manager of the defenders' hydropathic, and it could not be doubted, that with the means which, as manager, he had at his disposal, he could at once have put an end to the scene had he chosen, instead of which he allowed the Robertsons to bar the door against the pursuer for fifteen minutes, which was just the same thing as if the manager had done it himself. (2) In so acting the manager was acting within the course of his employment, and consequently the defenders were liable. Although the particular act might not be authorised, still if the act was done in the course of employment which was authorised,

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pursuer is so small as to be almost microscopic. It is not said even in the amended record that he laid hands upon her or that he in any way actively contributed to her detention in the room. This is part of her grievance against Mr Robertson, who is said to have stood against the door and prevented her from opening it. The complaint against the manager seems rather to be that he did not intervene to protect her against the Robertsons by ringing the bell or otherwise summoning assistance, or by requesting the Robertsons to permit her to leave. It is not suggested that he could thereby have prevented the alleged assault, but only that he might possibly have shortened her detention in the room by some minutes. Even against the manager, therefore, it does not appear to me that it would be possible to construct a relevant case. It follows that if there can be no action against the servant because of his non-intervention in the quarrel between the pursuer and the Robertsons there can be no possible claim against his employers.

"There is, however, another and separate ground on which I think that the defenders are entitled to be assoilzied. It was decided in the case of *Poulton*, L. R., 2 Q. B. 534, that the scope of a servant's authority is always limited to such acts as the employers could lawfully do themselves. For a mistake or excess in committing such an act by a servant his employer may well be held responsible, but not for an act which the employers cannot be supposed to have authorised, because they had no authority to do it themselves. I assume that it is part of the duty of a manager of a hydropathic to attend to the comfort of the guests as the pursuer avers, but it would be odd if I were required to hold that this impliedly authorised him to be a party to the detention of one guest in order to gratify the ill-will of another. The pursuer was unable to cite any authority for such a novel proposition. The only case referred to was that of *Bryce v. The Glasgow Tramway Company*, 6 S. L. T. 49. It has, in my opinion, absolutely no application. The act which the servant in that case was alleged to have done in a careless and reckless manner was an act which it was his duty towards his employers and in their interests to do, and accordingly the action was well directed against his employers.

"I shall accordingly assoilzie the defenders, and I have the less hesitation in doing so as it appears to me to be plainly in the interests of the pursuer that she should not be embarrassed with a second action for damages arising out of the self-same *species facti* as have already been remitted for trial by a jury. If she succeeds in that case she will recover full compensation for all injury that she has suffered; if she fails it is scarcely conceivable that she could recover against the present defenders."

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the master was liable.¹ The case of *Poulton*² did not support the broad general proposition for which the Lord Ordinary cited it; if it did it was wrongly decided. To hold, as the Lord Ordinary had held, that "the scope of a servant's authority is always limited to such acts as the employers could lawfully do themselves," would put an end to all actions of damages *ex delicto* against an employer on account of the acts of his servant, for an employer could never lawfully do an illegal act. In the present instance it was undoubtedly within the scope of the manager's authority to promote peace and harmony among the guests, and to endeavour to settle any disputes that might arise among them, and if the means he used to that end were illegal and wrongful, he was still acting within the scope of his authority although he was doing it badly. (3) The principle *de minimis non curat praetor* did not apply to actions of damages *ex delicto*. Besides, here the indignity of which the pursuer complained was not trifling.

Argued for the defenders;—(1) There was not here any relevant averment of an actionable wrong committed by the defenders' manager. It was not said that he had actually done anything in the way of detaining the pursuer; all that was said was that he had allowed the Robertsons to detain her. The pursuer's proposed issue shewed that she was conscious of this difficulty, for she proposed to put in issue whether the defenders' manager "wrongously detained or allowed her to be detained." If an issue was allowed, the words "or allowed . . . to be detained" ought to be deleted. These words either meant the same thing as "detained," in which case they were superfluous, or, if they meant something different, they were too vague. The issue was also objectionable in putting substantively whether the manager "induced" the pursuer; that *per se* certainly was not a ground of action. (2) Further, the pursuer had not relevantly averred that the defenders' manager in what he did was acting within the scope of his employment. Where an action was laid upon a contract entered into by a servant on behalf of his employer, the employer was *prima facie* liable—he took the risk of the servant exceeding his authority; but where the action was founded on a wrong committed by the servant the presumption was the other way. In such a case the pursuer must aver facts from which it could be inferred that the servant was acting in the course of his employment and for his employer's benefit.³ Here the pursuer's condescendence shewed the very opposite. She stated that Mrs Robertson had conceived a feeling of ill-will towards the pursuer; that the manager knew this; and that he intervened on Mrs Robertson's behalf in order to oblige the pursuer

¹ *Citizens' Life Assurance Co. v. Brown*, L. R., [1904] A. C. 423, *per* Lord Lindley, at pp. 427-8; *Wood v. North British Railway Co.*, Feb. 14, 1899, 1 F. 562; *Ellis v. National Free Labour Association*, May 12, 1905, 7 F. 629; *Maxwell v. Caledonian Railway Co.*, Feb. 5, 1898, 25 R. 550; *Bryce v. Glasgow Tramway and Omnibus Co.*, June 14, 1898, 6 S. L. T. 49; *Limpus v. London General Omnibus Co.*, 1862, 1 H. & C. 526; *Dyer v. Munday*, L. R., [1895] 1 Q. B. 742; *Ward v. General Omnibus Co.*, 1873, 42 L. J., C. P. 265.

² *Poulton v. London and South-Western Railway Co.*, 1867, L. R., 2 Q. B. 534.

³ *Wardrope v. Duke of Hamilton*, June 24, 1876, 3 R. 876; *Lundie v. MacBrayne*, July 20, 1894, 21 R. 1085; *Gillespie v. Hunter*, May 28, 1898, 25 R. 916; *Limpus v. London General Omnibus Co.*, 1 H. & C. 526; *Poulton v. London and South-Western Railway Co.*, L. R., 2 Q. B. 534.

to apologise to Mrs Robertson. In so acting the manager was not acting within the scope of his employment with the defenders. At all events, the pursuer could not have it both ways. Either the manager was acting in concert with the Robertsons, in order to give them an opportunity of gratifying their alleged feelings of ill-will, in which case the manager was not acting within the scope of his employment with the defenders, for it certainly was not part of his duties to give one guest an opportunity of gratifying feelings of ill-will towards another guest; or the manager preserved an entirely neutral attitude throughout the incident, in which case he neither detained nor allowed the pursuer to be detained. (3) The whole affair was trifling and the action ought to be dismissed on the principle *de minimis non curat praetor*. The pursuer had already obtained damages from the Robertsons, and she was not entitled to split up what was only one incident so as to make it the subject of different actions.¹

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LORD JUSTICE-CLERK.—I cannot see any ground for treating this case as one which ought to be disposed of without the facts being first ascertained. Such cases necessarily depend very much on the particular facts, and if this record does not present such features as make it necessary to assume that the manager of the hydropathic establishment was not acting in the course of his employment, then I think it must be allowed to go to trial.

I do not think a case of this kind can be dealt with on any application of the *de minimis* principle, at least until the whole facts are found. It is on the facts alone that the question of *de minimis* can arise.

We had a suggestion from the Solicitor-General that the manager could not be acting in the course of his employment because the pursuer says that he induced her to go to his room because a fellow-guest had conceived an ill-will towards her and he knew it, and that therefore he was acting not as manager but in the private interests of the other guest. That, of course, is a statement which they will be entitled to prove. But the case is of this kind, that this lady says that she went willingly to the manager's room and was detained there against her will for an appreciable time. The manager certainly got her to go there while acting in the course of his employment, and I do not see any ground for saying that on the statements made on this record he must have ceased so to act before she was detained. I must say that I think the statement quoted to us from the opinion of Lord Lindley in the case of the *Citizens' Life Assurance Company v. Brown*² is applicable to this case. "The law upon this subject cannot be better stated than it was by the acting Chief Justice in this case. He said: 'Although the particular act which gives the cause of action may not be authorised, still if the act is done in the course of employment which is authorised, then the master is liable for the act of his servant.'" I can have no doubt that the manager of a hydropathic establishment is authorised to interfere in the way referred to in this case when there is a quarrel between guests, and to bring them together to have the matter put right. If in the course of so doing he commits an actionable wrong, I have

¹ Ferguson v. Colquhoun, July 19, 1862, 24 D. 1428; Hassan v. Pater-son, June 26, 1885, 12 R. 1164.

² L. R., [1904] A. C. 423, at pp. 427-8.

Nov. 28, 1907. no doubt the master is liable. I propose to your Lordships that we allow an issue.

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LORD STORMONTH-DARLING.—It is only because we are reversing the judgment of the Lord Ordinary that I add anything to what has been already said by your Lordship. The main question at this stage of the case is whether there are relevant averments of an actionable wrong for which the manager's principal, i.e., the Hydropathic Company, may be liable. I think it must be admitted that the wrong, if wrong there was, was a very small one, for the averments of the pursuer at most amount to this, that the manager persuaded the pursuer to enter his private room, and detained her there against her will for some fifteen minutes.

I think, however, that these averments are relevant, and that the case must go to a jury. I am accordingly in favour of allowing an issue, although I hope that parties may yet see their way to settling this insignificant dispute. I think it unnecessary to attempt to improve on the statement of the law applicable to such cases which has already been made by many eminent Judges. I am content to take the statement quoted by your Lordship from the opinion of Lord Lindley in the *Citizens' Life Assurance Company v. Brown*.¹ Applying that law, I think the facts must be ascertained, unless it clearly appears from the pursuer's own averments that the servant was *not* acting in the course of his employment.

LORD LOW.—I am of the same opinion. We are asked to throw out this action upon three grounds: (First) that there are no relevant averments of an actionable wrong; (second) that upon the averments it is evident that the manager was not acting within the scope of his employment or in the course of his duty; and (third) that in any event the whole affair was trifling and the damage suffered negligible. In regard to the first of these grounds I have no doubt that a wrong, and in my view not a trifling wrong, has been averred. It is averred that the manager detained this lady in his room for fifteen minutes after the assault had been committed, and refused to let her go until she made an apology. If that be true it was an outrage, and a relevant case has been stated.

As to the second ground I have nothing to add to what has been said by your Lordship. It cannot be doubted that the manager, at first at all events, intervened in his capacity as manager, and there must be inquiry to find out whether in his subsequent actings he abandoned that capacity and acted as a private individual. As to the third ground, if an actionable wrong was committed, it does not matter that *prima facie* the pursuer sustained but little injury, she is, at anyrate, entitled to ask a jury to assess the damage.

LORD ARDWALL.—I regret that I feel bound to concur with the opinion your Lordships have expressed that this case must be sent to a jury. I cannot accept without considerable qualification the law laid down by the Lord Ordinary, and although the case is a narrow one, I am not prepared

¹ L. R., [1904] A. C. 423.

to say that it is irrelevant. While there is much force in Mr Murray's con- Nov. 28, 1907.
 tentation that the whole affair was really one incident, which a jury have Mackenzie v.
 already considered, and for which they have already awarded the pursuer a Cluny Hill
 certain sum of damages, still, if the averments are carefully scrutinised, it Co., Limited.
 is apparent that two separate wrongs are complained of: (Firstly) slander Lord Ardlwall.
 and assault by Robertson (the case already considered by a jury); (secondly)
 illegal detention by the manager (the case in which an issue is now asked).
 It cannot, therefore, be maintained that the pursuer is not entitled in
 law, if not in equity, to bring a second and separate action. I express no
 opinion as to the nature of the injury she sustained; that is a question for
 the jury.

THE COURT recalled the interlocutor of the Lord Ordinary, and
 allowed an issue in the following terms as amended, viz.:—
 “Whether, on or about 19th August 1906, the defenders’
 manager, Thomas N’Nair, acting within the scope of his
 employment by the defenders, having induced the pursuer to
 enter his private room in the defenders’ hydropathic establish-
 ment, wrongously detained her there,—to her loss, injury, and
 damage?

“Damages laid at £400.”

BRYSON & GRANT, S.S.O.—ROBERT STEWART, S.S.O.—Agents.

GEORGE EADIE AND OTHERS, Petitioners (Respondents).—*Dickson, K.C.* No. 35.
 —*Hon. W. Watson.*

THE RIGHT HON. WILLIAM BILSLAND AND OTHERS (Magistrates, &c. of Nov. 21, 1907.
 Glasgow), Respondents (Reclaimers).—*Hunter, K.C.*—*Macmillan.* Eadie v.
 JAMES AITCHISON JOHNSTON AND OTHERS, Minuters.— Glasgow
 Corporation.
Hon. H. D. Gordon.

*Burgh—Burgh Accounts—Objections to accounts—Time for lodging
 objections—Royal Burghs (Scotland) Act 1822 (3 Geo. IV. cap. 91), secs. 1, 3
 and 10—Royal Burghs (Scotland) Act, 1833 (3 and 4 Will. IV. cap. 76), sec.
 32—Glasgow Municipal Act, 1879 (42 and 43 Vict. cap. cxxiii.), sec. 10.—
 The Royal Burghs Act, 1822, sec. 1, enacts that accounts relating to the
 Common Good and revenues of royal burghs shall be made up annually
 to the day preceding the date of the annual election of magistrates, i.e., in
 November.*

Sec. 3, enacts that every such annual account shall be deposited with the
 Town-clerk within three months after the annual election of magistrates,
 and that the account shall remain, for thirty days, open to the inspection of
 burgesses who may state objections within that period or within two months
 thereafter.

The Royal Burghs Act, 1833, sec. 32, enacts that the magistrates and
 councils of royal burghs shall on or before 15th October make up the
 annual account down to that date, and that the account shall be kept open
 to the inspection of any of the registered electors from 15th October till
 the election of the council.

These Acts, though repealed generally by the Town-Councils (Scotland)
 Act, 1900, still remain in force, as regards the sections above referred to, in
 Glasgow, in virtue of a resolution by the Corporation under section 109 of
 that Act.

The Glasgow Municipal Act, 1879, alters the date for making up the
 accounts for Glasgow from 15th October to 31st May.

Nov. 21, 1907. On 7th May 1907, within the time allowed for objections by the Royal Burghs Act of 1822, certain burgesses of Glasgow, by a letter addressed to the Town-clerk, objected to an item charged in the Common Good account for the year ending 31st May 1906, and on 7th June 1907 presented a petition and complaint praying the Court to disallow the charge.

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The Corporation of Glasgow, besides answers on the merits, maintained that the objections were too late, contending that the alterations made on the date for lodging the annual account involved a corresponding change in the date for objecting to the account.

Held (aff. judgment of Lord Johnston) that the statutory provisions in the Act of 1822 as to lodging objections to the annual account were not affected by the alteration of the date for making up and lodging the account.

Process—Citation—Corporation—Citation of Corporation by citing its members—Disclaimer of defence by certain members.—A corporation was cited by calling its members by name, as representing the corporation but not as individuals. The majority of the corporation resolve to defend the action. *Held* that they were entitled to lodge defences in name of the whole members as representing the corporation, and that dissenting members were not entitled to disclaim the defences.

1st Division.
Exchequer
Cause.
Ld. Johnston.

ON 7th June 1907 George Eadie and two others, all burgesses of the city and royal burgh of Glasgow, presented to the Court a petition and complaint in terms of the Acts 3 Geo. IV. cap. 91, and 19 and 20 Vict. cap. 56, and relative Acts of Sederunt, in which they objected to an item entered in the accounts of the city and burgh of Glasgow for the year ending 31st May 1906. They prayed that the petition should be served upon "the Right Honourable William Bilsland, residing at 28 Park Circus, Glasgow, Lord Provost; Peter Gordon Stewart, brush manufacturer, 518 Victoria Road, Glasgow," and thirteen others, all therein named and designed, "all magistrates; and Robert Harvie, baker, 145 Greenhead Street, Glasgow," and sixty-four others, all therein named and designed, "all members of the Town-Council of Glasgow, being the Lord Provost, Magistrates, and members of the Town-Council of the city and royal burgh of Glasgow."

The petitioners set forth that the last annual election of the Magistrates of the city and royal burgh of Glasgow took place on 9th November 1906, and that the last stated annual account of the Common Good and revenues of the said city and royal burgh was an account for the year from 1st June 1905 to 31st May 1906. That in the balance-sheet stated in said account there was entered the following item:—"Taxation of land values (suspense account), including £1142, 9s. 6d. spent during the year, £2457, 2s. 1d." That they objected to this item; and on 7th May 1907, by letter addressed to the Town-clerk, they stated objections in writing, including, *inter alia*, the following:—"We object to the item of £2457, 2s. 1d. appearing at page 16 of the Common Good accounts for year ending May 31, 1906, under the heading of 'Taxation of Land Values,' on the ground that the sum has been illegally spent in promoting a public Parliamentary Bill for the whole country, called the 'Taxation of Land Values Bill,' notwithstanding the instructions of the Town-clerk, Sir James Marwick, that such expenditure would be illegal. We also call for the production of the vouchers vouching the above entry, and give notice that we intend to bring the above illegal expenditure and failure to comply with said Act, by way of complaint before the said Court." They further stated that no vouchers had been produced for their inspection, and that accordingly they objected to the said item,

except in so far as it might be duly vouched to represent expenditure in petitioning Parliament in favour of the bill or in asking Members of Parliament to support the bill; and they craved the Court "to disallow the said item of £2457, 2s. 1d. as a charge against the Common Good or revenues of the city and royal burgh of Glasgow, or so much of said item as may be found in the course of the proceedings to follow hereon not to be chargeable against the said Common Good or revenues, and to ordain the said account to be rectified accordingly."

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The making up of the annual accounts of the royal burgh of Glasgow, and the stating of objections thereto by the burgesses, are regulated by the following statutes. The Royal Burghs (Scotland) Act, 1822 * ("Sir William Rae's Act") provides by section 1 that an account of the Common Good and revenues of every royal burgh shall be made up to "the day preceding the general annual election of magistrates in each burgh"; and, by section 3, that it shall be deposited within three months thereafter for inspection by the burgesses, and that objections may be stated thereto by any burghess within a fixed period (amounting *in cumulo* to five months and thirty days) from the date of that election.

The Royal Burghs (Scotland) Act, 1833 † ("The Burgh Reform

* The Royal Burghs (Scotland) Act, 1822 (3 Geo. IV. cap. 91), enacts:—
Sec. 1. "From and after the passing of this Act, a particular account of the Common Good and revenues of every royal burgh of Scotland, made up to the day preceding the general annual election of magistrates in each burgh, shall be annually stated and deposited in the manner directed by this Act, which account shall be so made out as to exhibit a complete state, showing the Common Good of each burgh classed under different heads. . . ."

Sec. 3. "And be it enacted that every such annual account shall be deposited in the office of the town-clerk of the burgh to which it appertains within three months after the annual election of the magistrates thereof; and such account shall remain there for thirty days after the expiration of the said three months open to the inspection of the burgesses, who may state objections thereto in writing, either during that time or within two months after the expiration of the said thirty days, and be entitled to call in writing for the production of any particular vouchers, and if upon such objections being made the party or parties making the same shall not be satisfied with the explanations which may or shall be thereupon given, it shall and may be lawful for any three or more burgesses of such burgh, within three calendar months after the expiration of the said thirty days to make complaint in writing to the barons of the Court of Exchequer in Scotland, who shall proceed to determine the same in a summary manner, and to make and establish such rules and regulations, as to the said barons shall seem meet, for hearing and determining all matters that may come before them upon such complaints; provided always that no objections shall be stated in any such complaint that had not been previously during the time above mentioned stated in writing to the accounts, unless upon sufficient cause shewn, to the satisfaction of the said barons, why such objection was not then stated."

Sec. 10. " . . . In the event of no complaint being made to any annual account within the time herein limited, it shall not be competent thereafter to complain to such Court in regard to such account."

† The Royal Burghs (Scotland) Act, 1833 (3 and 4 Will. IV. cap. 76), enacts:—Sec. 32. "And be it enacted that the existing magistrates and council in all royal burghs shall, on or before the fifteenth day of October, in the present and in all future years, make up a distinct state of their affairs subscribed by the chief or senior magistrate, town-clerk, and treasurer, containing an account of all the funds, properties, and revenues in their admini-

Nov. 21, 1907. Act") provides, in section 32, for the accounts of all royal burghs being made up on or before the 15th day of October in each year, and deposited for inspection by the electors on that day.

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The Glasgow Municipal Act, 1879,* provides in sec. 10 that the annual accounts of the burgh of Glasgow may be made up as at the 31st of May in each year, "and no other annual state of affairs or account than that hereby authorised shall be required to be made up." Neither of the Acts last referred to contained any provisions with regard to the stating of objections to the accounts.

The Town-Councils (Scotland) Act, 1900 (63 and 64 Vict. cap. 49), repealed the Acts of 1822 and 1833 above referred to, and enacted a uniform system of keeping, exhibiting, and auditing the annual accounts of burghs in Scotland, but it contained a provision enabling certain of the larger burghs, of which Glasgow was one, by resolution to determine that the provisions of the repealed Acts with regard to the annual accounts should continue to apply to these burghs in lieu of the new provisions introduced by the Act of 1900. The burgh of Glasgow exercised that option, and resolved that the provisions of the said Acts of 1822 and 1833 should apply to Glasgow in lieu of the provisions of the Act of 1900.

Answers were lodged to the petition on behalf of all the persons called as respondents, "all members of the Town-Council of Glasgow, being the Lord Provost, Magistrates, and members of the Town-Council" of Glasgow. The answers, besides stating defences on the merits, contained this statement:—"The present answers have been lodged on behalf of the members of the Town-Council of Glasgow in their official and representative capacity with a view to having the general question raised by the petitioners judicially determined, in terms of a remit made at the meeting of the said Town-Council on 19th June 1907 to the Town-clerk and the City Finance Committee, empowering them to lodge answers to the present petition and complaint. It is explained, however, that at the said meeting five of the members of the Town-Council called as respondents hereto intimated that so far as they were personally concerned they did not authorise the lodging of answers on their behalf, while a number of the members of the Town-Council called as respondents were not

stration, and of all their transactions in relation to such funds, properties, and revenues, since they came into office, which account shall be brought down as nearly as may be to the said fifteenth day of October, and shall be kept in the town-clerk's or treasurer's office, for the inspection of any of the registered electors, from the said fifteenth day of October down till the time of the election; and a full and distinct abstract of the said account, with a balance-sheet containing all necessary particulars, shall be printed and published by the said magistrates on or before the twentieth day of the said month of October."

* The Glasgow Municipal Act, 1879 (42 and 43 Vict. cap. cxxiii.), enacts:—Sec. 10. "The Lord Provost, Magistrates, and Council may cause the state of affairs which they are required to make up annually on or before the fifteenth day of October in each year, by section 32 of the Act third and fourth William the Fourth, chapter 76, to be made up as at the thirty-first day of May in each year, with the annual accounts or statements of the various other trusts under their administration, and the said thirty-first day of May shall be substituted for the said fifteenth day of October; and no other annual state of affairs or account than that hereby authorised shall be required to be made up by them."

members thereof when the whole or part of the expenditure complained of was incurred or authorised, or do not admit that they concurred in sanctioning the same, and, accordingly, disclaim personal responsibility therefor.”

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A minute was subsequently lodged in process on behalf of James Hunter and nineteen others, all respondents in the action, which stated that “they gave no instructions or authority for appearance being entered or for answers being lodged in their names in this petition and complaint, and they therefore disclaimed, and hereby disclaim, the entering appearance for them and the said answers so far as they are concerned.”

On 19th July 1907 the Lord Ordinary (Johnston) pronounced this interlocutor:—“Sustains the minute of disclaimer for James Hunter and others, No. 27 of process: Finds the remaining compearing respondents liable in expenses to the said James Hunter and others: Modifies the same at £3, 3s., for which sum decerns against the said remaining respondents: Having heard counsel for the petitioners and complainers, and for the said remaining respondents, on the preliminary objection for the latter, that the petition and complaint has not been timeously brought, and considered the cause, repels the said objection: Appoints the said remaining respondents to produce in process, at or prior to the first box-day in the ensuing vacation, a detailed account, with relative vouchers, of the item on page 16 of their abstract of accounts, No. 23 of process, which is the subject of objection and complaint: Grants leave to reclaim.”*

* “OPINION.—(After narrating the objects of the petition)—The Corporation, or rather those members who appear to defend, for a large number have disclaimed the defence, state the preliminary plea that the objection was not timeously taken, and that it is now, by virtue of section 10 of Sir William Rae’s Act of 1822, incompetent to complain to the Court in regard to any entry in the account for the year ending 31st May 1906. . . .

“I think that the objection was timeously stated, and that there is nothing to prevent my entertaining the complaint on the merits.

“As the contention was seriously maintained, and as the Corporation intimated that they desired an authoritative construction of the statutes bearing upon this point, which is doubtless of importance to the Finance Department of the city, it is right that I should explain at some length my reasons for coming to the above conclusion.”

(His Lordship pointed out that secs. 1 to 4, and 9 and 10 of Sir William Rae’s Act of 1822, and sec. 32 of the Burgh Reform Act 1833, remained in force, or were revived, with regard to Glasgow, and continued)—

“I would now draw attention to the enactments of Sir William Rae’s Act of 1822. It proceeded on the preamble that it was expedient that regular accounts should be annually stated and exhibited of the Common Good of the royal burghs of Scotland, shewing the property and funds as well as the encumbrances affecting the same and the receipts and disbursements in every year, and that provision should be made for preventing and redressing any error or wrong that may be committed in the administration of the Common Good, and therefore enacted (sec. 1) that ‘a particular account of the Common Good and revenues of every royal burgh in Scotland, made up to the day preceding the general annual election of magistrates in each burgh, shall be annually stated and deposited in the manner directed by this Act.’ This account was to be certified by the Provost in terms of a statutory certificate.

“It was then enacted (sec. 3) that”—(His Lordship quoted the section).

“I must here note that the annual election of the magistrates is not a

Nov. 21, 1907. The respondents reclaimed.

—
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After the reclaiming note had been sent to the roll a minute of disclaimer was lodged on behalf of James Aitchison Johnston and others, being six of the remaining respondents, which was in these terms:—
“*Gordon*, for the minuters, stated to the Court that they gave no instructions or authority for appearance being entered or answers being lodged in their names or on their behalf in this petition and complaint, or for their being represented in the procedure therein before the Lord Ordinary in Exchequer Causes; that they were not members of the Corporation when the expenditure objected to was incurred, and strongly object to it, and only recently was it brought under their notice that appearances had been made or answers lodged in their names or on their behalf: And he further stated that the minuters gave no instructions or authority for the presentation of the reclaiming note against the Lord Ordinary’s interlocutor of 19th July

loose expression intended to refer to the election of the council. The Act in several passages carefully distinguishes between the council as a whole and the magistrates, and when it refers to the annual election of the magistrates it means, in my opinion, the election of magistrates, properly so-called, by the council. Under this statute, therefore, the maximum period for the lodging objections to the burgh accounts was three calendar months *plus* thirty days *plus* two calendar months, and for complaining to the Court of Exchequer one calendar month more. And it is admitted that the petitioners’ letter of objections of 7th May 1907 and their subsequent complaint to this Court were timeous if the limitation of time imposed is to be found in this statute. I should have said that the Act (sec. 10) further enacted ‘that in the event of no complaint being made to any annual account within the time herein limited, it shall not be competent thereafter to complain to such Court in regard to such account.’

“But, then, matters do not rest on this statute alone. The Burgh Reform Act of 1833 provided, by section 32, which, as above mentioned, notwithstanding its repeal, remains in force or is revived *quoad* Glasgow, that”—(His Lordship quoted the section).

“This is the whole provision contained in the Act of 1833 regarding corporate property and accounts, and it is quite clear that its provisions had a totally different purpose from, and did not supersede those of, Sir William Rae’s Act of eleven years previous. The object of that Act was to secure honest and accurate accounting, the exposure of the burgh accounts to the inspection of the burgesses, and their correction, if necessary, by the Court of Exchequer. But the object of the Burgh Reform Act of 1833 was electoral merely. In contemplation of the annual election in the month of November, it provided for the inspection of the burgh accounts, not by burgesses with a view to correction, but by registered electors, clearly because the disclosures of the burgh accounts for the past year had or might have a material bearing on the question of the election and re-election of candidates. And consequently the Act of 1833 contained no provision for objection or complaint to the Court of Exchequer or any other authority. Hence I am clearly of opinion that, though there may have been an awkward overlapping of dates, involving the statutory deposit of the same accounts on two different dates, for two different purposes, and with entirely different consequences, that is no possible reason why the important and salutary provisions of the former statute of 1822 should be held as virtually abrogated by those of the later statute of 1833.

“Nor do I think that this virtual repeal is effected by the qualification introduced into the Act of 1833 by the local Glasgow Municipal Act of 1879 (42 and 43 Vict. cap. cxxiii.). This Act (sec. 10) provides that the Council may cause the state of affairs which they are required to make up

1907 in their names or on their behalf, and accordingly the minuters Nov. 21, 1907.
disclaim all said proceedings unwarrantably taken in their names or
on their behalf.”

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Parties were heard on this minute on 9th November 1907, when
the following opinion was delivered :—

LORD PRESIDENT.—The point which is before us arises out of a petition and complaint presented by certain burgesses of Glasgow in order to have certain expenditure of the Common Good fund of the city of Glasgow, which they allege to be illegal, checked. The Common Good of Glasgow is administered by the Corporation of Glasgow, the Lord Provost, Magistrates, and Town-Council, and accordingly in the prayer of the petition, which is based, *inter alia*, upon an Act 3 Geo. IV. cap. 91, warrant is asked for service upon “The Right Hon. William Bilsland, Lord Provost,” then follows a string of names and addresses, and at the end of these names and addresses come these words “all members of the Town-Council of Glasgow, being the Lord Provost, Magistrates, and members of the Town-Council of the city and royal burgh of Glasgow, and to ordain

annually on or before 15th October by sec. 32 of the Act of 1833, ‘to be made up as at the 31st day of May in each year, with the annual accounts or statements of the various other trusts under their administration, and the said 31st day of May shall be substituted for the said 15th day of October.’ Pausing there and reading sec. 10 of the local Act of 1879 into sec. 32 of the General Act of 1833, it only amounts to this, that the Council shall on or before 31st May in each year make up a state of their affairs brought down as near as possible to that date, which account shall be kept in the Town-clerk’s or Treasurer’s office from the said 31st May down to the time of the election, and an abstract shall be printed and published on or before 20th October. The result is merely to anticipate the date of closing the burgh’s accounts for the year, and to subject them to the inspection of the registered electors for a very much longer period. But as, in my opinion, the provisions of sec. 32 of the Act of 1833, in their original form, in no way abrogated the provisions of Sir William Rae’s Act of 1822, neither do they do so where qualified by section 10 of the local Act of 1879.

“But then the last-mentioned section concludes, ‘and no other annual state of affairs or accounts than that hereby authorised shall be required to be made up by them.’ The only result, so far as I can see, of this latter provision, is to remove any doubts as to whether two different accounts, one under the Act of 1822, and the other under the Act of 1833, as modified by that of 1879, were required. If before there was any doubt on the subject, for the future one account only was required to satisfy the provisions of both sets of enactments. But this does not result in the provisions for its exhibition to the registered electors for the purposes of the Burgh Reform Act of 1833 superseding the necessity of its exhibition to the burgesses for the purposes and under the conditions of Sir William Rae’s Act of 1822. I am here concerned with the purposes of the last-mentioned Act only, and for these purposes the calendar or series of dates specified in that Act still regulates procedure. And as on that hypothesis it is admitted that the objections and complaint now before me are timeous, I must repel the preliminary objections stated for the Corporation, and I think that the best step which I could take at this period of the session to advance the process is to ordain the Corporation at or prior to the first box-day in vacation to produce in process a detailed account, with relative vouchers of the item on page 16 of their abstract of accounts, No. 23 of process, which is the subject of objection and complaint.”

Nov. 21, 1907. them to lodge answers hereto, if so advised, within eight days after such service ; and thereafter, upon resuming consideration hereof, with or without answers, and after such inquiry as to your Lordships shall seem proper, to disallow the said item of £2457, 2s. 1d. as a charge against the Common Good or revenues of the city and royal burgh of Glasgow . . . and to ordain the said account to be rectified accordingly." Now, to this petition answers have been put in, and these answers have been put in in precisely the same form as was set forth in the prayer of the petition, viz., "For the Right Hon. William Bilsland, Lord Provost," &c., followed by the list of names, and by the concluding words I have just read, "all members of the Town-Council of Glasgow, being the Lord Provost, Magistrates, and members of the Town-Council of the city and royal burgh of Glasgow."

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Ld. President.

Mr Gordon appears for six of these gentlemen, and in a minute he says that they gave no instructions or authority for appearance being entered in their names, and upon that he moves that his disclaimer should be sustained, that the names of these parties be taken out of the case, and that they be found entitled to their expenses against the others who have lodged defences. It seems that something of the same character was done in the Outer-House upon the motion of certain other of the defenders, but that is a matter which is not before us.

I have come to the conclusion that there is no ground for this motion. If answers were put in for these individuals as individuals, and if these individuals say that they never gave any authority, it is clear that they are entitled to have their names taken out of the unauthorised paper, and entitled to their expenses against the persons who put in the unauthorised paper. But it seems clear that the simple answer here is that there was no appearance for these individuals as individuals.

The common way of citing a corporation is to cite it by its corporate name. This seems to be the appropriate manner of citing all common law corporations, and I think the Corporation of Glasgow is a common law corporation. But further, the Corporation of Glasgow has the right of citing and of being cited by its corporate name assured to it by several Acts. But though that is so, I have never heard that a pursuer might not cite members of a corporation, provided he goes on to explain that he cites them not as individuals but as members of the corporation. That this has been done here is clear from the print. So I think that when these answers were put in, echoing the prayer of the petition, they were put in for the Corporation and not for the individuals cited. Mr Gordon's clients may say that they do not wish to defend the action, but they cannot avoid being there, in their representative capacity only, as long as the majority of the Corporation desires to defend.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

THE COURT refused the minute.

At the subsequent hearing on the reclaiming note the reclaimers argued ;—(1) *Competency of objections*—These objections were incompetent, for they had not been timeously stated. It was not disputed that they were timeously stated if the date from which the time fell

to be counted was still the date of the election of the magistrates. But Nov. 21, 1907. that was no longer the date, for, as the making up of the accounts no longer depended on the date of the election of magistrates, that date had ceased to be of significance. With the alteration of the date for making up the accounts the whole time-table of dates that followed and depended thereon, including the date for stating objections, must be held to have been altered also, and to count from the new date for making up the accounts. To hold otherwise would lead to the absurd result that accounts made up as at 31st May could not be objected to for nearly six months thereafter. If the period for stating objections fell to be reckoned from the 31st of May these objections were not timeously stated. (2) *Production of vouchers*—It was not necessary that vouchers should be produced here, as the nature of the expenditure sufficiently appeared from the accounts. In any event, vouchers only for the £1142 incurred during the year to which the accounts applied should be called for, the rest of the sum in the item complained of had been incurred during previous years, and in all probability it would be impossible now to produce complete vouchers of all that expenditure.

Counsel for the respondents were not called on.

On 21st November 1907 the following opinions were delivered :—

LORD PRESIDENT.—The only point raised in the petition and complaint at this stage was whether certain objections that had been stated to the petition and complaint at the instance of the burgesses against the Town-Council are in time or not, and that depends upon the regulations laid down for making objections to the accounts in the Act of Parliament dealing with the accounts. The Act of Parliament that deals generally with the accounts of municipal bodies in Scotland is the Act of 1900. But there is a provision in that Act by which what are known as the larger burghs are enabled by resolution to prevent the Act applying to their accounts, and really to maintain the *status quo ante*. That provision was taken advantage of by Glasgow. The Act which deals with the Common Good, the expenditure of which is here called in question, is the Act of 1822. That Act, by the first section, requires that the accounts of the Common Good and revenues of every royal burgh in Scotland, made up to the day preceding the general annual election of magistrates in each burgh, shall be annually stated and deposited in the manner directed by this Act. Then in section 3 there is what I may call a time-table, which I really need not go through, but which provides for the time within which objections may be taken and explanations called for, and then, if the explanations are unsatisfactory, there is allowed an appeal to the Court of Exchequer. Assuming that that time-table applies, it is admitted that these objections are in time. But the respondents, the Town-Council of Glasgow, say that they are not in time, and for this reason. They say that although under the Act the accounts are to be made up to the day preceding the annual election of magistrates, which is sometime in November, this has been changed by subsequent Act of Parliament, and that the time has been changed with it, and if the time-table is reckoned from the 31st May, which is what I may call the modern date, then it is equally admitted by both parties that these objections are not in time.

Now, the first change that took place was in the Burgh Reform Act

Nov. 21, 1907. of 1833, which changed the time of making up and bringing down the
 Eadie v. account from the date of the election to the 15th day of October. One can
 Glasgow easily see for what reason that was done. It was done at the time of the
 Corporation. great reform of municipal corporations, and it was done, not I think for the
 Ld. President. purpose of making any difference in the objections that might be made to
 the accounts, but for the purpose of allowing the electors—who were now
 brought into existence, in the proper sense of the word, for the first time—
 to consider whether there had been undue expenditure or not, in view of
 their choice of their future representatives. But that again was altered so
 far as Glasgow was concerned by the private Act of 1879, called the Glasgow
 Municipal Act. That Act in section 10 provides that the state of affairs
 which was required to be made up annually—that is the then existing one,
 the one on or before 15th October—shall be made up as at the 31st day of
 May, and then it goes on to say that “no other annual state of affairs or
 account than that hereby authorised shall be required to be made up by
 them.” That, of course, is perfectly plain; the date provided by that
 Act of 1879 for the Glasgow annual state of affairs is the 31st May, and
 no other date in the year. But the Act does not deal with the question
 of objections to the accounts; that is allowed to remain upon the old
 statute.

It has been urged to us by Mr Macmillan, the learned counsel for the
 appellants, who said everything that could be said, that it is very awkward
 and very ungainly to have a time-table for objections starting from a different
 date from the time at which the account is to be made up. I think that
 may be conceded. But nevertheless what the learned counsel is asking us
 to do here is to take away these burgesses' right of objection—for that is
 what it comes to—simply because these burgesses have not been able to put
 together two Acts of Parliament and spell out a different result from that
 which the Act of Parliament really says. I do not think that argument can
 be given effect to, for this very plain and simple reason that, if in the Act of
 1879 the Glasgow Town-Council wanted to change the calendar during
 which objections could be made, nothing in the world was easier than to say
 so. If, on the contrary, they left the matter alone, then I think the Act of
 Parliament must be read according to its plain letter as it stands, and we are
 not by inference to read into the Act of Parliament different dates from
 what are there set forth. Therefore I am of opinion that the Lord Ordinary
 has come to a right decision.

LORD M'LAREN.—I should have thought that a great corporation like
 the municipality of Glasgow, when any part of their administration is chal-
 lenged, would be anxious that the fullest light should be thrown upon the
 management of funds entrusted to them. Agreeing with your Lordship as
 to the proper construction of these statutes, I do not participate in the
 scruples which the Magistrates and Council seem to have as to the regularity
 of the present proceedings, but think they are perfectly within the scope
 of the statutes. Indeed, it is as much in the interest of the Corporation as
 of the ratepayers that the legality of this expenditure should be determined
 by the Court, in order that in future cases there may be a guide to Town-
 Councils as to how far they are entitled to burden the Common Good. I

rather think I have seen some indications that municipal bodies are inclined Nov. 21, 1907.
to take too much out of the Common Good, and it is just as well that they
should be reminded that such charges are subject to statutory audit or ^{Eadie v.} Glasgow
inquiry when necessary. The question will always be, whether the subject ^{Corporation.}
of the expenditure is fairly within the scope and duties of municipal bodies, Lord M'Laren.
and is for municipal purposes. I agree in all the observations your Lord-
ship has made upon the Acts of Parliament.

LORD KINNEAR.—I agree upon the simple ground which your Lordship
has stated, that we cannot disregard the plain words of the Act of Parlia-
ment in order to make a series of Acts more coherent than Parliament itself
has found necessary.

LORD PEARSON.—I am of the same opinion.

LORD PRESIDENT.—There was one point that was urged upon us in pro-
nouncing an order as to what accounts the respondents are to produce.
Mr Macmillan first of all suggested that we need not order the production
of vouchers, and second, he suggested that in any case the order should be
limited to the sum of £1142 instead of to the sum of £2457. As far as
regards the vouchers, I think the objectors here are entitled to the vouchers,
because they are entitled to know precisely how this money was spent, and
I think Mr Dickson's remark was quite right that, if the respondents choose
to put in an admission that this expenditure was illegal, then, of course, he
would not want anything more. But to put in simply a so-called admission
that this was spent on Taxation of Land Values Suspense Account really
does not put the matter much further, because Taxation of Land Values
Suspense Account may, in one sense, mean anything. Of course, I am not
meaning that one has not got a general notion, drawn from what is in the
pleadings in the case—because in this class of matter one is not entitled to
take cognisance of anything except what is brought before one in the case—
I do not mean that one has not a general notion, in a certain way, of how
the money has been spent, but then it is perfectly evident that the money
may not have been even spent on that—there may be, so to speak, expendi-
ture within expenditure which would be perfectly illegal, and which, even
supposing it was held that what I may call the dominating head of expen-
diture was correct, might yet fall to be disallowed; and accordingly, with-
out the vouchers to shew how the sum was split up, it is impossible to
know where we are. Therefore I think, first of all, that the vouchers must
be produced, and, secondly, that the sum to which the order shall apply is
the sum stated by the Lord Ordinary—£2457—because that is the sum
which is put into the accounts. If there has been—I find it difficult to
use a word, because I do not want to use a word which suggests that any-
thing in the slightest degree wrong has been done in the account—if there
has been an arrangement by means of a suspense account by which items,
so to speak, have escaped detection for the moment, that is because of
the way in which the accounts are arranged, and the respondents have only
themselves to thank for that state of affairs. I am not suggesting that there
is anything wrong in the way in which the accounts are stated; what I am

Nov. 21, 1907. saying is that until one sees the full account it is impossible to form a judgment upon that matter.

Eadie v.

Glasgow

Corporation.

Ld. President.

Mr Macmillan says quite frankly that there might actually be some vouchers in that £2457 which, being in past years, might be very difficult to find. Well, we must deal with that when it comes before us. It is quite clear that the order must be pronounced, and if it is impossible to obtemper that order and good reason is given, I suppose the matter will end there. But at anyrate we cannot do all that in the dark. At the present moment I have not even a notion of what this Suspense Account is. A Suspense Account, as one knows in book-keeping, may mean anything. What this means I cannot tell until I see it. I think, therefore, the scope of the Lord Ordinary's order was correct. That is the judgment of the Court.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor, except in so far as it decerns for the sum of £3, 3s.: Of new repel the objection that the petition and complaint has not been timeously brought: Of new appoint the respondents to produce in process . . . a detailed account, with relative vouchers of the item of their abstract accounts . . . which is the subject of complaint," &c.

MACRAE, FLETT, & RENNIE, W.S.—CAMPBELL & SMITH, S.S.C.—
CALDER, MARSHALL, & WALKER, W.S.—Agents.

No. 36. G. W. WHITEHOUSE, Pursuer (Respondent).—*McClure, K.C.—Christie.*
R. & W. PICKETT, Defenders (Reclaimers).—*Watt, K.C.—Munro.*

Nov. 16, 1907.

Whitehouse v.
Pickett.

Innkeeper—Limitation of Liability to guests—Negligence—Onus probandi—Deposit expressly for safe custody—Innkeepers Liability Act, 1863 (26 and 27 Vict. cap. 41).—The Innkeepers Liability Act, enacts, sec. 1, that no innkeeper shall be liable to make good to any guest of such innkeeper any loss of property brought to his inn to a greater amount than £30, except (1) where such property shall have been lost through the wilful act, default, or neglect of such innkeeper or any servant in his employ; or (2) where such property shall have been deposited "expressly for safe custody" with such innkeeper.

A hotel exhibited on the wall of a corridor a printed intimation that the proprietors "will not be responsible for any valuables left in bedrooms, but will take charge of same in office. See extract from Act of Parliament, chap. 41, Vict. 26 and 27, in entrance hall." The extract in the entrance hall contained section 1 of the Act.

A commercial traveller for a manufacturing jeweller left a bag containing jewels to the value of £1800 at the office on a Saturday afternoon. He was in use to visit the hotel, and the hotelkeepers knew that he was in the habit of carrying jewellery with him. At 11.30 p.m., when he asked for the bag with the view of taking it to his bedroom, it was discovered that his bag had been stolen. Another bag of the same size and appearance had been left at the office by one of three guests in the hotel who disappeared the same evening without paying their bill, but leaving behind them certain burglar's tools.

In an action by the jeweller against the hotelkeepers for the value of the bag, the defenders pleaded, *inter alia*, the statutory limitation of liability to £30.

The pursuer pleaded, *inter alia*—(1) that the goods having been deposited with the defenders for safe custody he was entitled to indemnity;

and (2) that the goods having been stolen through the default or neglect of the defenders or of their servants, they were liable in reparation.

After a proof, in which the facts above narrated were established, the Lord Ordinary (Salvesen) *held* that the goods had been lost through the negligence of the defenders or of their servants. Whitehouse v. Pickett.

On a reclaiming note the Extra Division *held* (*rev.* the judgment) (1) that the bag had not been deposited expressly for safe custody within the meaning of sec. 1, subsec. (2), of the Act; (2) that the *onus* of proving "default or neglect" on the part of the defenders or of their servants lay upon the pursuer, and that that *onus* had not been discharged; and therefore (3) that the defenders were entitled to the benefit of the statutory limitation of liability.

In this action G. W. Whitehouse, manufacturing jeweller and diamond mounter, Birmingham, sought decree against R. & W. Pickett, hotelkeepers, Imperial Hotel, Edinburgh, for payment of the sum of £1966, 5s. 6d., as being the value of a bag of jewellery belonging to the pursuer which formed part of the luggage of John Buckley, one of his commercial travellers, and which was stolen while the traveller was a guest in the defenders' hotel. The defenders denied liability, but tendered £30 in full of the conclusions of the summons. EXTRA DIVISION.
Lord Salvesen.

The defenders stated, *inter alia*,—"There is a bar on the ground floor of the Imperial Hotel, and there is another bar at the office on the first floor. Both of these bars are used for the supply of refreshments to customers. The bar on the first floor is mostly used for the supply of customers who are staying in the hotel. In a conspicuous place in the entrance hall of the hotel there is, and has during the defenders' occupancy of the hotel, been exhibited a notice under and in virtue of the Act to amend the law respecting the liability of innkeepers, and to prevent certain frauds upon them, 13th July 1863 (26 and 27 Victoria, caput 41), narrating the provisions of section 1 thereof. There are also notices to a similar effect exhibited in the corridors and bedrooms of said hotel.* Mr Buckley never told defenders of the contents or value of said bag, and never deposited it with them for safe custody."

The following narrative is taken from the Lord Ordinary's opinion:—

"The facts in this case as they have been disclosed in the proof are comparatively simple, and, so far as material, admit of brief statement. The pursuer's traveller, John Buckley, who has been in the same employment for sixteen or seventeen years, arrived at the Imperial Hotel, belonging to the defenders, on 17th February 1906, in the course of one of his regular journeys on the pursuer's business. Outside the hotel he was met by James Sim, the boots or hotel porter, who relieved him of two bags which he was carrying. One of these was a stock or sample bag, in which Mr Buckley was in the habit of carrying the jewels belonging to his employer, and which he sold to retail dealers. Sim knew Buckley as an old customer. He also knew his occupation, and the fact that one of the bags contained valuable articles of jewellery. On reaching the first floor, accordingly, Sim carried this bag straight into the office, and deposited it in a dark

* At the proof it appeared that these notices were in the following terms:—"The proprietors of this hotel respectfully beg to intimate that they will not be responsible for any valuables left in bedrooms, but will take charge of same in office. See extract from Act of Parliament, chapter 41, Vict. 26 and 27, in entrance hall." The extract in the entrance hall contained section 1 of the Act.

Nov. 16, 1907. corner between an ice chest and the wall. He then obtained from
Whitehouse v. Pickett. Mr Reginald Pickett (who is for some unexplained reason called 'Harry' throughout the proof) the key of Mr Buckley's bedroom and carried the other bag, which contained the latter's personal effects, up to the bedroom. Mr Pickett accompanied Mr Buckley into the coffee-room, where there was an acquaintance of his, and left him there.

"It being Saturday afternoon, Mr Buckley had no occasion to display any of the contents of his bag. It was his practice, however, when he retired to rest to carry his bag with him up to the bedroom; and, accordingly, he inquired for it about 11.30 the same evening. He was handed a bag which somewhat resembled his own, but which he at once discovered was not his. Sim had left for the night, but was sent for, and at first thought that the bag was Mr Buckley's. The defenders, however, being satisfied that it was not, sent for the police, who, on opening, discovered that it contained only a wooden frame, a piece of sheet zinc, and some other articles; the contents being so arranged as to give the bag the appearance of being full.

"Suspicion was at once thrown upon three persons who had been guests in the hotel, one of them who gave the name of 'Hall' having occupied a bedroom since the Wednesday previous. These men disappeared the same evening without having paid their bill, and leaving behind them some effects, including a skeleton key and a pair of diamond scales, which left little doubt as to the profession to which they belonged. The police bill which was issued with a view to capturing the three persons in question published a minute description of all the articles which could give a clue to the thieves; but, although Mr Buckley's bag contained nearly 1600 articles of small jewellery, principally rings, many of them being marked with the initials of the pursuer, none of the property has been traced, nor have the thieves been captured.

"The only other piece of evidence bearing on the theft is that about 6.30 P.M., one of the suspected individuals handed to Mr R. Pickett the brown leather bag which was left instead of Mr Buckley's, and asked him to take charge of it. Mr Pickett did so, placing it in the same recess as that in which Mr Buckley's bag was placed. How the theft was committed remains unexplained, but, as Mr Buckley's bag was not handed to any of the three men in mistake, it must have been removed by one of them without the knowledge or consent of the defenders or their servants."

The pursuer pleaded, *inter alia*;—(1) The said goods being lost to the pursuer while in the custody of the defenders as part of the luggage of the pursuer's said traveller, while he was a guest residing at the defenders' hotel, the defenders are, under the edict *Nautæ, Caupones, &c.*, bound to compensate the pursuer for said loss as concluded for. (2) The said goods having been deposited with the defenders for safe custody as libelled, they are bound to indemnify the pursuer for the loss thereof. (3) The said goods having been stolen through the default or neglect of the defenders or their servants, the defenders are liable in reparation to the pursuer as concluded for.

The defenders pleaded, *inter alia*;—(1) No relevant case, and, in any event, the action is irrelevant in so far as laid on the edict *Nautæ, Caupones, &c.* (3) The bag referred to not having been deposited with the defenders expressly for safe custody, they are not responsible for its value to the pursuer. (4) The pursuer not having suffered any loss or damage through the fault or negligence of the defenders, or of

those for whom they are responsible, the defenders should be assoil- Nov. 16, 1907.
zied. (5) The defenders having complied with the provisions of the Whitehouse v. Pickett.
Act 26 and 27 Vict. cap. 41, are not liable to the pursuer in more
than the sum of £30.*

On 23d November 1906 the Lord Ordinary (Salvesen), after a proof, pronounced an interlocutor, in which he decerned against the defenders for payment of the sum of £1790, 3s. 6d., with expenses.†

* The Innkeepers Liability Act, 1863 (26 and 27 Vict. cap. 41), enacts :—

Sec. 1. “No innkeeper shall, after the passing of this Act, be liable to make good to any guest of such innkeeper, any loss of, or injury to, goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of thirty pounds, except in the following cases ; (that is to say)

“(1) Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ ;

“(2) Where such goods or property shall have been deposited expressly for safe custody with such innkeeper ;

Provided always that in the case of such deposit it shall be lawful for such innkeeper, if he thinks fit, to require, as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same.”

† “OPINION.— . . . The pursuer accordingly now sues the defenders for the sum of £1996, 5s. 6d., as the value of the articles of jewellery contained in the stolen bag. The pleadings disclose alternative grounds of liability ; but the case mainly insisted in was that the goods having been put into the defenders’ custody for safe keeping, and having been stolen through the negligence of the defenders or their servants, they are liable to compensate the pursuer for his loss. This ground of action may still be insisted in notwithstanding the Act 26 and 27 Vict. cap. 41, which limits the liability of innkeepers. It is admitted, however, that the effect of that Act was to throw the *onus* upon the guest, whose property had disappeared in the innkeeper’s custody, to prove that it had so disappeared through the default or negligence of the innkeeper or his servants: failing which proof the liability is limited to the sum of £30. As might be expected, however, there is no direct evidence of negligence ; but the pursuer says that it must be inferred from the disappearance of the goods coupled with the facts disclosed in the proof, which he says instruct both a laxity in the system adopted by the defenders in storing their customers’ property, and negligence on the part of those in charge.

“I have already described the place where the bag was deposited by Sim, and which is called a bar on the plan, but was also used as an office. There is a service window in this room and a door at the side of it. Opposite this door at the other end is a glass door, which gives admission to a private room used by the defenders as their own sitting-room, and this again has a door marked ‘Private’ opening into the lobby. There being at that time no strong room in the hotel (although one has since been added) the place where Buckley’s bag was put was undoubtedly the safest place in the hotel for the purpose. There is usually some person either in the bar or in the private room ; and it is said that when the bar is left vacant the door is generally snibbed, and ought invariably to be so. If that were done, no access could be obtained to the bar except through the private room ; and so long as there was any person in the private room, no unauthorised person could remove any property from the bar without his observing it. I am satisfied, however, that the defenders or their servants did not always adopt the precaution of snibbing the door to the bar. It was not

Nov. 16, 1907. The defenders reclaimed.

Whitehouse v. Pickett. Argued for the reclaimers;—The Lord Ordinary was in error in the inference which he drew from the facts. It was necessary under the Innkeepers Liability Act, 1863, that the pursuer should prove that there was negligence on the part of the defenders or their servants, or that the bag had been deposited expressly for safe custody. (1) Under section 1, subsection (1), of the Act the *onus* of proving that the goods were lost “through the wilful act, default, or neglect” of the innkeeper or his servant was on the pursuer.¹ In this case there was no proof of negligence on the part of the defenders. (2) With reference to the case made on section 1, subsection (2), of the Act, it could not be held that goods were deposited expressly for safe custody if the deposit and its purpose were not brought to the personal know-

snibbed when Sim took Buckley’s bag and deposited it in the recess, nor was it snibbed in the evening when Mr Buckley went in to take it up to his own bedroom. On both occasions there was no doubt some person in the private room who could more or less watch the bar; but the efficiency of this would depend upon the position that he occupied at the time. From many parts of the private room only a very small portion of the bar could be seen; and, judging from the plan, if the bar door were open, a person might easily reach the recess without being observed by those in charge of the adjoining room. Similarly, if the private room itself was untenanted there was nothing to prevent anyone going from the lobby, through the two doors into the bar, even if there was a person in attendance there, and being unobserved, if that person was occupied at the service window with his back towards the recess. The safety of a guest’s property in the apartment depended therefore, when all the doors were left unfastened, entirely on the vigilance of those who were inside.

“As Mr Buckley’s bag was removed without any person observing it, it follows, either, that there was nobody in the two rooms at the time, or that the person there was not attending to his duties—one of which undoubtedly was the protection of property left in the office. On this point it is not without importance that the defenders exhibited a notice in various parts of the hotel ‘that they would not be responsible for any valuables left in bedrooms, but would take charge of same in the office.’ That was an invitation to guests in the hotel to leave valuables in the office, and imposed upon the defenders a duty of taking charge of them there. The place selected by Sim therefore for the deposit of the pursuer’s bag was the recognised place, according to the rules of the hotel, for storing such property; and it is immaterial whether on other occasions Mr Buckley had left his bag under the sideboard in the private room, which was no doubt an equally good place, provided there was somebody in attendance there.

“Mr Watt, for the defenders, pressed upon me that there was no evidence of negligence at all, and that the bag might have been removed consistently with no negligence being attributable to the defenders or their servants. I do not agree. The negligence may have been slight because of the dexterity of the thieves, but I am unable to see how, without negligence, the theft could have been committed. Perhaps the fact that no theft had ever been committed from the hotel before may have lulled the defenders and their servants into a false confidence. Perhaps the exigencies of business (there were two dinners going on at the hotel that evening) may have temporarily

¹ Medawar v. Grand Hotel Co., L. R., [1891] 2 Q. B. 11; O’Connor v. Grand International Hotel Co., L. R., 2 Ir. [1898] 92; Moss v. Russell, 1884, 1 Times Law Reports, 13; Marchioness of Huntly v. Bedford Hotel Co., Limited, 56 J. P. 53.

ledge of the person with whom the goods were alleged to have been deposited.¹ Accordingly the subsection did not apply in this case, because Buckley gave no instructions as to the deposit of the bag, and it was proved that the defenders were not aware that the bag had been placed in the office. Nov. 16, 1907.
Whitehouse v. Pickett.

Argued for the respondent;—(1) At common law an innkeeper, unless he limited his responsibility by contract, express or implied, was regarded as insuring the goods of a guest. To make him liable, the only facts that need be proved were that the goods were taken to the inn and that they were lost.² The only change made on the common law by the Innkeepers Liability Act, 1863, was that, as regards liability beyond £30, what had been a *presumptio juris* became a *presumptio facti*; and the innkeeper was enabled to escape liability by proving that he had not been in fault. The *onus probandi*, however, still rested on the innkeeper. An analogy might be found in the law as to the liability of carriers in regard to goods and passengers carried by them.³ This result was in accordance with the general rule of law that the *onus* of proving a fact which was specially

absorbed the whole staff and left the private room and bar untenanted and unlocked. Whatever the reason may have been, I cannot doubt that the thief entered the apartment either by the bar door or the door of the private room, and found no obstacle to his removing the bag. The other bag had no doubt been left in the same place in order to afford the excuse, if the thief were intercepted with the bag in his hand, that he had mistaken Mr Buckley's bag for his own.

"I am therefore prepared to affirm on the evidence that the bag in question was stolen, and that it could not have been stolen but for the negligence of the defenders or their servants. A defence of contributory negligence by Mr Buckley is indicated on record, but it came to nothing. After the theft had been committed Buckley remembered that he had met a man called Hall at other hotels with a bag very similar to the one which had been left, and he jumped to the conclusion that this man had in all probability been shadowing him for some time before. He had, however, at the time no suspicion of Hall, and his appearance was not such as to excite any remark.

"Parties were agreed upon the law applicable to this case, and it is shortly stated at pages 127-8 of 1 Smith's Leading Cases as deduced from *Medawar*, [1891] 2 Q. B. 11.

"On the view which I reach that the pursuer has sufficiently established negligence on the part of the defenders, it is not necessary to consider a separate point based on the alleged failure to exhibit a notice of the provisions of the Act in a conspicuous place. If I had to decide this point my decision would be against the pursuer. I think it is proved that the notice was exhibited on the staircase leading from the entrance hall to the first floor, and at such a height that it could be read by any person who stopped on the stairs for that purpose. The place selected may not have been the best, but I think it was conspicuous enough to satisfy the statute.

"The only other matter with which I have to deal is the value of the property which was stolen." (His Lordship proceeded to examine the evidence on this point, and came to the conclusion that the value was £1790, 3s. 6d.)

¹ O'Connor v. Grand International Hotel Co., L. R., 2 Ir. [1898] 92; Moss v. Russell, 1884, 1 Times Law Reports, 13.

² Bell's Commentaries (7th ed.), vol. i., p. 495, note 4.

³ Watson v. North British Railway Co., March 18, 1876, 3 R. 637 (the Lord President's opinion); Bell's Principles (10th ed.), secs. 164, 167, and 170.

Nov. 16, 1907. within the knowledge of one of the parties to a case was on that party,¹ and as a guest could not know what had become of his goods after they were entrusted to the innkeeper, it fell on the latter to prove that the loss had not been occasioned by his negligence. Even assuming that under section 1, subsection (1), of the Innkeepers Act the *onus* was placed on the pursuer, that *onus* was discharged by the evidence, which shewed that the defenders had been negligent. The defenders were at fault either in not having a place sufficiently secure for guarding valuables or in not having on this particular occasion seen that the doors of the office were kept locked. (2) The evidence proved that the goods had been deposited for safe custody. The office had been selected by the defenders as the safest place for the custody of valuables, and by the notice exhibited in the hotel they had stated that they would take charge of such goods in the office. Buckley was in the habit of visiting the hotel, and acting on the invitation implied in the notice was accustomed to place the bag in the office. Hence when Sim placed the bag, which, as he was aware, usually contained valuables, he must have known that Buckley intended to deposit it for safe custody, and these facts were sufficient to satisfy the requirements of section 1, subsection 2, of the Act.

Whitehouse v.
Pickett.

At advising, on 16th November 1907,—

LORD M'LAREN.—The pursuer in this case, who is a manufacturing jeweller in Birmingham, employed Mr Buckley as a traveller to assist in the sale of his goods, and the claim is made against an innkeeper in Edinburgh, with whom the traveller lodged, in respect of the loss of a bag containing jewellery to the value of about £1900. The traveller had been in the habit of resorting to this hotel on his visits to Edinburgh, and seems to have been known to the proprietors of the hotel, the Messrs Pickett, as well as to some of their servants. This bag (containing samples of jewellery) was of a different description and pattern from the ordinary tourist's bag, and was easily recognised as a receptacle used for trade purposes. On the day in question the traveller on arriving at the hotel was met by the porter, who took the bag out of his hand along with another bag in which he carried his personal effects. At the same time one of the Messrs Pickett, who was in attendance in the bar-room—there was a bar-room and a private sitting-room with inter-communication—came forward to book a room for the traveller, telling him at the same time that he would find two of his friends in the coffee-room. While this colloquy was proceeding the porter deposited the bag in the bar-room, not exactly in the spot where the traveller had been in use to put it on former visits, but substantially in the same position and with the same protection from interference by outside persons. The traveller went out in the course of the afternoon and returned again, and after spending some time in the smoking-room he purposed retiring to rest, but before doing so he came to the bar-room and asked for his bag, because he thought it would be safer to have it in his bedroom. The bag was then found to be missing. I think it is common ground that the theft was committed by three professional thieves who had taken up their quarters as visitors at the hotel, apparently with some knowledge about the jeweller's traveller and with the intention of

¹ Taylor on Evidence (10th ed.), sec. 376A.

appropriating his bag. The bag may have been taken during the absence Nov. 16, 1907. of the Messrs Pickett from the bar-room where it was left, although their ^{Whitehouse v.} rule was that the office should never be left unoccupied, or it might be ^{Pickett.} that while the proprietor in charge was engaged in conversation by one of ^{Lord M'Laren.} the confederates another slipped round behind his back and walked off with the bag. The Act of Parliament limits the liability of innkeepers to the sum of £30 except under two conditions. One of the exceptions is that negligence is proved, and the other exception is where such goods or property shall have been deposited expressly for safe custody with such innkeeper.

In this state of the facts it is maintained for the pursuer (1) that the placing his bag in the bar-room was equivalent to a deposit of the bag expressly for safe custody, and (2) alternatively, that the bag was stolen in consequence of the negligence of the innkeeper. I am not satisfied that either of these grounds of liability is made out.

As to the first ground of action I think that we must ascribe some definite meaning to the word "expressly." Without elaborating the suggested distinction it may suffice to say that the statute contemplates that the innkeeper is to be liable for loss if it is made clear to him when the property is deposited that he is charged with the duty of safe custody—a duty which the innkeeper is not at liberty to decline if he is invited to undertake it. I think the statute also contemplates that there may be a deposit of property which is not for the express purpose of safe keeping or safe custody, and that in such a case, if the property is lost or stolen without fault on the part of the innkeeper, his liability would be limited to the sum of £30. If my second proposition is disputed, and if the liability of the innkeeper is to be just the same whether the purpose of safe keeping is or is not expressed, that is equivalent to saying that the word "expressly" has no definite meaning—is, in other words, a mere expletive. But I am not prepared to treat the word "expressly" when used in a statute as a redundant expression—first, because this would be contrary to what I think is a sound principle of construction, that in general every word in a statute must receive its ordinary meaning; and secondly, because I think it may very well have been in the view of the Legislature that a guest might be content to leave his property in the charge of the innkeeper trusting that he would take reasonable care of it, without seeking to put the innkeeper under the special responsibility that follows from a deposit for the express purpose of safe custody. In this connection I may point out that under the statute if the innkeeper is charged with safe custody he may request the guest to put his property in a box which the guest is to lock and seal. This might not be convenient to the guest; and if the guest is a commercial traveller who wants his bag three or four times in the course of a day, it may very well be that rather than be at the trouble of having his bag locked and sealed every time he returns from a visit, he would be content to leave it in the office without going through these formalities, believing that his bag was secure against all probable risks in the innkeeper's hands.

On the facts of the case it is plain enough that the bag was put into the bar-room by the hotel porter without anything being said by word or sign as to the purpose for which it was left there; and Mr Reginald Pickett, the

Nov. 16, 1907. partner in attendance, who seems not to have observed the placing of the
Whitehouse v. bag in the bar-room, had no opportunity of requiring that the bag should be
Pickett. put into a box and locked and sealed. I am therefore of opinion that the
pursuer did not take the necessary step for bringing himself within the
Lord M'Laren. second exception of the statute, because he did not bring to the notice of Mr
Pickett that he meant to charge him with responsibility for the safe custody
of the bag. The fact that Mr Buckley went to the office for his bag late
on Saturday night, in order, as he says, to take it to his bedroom, is, as I
think, absolutely inconsistent with his case under this head. He did not
need the bag until Monday morning, and if he understood that he had
deposited it in terms of the statute, he had no occasion to take it to his
bedroom, and I can only explain his doing so on the supposition that
Mr Buckley considered the bag was lying in the office at his own risk,
barring such negligence as would make the innkeeper liable in compensa-
tion. This was also the view of the other party, because neither of the
Messrs Pickett knew that the bag was there, and cannot therefore be sup-
posed to have entered into an express contract of safe custody regarding it.

Passing to the first exception of the statute, which I consider in the
second place, I, of course, assume in this branch of the case that the bag
was not expressly deposited for safe custody, but was simply put into a
room which was under the control of the partners. This does not relieve
the defenders from the obligation of taking all reasonable care of the pro-
perty entrusted to them. The question then is, whether reasonable care
was taken, or whether the property was stolen through the "default or
neglect" of the innkeeper. The Lord Ordinary observes that the effect of
the Act of Parliament was "to throw the *onus* upon the guest, whose pro-
perty had disappeared in the innkeeper's custody, to prove that it had dis-
appeared through the default or negligence of the innkeeper or his ser-
vants," failing which proof the liability is limited to the sum of £30.

To this statement of the law I give my unqualified adhesion. But then
if this statement is anything more than an unmeaning generality it means
this, that you do not fix responsibility on the innkeeper by proving that
under the ordinary conditions of hotel business the property disappeared.

If the guest, as a condition of recovering damages, undertakes the *onus*
of proving negligence, he must be able to say in what the negligence con-
sisted—what is the duty to him which the innkeeper failed to perform.
If he can only say, as the Lord Ordinary has said, in his review of the
facts, "that the bag in question was stolen, and that it could not have been
stolen but for the negligence of the defenders or their servants," this appears
to be only another way of saying that the *onus* of proving reasonable care
lies on the defenders, and that in the absence of evidence as to the cause of
the disappearance of the property negligence is to be presumed. I cannot
help thinking that in formulating the ground of judgment which I have
just quoted, the Lord Ordinary has lost sight of the sounder statement of
the criterion of responsibility which he developed in the first part of his
opinion. It is common ground that the bag was stolen by persons who had
obtained admission to the hotel as guests, and I am not prepared to affirm
that the fact that property left in the innkeeper's apartments was stolen is
conclusive evidence of negligence on the part of the innkeeper.

It was argued to us that there was positive evidence of negligence, because Nov. 16, 1907. the door of the bar-room was occasionally left unlocked, and only closed by Whitehouse v. the latch. Now, I think the care which an innkeeper is required to take of Pickett. the property of his guest will depend on the part of the house in which the Lord M'Laren. property is left.

If a bag is left by the guest in the coffee-room the innkeeper is responsible for the reputed honesty of his servants, but as these servants must occasionally leave the room, it would be hard on the innkeeper to say that he is to be responsible if the bag is stolen while the room is unguarded. In the case of goods left in a bedroom or in a private sitting-room, perhaps some higher degree of care may be exigible, but in no case can the care required by law be greater in degree than is consistent with the management of a hotel in the ordinary course of business. The bar-room and Messrs Pickett's parlour which opened into it were probably the safest places in the hotel for leaving valuables (assuming that it was not intended that they should be put into the hotel safe), because it was their practice not to leave these rooms unoccupied. But it is one question to consider what was the usual practice, and quite another question—what did the innkeeper bind himself to do in order to keep his guests' property safe? I cannot accept the suggestion that by merely receiving the pursuer's bag Messrs Pickett undertook as a duty to the pursuer that so long as he remained in the hotel they would never for one instant leave these apartments unguarded. I do not see how the business of a hotel could be carried on under such conditions, and if such a condition had been proposed to them I think the defenders would have replied—"We cannot bind ourselves that one of the family shall always be in these rooms, but if you wish to be absolutely secure we will put your jewellery into the safe and undertake responsibility in terms of the statute."

On this part of the case my opinion is that the defenders, by receiving the bag without express instructions, only undertook to take such care of it as was consistent with the primary purposes to which these rooms were appropriated, viz., for the administrative business of the hotel, and I see no evidence of neglect on their part. They had no reason to suspect dishonesty on the part of the inmates of the hotel, and the fact that a gang of thieves, who were watching their opportunity to steal the bag, succeeded in purloining it when the innkeeper was either engaged at the bar or momentarily out of the room, does not in my judgment amount to evidence of negligent performance of the innkeeper's duty to his guests. I have not commented on the authorities which were cited, but I consider that the judgment I propose is consistent with the judgment of the Appeal Court in *Medawar v. Grand Hotel Co.*,¹ because in that case the judgment was for the defendant when the alleged negligence was only inferential and not supported by positive proof.

I am of opinion that the interlocutor under review should be recalled and the defenders found liable in damages to the extent of £30, and *quoad ultra* absolved.

LORD PEARSON.—The Innkeepers Liability Act of 1863 altered the

¹ L. R., [1891] 2 Q. B. 11.

Nov. 16, 1907. common law by restricting their liability for the property of their guests to
Whitehouse v. £30, except in two cases, namely—(1) where such goods or property shall
Pickett. have been stolen, lost, or injured through the wilful act, default, or neglect
of such innkeeper or any servant in his employ; (2) where such goods or
Lord Pearson property shall have been deposited expressly for safe custody with such
innkeeper.

In these two cases the liability of the innkeeper is still a total liability.

I am not sure that the Lord Ordinary has sufficiently distinguished these two cases, for he says—"the case mainly insisted in was that the goods having been put into the defenders' custody for safe keeping, and having been stolen through the negligence of the defenders or their servants, they are liable to compensate the pursuer for his loss." But clearly they are separate grounds of liability, and must be considered separately.

I take first the second case, under which the question is, whether the jewellery was deposited expressly for safe custody with the innkeeper, because if such express contract is made out, the total liability of the defenders must be affirmed whether there was negligence on their part or not. In my opinion the evidence does not establish any such deposit within the meaning of the Act. The parole evidence taken by itself is, I think, quite insufficient. Nor do I think the pursuer is more successful in making out a special undertaking to that effect founded on the notice which was exhibited throughout the hotel, bearing that the proprietors would not be responsible for any valuables left in bedrooms, but would "take charge of same in office," and adding a reference to the statute. That may well be construed as an invitation to make such a deposit expressly for safe custody as the Act contemplates, but it does not, in my opinion, import that the placing of the goods in the office has of itself that effect.

It remains to consider the other case mentioned in the statute, namely, where the goods are stolen, lost, or injured through the wilful act, default, or neglect of the innkeeper or his servant. It was argued for the pursuer that the burden of proof under this head of liability lies upon the innkeeper, and that it rests with him to shew that he took all due care to prevent the loss of the goods. I do not think that this view is sound. The burden of proof may shift in the course of the inquiry, but in the first instance it lies upon the pursuer to establish the "wilful act, default, or neglect" on which he founds. Here the goods were in the office, having been put there by the defender's servant with the cognisance and approval of the guest, and I take it to be established by the evidence that they were stolen from the office by three very expert thieves acting in concert, in one or other of the methods suggested in the argument. The Lord Ordinary holds—and I agree with him, that there is no direct evidence of negligence. But the ground of his judgment is that on the evidence the bag in question could not have been stolen but for the negligence of the defenders or their servants. I cannot assent to that view. On the contrary I think by far the most probable explanation of the theft, upon the evidence as it stands, is that the thieves—who, be it remembered, were at that time accepted and treated by all concerned as honest guests in the hotel—cheated the hotel officials into a false security by some of the tricks of their trade. This being so, I think the proof of negligence fails.

LORD ARDWALL.—This case raises questions of some difficulty in the Nov. 16, 1907. interpretation of the Act 26 and 27 Vict. chap. 41, and its application to the special circumstances which have been established by the proof. Whitehouse v. Pickett.

The action has been raised for the purpose of recovering from the defenders, who are hotelkeepers at the Imperial Hotel, Edinburgh, the value of a bag of jewellery belonging to the pursuer, which was stolen from the office of the hotel, where it had been deposited by the pursuer's traveller on 17th February 1906. The Lord Ordinary has found that the defenders were guilty of negligence, and has given judgment against them for £1790, 3s. 6d. I am of opinion that the judgment ought to be recalled.

The pursuer's traveller, Mr Buckley, who was well known to the defenders, and had been a frequent guest at their hotel over a period of eighteen years, had been accustomed, and was known by the defenders to be accustomed, to carry with him in addition to his ordinary personal luggage a bag of valuables consisting of samples of jewellery and precious stones for exhibition or sale to the pursuer's customers.

The usual notice as to innkeeper's liability in terms of the Act of 1863 was hung up in the hall of the hotel, but there was another notice exhibited on the wall of the corridor of the first flat of the Imperial Hotel, and, it would appear, also in some of the bedrooms, to the following effect,—“The proprietors of this hotel respectfully beg to intimate that they will not be responsible for any valuables left in bedrooms, but will take charge of same in office. See extract from Act of Parliament, chap. 41, Vict. 26 and 27, in entrance hall.”

On the occasion of Mr Buckley's visit in February 1906, when the bag was stolen, his bag of valuables was, at his sight, deposited by the “boots” in a corner of the office, and he got the number of his bedroom, and the “boots” took his other luggage up to that bedroom. But, as hereafter noticed, nothing was said or done to draw the attention of Mr Reginald Pickett, who was in the office, to the fact that the bag was deposited in the office. The evidence shews that there is always someone either in the office or in the bar parlour which adjoins it, there being a glass door between the two apartments which generally stands open. The bar parlour had, however, an entrance from the public passages of the hotel by a door which is generally unlocked. There is also a door into the office from the corridor, close to the “service” window.

On the occasion of the theft the person in the office (Mr Reginald Pickett) most probably had his attention distracted from the bag by one of the thieves while the other slipped in at the door of the bar parlour and took away the bag. Probably the bag was taken away at the time that Reginald Pickett was receiving the thief's bag at the “service” window for safe custody, and it is worthy of notice that he put it down in the very place from which Mr Buckley's bag had been removed a few seconds before. It appears from Mr Reginald Pickett's evidence that this corner in the office and the bar parlour are the safest places in the hotel for putting bags of valuables, and that indeed the defenders had no other place for depositing such a bag as Mr Buckley's, although they might have put the jewels, after being taken out of the bag, in a small safe. In these circumstances two questions arise. (First) Are the defenders liable in respect of the 2d sub-

Nov. 16, 1907. section of section 1 of the said Act? An able argument was submitted by the pursuer's counsel founded on the notice above quoted, which was said to be a direction to guests in the hotel not to leave any valuables in their bedrooms, but to take them to the office, where the proprietors say they will "take charge of same." It was argued that there could be only one object in depositing the bag in question in the office, namely, to put it in safe custody, and that this was the method of putting valuables into safe custody prescribed by the proprietors of the hotel themselves, and that therefore they are barred from maintaining that valuables put into the office are not put in there expressly for safe custody, or that they are not responsible for them, as they impliedly undertake to be by the said notice. I consider there is very great force in this argument, but as matter of interpretation of the statute I cannot hold that depositing valuables in an office in pursuance of such notice as I have quoted, without saying a word about them to the person in charge of the office or hotel, would amount in the words of the Act to "depositing them expressly for safe custody" with the innkeeper.

(Second) But assuming that the pursuer cannot bring his case within subsection 2, the question still remains whether the defenders are not liable under subsection 1, which is in the following terms:—"Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ." The question under this section is whether the bag in question was stolen or lost through the default or neglect of the defenders or their servants.

According to the evidence of the defenders themselves, the only place where valuables contained in a bag of some bulk could be so deposited in their hotel was the office and bar parlour. These were the safest places in this hotel for the custody of valuables; and further, the office was the place where the defenders invited their guests to deposit their valuables, and undertook to "take charge" of them. This being so, I am of opinion that if Mr Buckley had either handed his bag to Mr Pickett to take charge of, or had said to Mr Pickett, "That is a bag containing valuables, and I must ask you to take charge of it," a special duty would have been laid upon the defenders, and that in the circumstances it would have been their duty not only always to have had some person in the office, but also when there was only one person there who had various duties to discharge at the service window and otherwise, that they should have taken care to have had both the doors locked, so that persons could not slip in and make away with valuables when the single occupant of the two rooms was engaged in other ordinary and necessary duties. But the facts raise a very different case, for I hold it clearly established by the evidence alike of Mr Buckley, Mr Pickett, and the witness James Sim, that the bag was deposited in the corner of the office behind an ice-chest without a word being said to Mr Pickett about the matter or his attention drawn to the bag in any way whatever. It seems that when Mr Buckley and Sim entered the office Mr Reginald Pickett was taking his dinner in the back parlour and came forward just as they were entering, looked up a book and gave a number to the "boots," and then went out with Mr Buckley to introduce him to some friend of his in the coffee-room. So little

was Mr R. Pickett aware that a bag of any kind, not to say of value- Nov. 16, 1907.
ables, had been deposited in the corner of the office, that when later ^{Whitehouse v.}
on in the evening he went to deposit the bag, handed in by one of the ^{Pickett.}
thieves, in the same corner, he did not know that there should have ^{Lord Ardwall.}
been another bag there. Then it appears from Mr Buckley's own evidence,
which is corroborated by the evidence of the Picketts, that on the occasion
of Mr Buckley's visits his bag of valuables was never as a rule given in
charge to either of the Messrs Pickett or other person in the office, but was
put at Mr Buckley's pleasure either in the corner from which it was stolen
on the occasion in question, or beside the safe under the sideboard in the
bar parlour, and then, if Mr Buckley wished to take it out for the purpose
of going his round of customers with it, he just went in and took it out as
it suited himself; and finally at night when it was no longer matter of con-
venience for him to have the bag on the first floor, and when he could watch
it himself, he walked into either the parlour or the office as the case might
be and took the bag up to his bedroom without apparently saying anything
about it to anyone. Indeed, it was when he wished to take the bag up to
his bedroom on the occasion in question that he discovered that it had dis-
appeared. This being the regular course of conduct on the part of Mr
Buckley, it can hardly be suggested that the defenders had any special duty
with regard to his bag, nor did he consider it of importance to lay any such
duty upon them, which perhaps might have interfered with his having such
ready access to the bag as he usually seems to have had. He chose to leave
the bag in one or other of the places I have mentioned, content with the
amount of security that was afforded by its being out of the view of the
public, and in private rooms dedicated to the use of the managers of the
hotel, and to which in the ordinary case the public had not access, although
apparently privileged customers like Mr Buckley were allowed to come in
and out without any locking or unlocking of the doors which led into the
passages of the hotel.

In these circumstances I do not think it can be held that the defenders
were under any duty to take the special precautions I have above alluded
to, and which I think they would have been bound to take if the bag had
been in any way, however informally, put under their charge, even though
not "expressly for safe custody." They gave the pursuer's bag, and
apparently those of other persons what might be called house-room in any
part that the customers pleased of the office or bar parlour, but they came
under no obligation, express or implied, to work these two rooms otherwise
than they were accustomed to do in the ordinary service of the hotel, and
if customers chose to take advantage of the permission to leave their bags
in these rooms and at the same time to have absolute freedom of access to
them whenever they pleased, but without giving warning of any kind to
the hotelkeepers that they were putting valuable property under their charge,
I do not think that they can impute neglect to the hotelkeepers for not
taking precautions beyond those which they usually took to exclude the public
from their private rooms.

I may add that it appears to me that the principal neglect in the case
was on the part of Mr Buckley in not putting his bag in special charge of
the hotelkeepers. It was suggested that it was the duty of James Sim,

Nov. 16, 1907. the "boots," to have done this when he took the bag into the office, and that he was negligent in not doing so. I cannot accept this view of the case. The "boots" was merely the hand of Mr Buckley in carrying in and depositing his bag, and it was for Mr Buckley himself, and not the "boots," to tell Mr Pickett that he was giving the bag into his charge. For these reasons I am unable to hold that negligence within the meaning of the first section of the Act had been proved against the defenders. I accordingly think that the Lord Ordinary's interlocutor ought to be recalled and the defenders assoilzied, with expenses.

THE COURT recalled the Lord Ordinary's interlocutor and found " (1) that the pursuer's traveller did not deposit the bag of jewellery mentioned on record with the defenders expressly for safe custody, and (2) that it is not proved that the defenders negligently failed to take proper care of the said bag and contents: Ordain the defenders, jointly and severally, to make payment to the pursuer of the sum of £30 sterling tendered by them on record, with interest thereon as concluded for, in full of the conclusions of the summons: *Quoad ultra* assoilzie the defenders, and decern."

CUTHBERT & MARCHBANK, S.S.C.—GARDINER & MACFIE, S.S.C.—Agents.

No. 37. MRS MARGARET BROWNLEE (Brownlee's Executrix), Pursuer
(Respondent).—*Hunter, K.C.—Morison, K.C.—T. G. Robertson.*
Nov. 29, 1907. ROBERT BROWNLEE Junior, Defender (Reclaimer).—*D.-F. Campbell*
—*Graham Stewart, K.C.—More.*
Brownlee's
Executrix v.
Brownlee.

Donation—Animus Donandi—Delivery—Proof.—On 24th December 1903 the books of Robert Brownlee junior contained an account-current between him and his father, Robert Brownlee senior, which shewed a balance of £1653, 8s. 6d. at the credit of the father. At the same date the account was squared by an entry of "To cash, £1653, 8s. 6d.," and a docquet was appended, which was signed by Robert Brownlee senior, in these terms "Settled this date."

Of the same date a receipt was granted by the father to the son for £1653, 8s. 6d. "as per account rendered." No cash passed between the parties. At the same date the son gave a receipt to his sister, Miss Brownlee, for £1653, 8s. 6d., and she was credited in his books with that amount.

On 22d February 1904 Robert Brownlee junior gave his father a written guarantee that Miss Brownlee would pay him £2000.

On 16th March 1904 Robert Brownlee junior, by Miss Brownlee's instructions, paid the £1653 and interest to the father's agents.

In an action brought by the father's executrix in 1905 against Robert Brownlee junior for payment of the £2000, the question arose whether in March 1904 the sum of £1653, 8s. 6d. belonged to the father or to the daughter.

The defender alleged that it had been gifted by the father to the daughter on 24th December 1903, and contended that the documents above mentioned instructed an absolute title in the daughter, and, therefore, that the £1653 had been paid by the daughter, and the defender's liability under the guarantee reduced by that amount.

Held (aff. judgment of Lord Salvesen) that as the defender admitted that the sum due by him to his father had not been paid by him to his father on 24th December 1903, the *onus* lay upon him to prove (1) that the father had transferred the title to Miss Brownlee, and (2) that he had done so *animo donandi*; and that the writings did not, by themselves or

along with the parole evidence, instruct either the transfer to her or the Nov. 29, 1907.
animus donandi.

THE pursuer in this action was Mrs Margaret Irvine or Colquhoun or Brownlee, the widow and sole executrix of the deceased Robert Brownlee senior, Glasgow, who died on 29th March 1905, and the defender was Robert Brownlee junior, his son.

Brownlee's
 Executrix v.
 Brownlee.

1ST DIVISION.
 Lord Salvesen.

The action concluded for payment of £2000 alleged to be due to the deceased's estate by the defender under a letter by which he guaranteed payment of that sum by his sister, Miss Catherine Brownlee, to the deceased, to enable him to make a provision for Mrs Barr, his daughter by a former marriage.

In his defences Robert Brownlee junior stated that on 24th December 1903 a sum of £1653, due by him to his father, was by the father transferred to his daughter Catherine as a gift, and that on 16th March 1904 this sum was paid by her to her father, thereby reducing the defender's liability as cautioner by that amount.

The pursuer in answer stated that this sum was not transferred to or gifted by the father to his daughter, and remained his property.

The circumstances in which the action arose and the nature of the action are fully stated in the Lord Ordinary's note.

On 6th November 1906 the Lord Ordinary (Salvesen), after a proof, ordained the defender "to make payment to the pursuer of £1950 sterling in full of the conclusions of the summons." *

* " OPINION.—The late Robert Brownlee senior was thrice married. By his first marriage he had one daughter, now Mrs Barr. By his second marriage he had two children, the defender and Catherine Brownlee. During the lifetime of his second wife he contracted an intimacy with Mrs Colquhoun, the pursuer in this action, who was then a widow. After the death of his second wife he continued this intimacy with Mrs Colquhoun until 1901, when he married her. The defender and his sister were much opposed to this marriage, and it was kept a secret from them, at all events from Catherine Brownlee. Although the deceased continued on affectionate relations with his wife and regularly visited her, they did not live together, but I see no reason to doubt the pursuer's statement that he would have married her much earlier but for his fear of the defender and Miss Brownlee.

" The deceased was in business for many years as a timber merchant, and was so successful that at one time he seems to have been possessed of a fortune of over £100,000. During his lifetime he distributed his means amongst his near relatives, so that at the time of his death he was absolutely without means; and his funeral expenses have not yet been paid by any of those who benefited by his bounty. The pursuer is his executrix and universal legatory under a holograph settlement which he executed about a year before his death.

" In 1891 the deceased made over to the defender a sum of £30,000, which is admitted by him to have been in large measure a gift. There is contemporaneous evidence that the deceased intended only to lend this sum to his son, but he did not obtain any acknowledgment of the terms upon which the money was given, and the defender refused to give any such acknowledgment, maintaining that the money had been gifted to him. Some years later Catherine Brownlee received a sum of £17,000, in respect of which she granted a full discharge of her rights of legitim. She said in evidence that she told her father at the time that, notwithstanding this discharge, she would expect him to make her further payments; and she admits having received at least £2100 worth of shares subsequently. The pursuer also from time to time obtained sums of money from the deceased, but there is no evidence which enables me to fix the amount. The defen-

Nov. 29, 1907.

Brownlee's
Executrix v.
Brownlee.

The defender reclaimed, and argued;—The documents produced shewed that on 24th December 1903 £1653 was completely and unconditionally transferred by the deceased to Miss Brownlee. The documents themselves were her title, and it was unnecessary for her to prove any other. If the money were now claimed on behalf of the deceased, it could only be on the ground that it had been handed to Miss Brownlee in trust; that could only be proved by her writ or oath, and no such evidence was forthcoming. The authorities relied on by the pursuer were all inapplicable, dealing as they did with the transference of money by indorsement of a deposit-receipt. The ratio of these decisions was that the indorsement of a deposit-receipt was not in itself a complete transference of the money which it represented, and that consequently further proof was required of the title on which the property was acquired. But where, as in the present

der and his sister seem to have entertained feelings of intense animosity towards Mrs Colquhoun, so much so that Miss Brownlee admitted in the witness-box that Mrs Colquhoun was to her like a red rag to a bull, and that she could not control either her language or her actings in her presence.

“ In the beginning of 1904 Mrs Barr, having heard of her father's extensive alienations of his estate, thought that it was time that she too was putting in a claim for a share. She had reason to believe, from what her father had told her, that one-third of the sum of £30,000 transferred to the defender's account had been intended as a provision for her. Her father seems to have recognised the justice of her claim, and negotiations were opened between the agents of the parties, which resulted in the deceased undertaking to pay Mrs Barr a sum of £5000. A hitch occurred in the settlement, due to the fact that the deceased's only available means at that time seem to have consisted of a sum of £3000 due to him by the Limited Company which had taken over his business and mills. He accordingly endeavoured to withdraw from his obligation. The defender was aware that Mrs Barr claimed that a share of the money which had been transferred by his father to him had been so transferred for her behoof, and he was accordingly interested in having a settlement effected. Some negotiations followed, and finally a meeting took place on the 23d of February 1904, at which Mrs Barr agreed, on payment to her of £5000, to discharge her right of legitim and all other claims which might be competent to her against the deceased, the defender, Miss Catherine Brownlee, and Mrs Colquhoun, or any of them. In order to get this settlement carried through, the defender at the same time wrote and delivered the letter of guarantee which is printed on page 7 of the Record.* He says that before

* The document referred to was as follows:—

“ Glasgow, 23d February 1904.

“ James Findlay, Esq., Writer, Glasgow.

“ Dear Sir,—I hereby authorise you to make payment to my daughter Mrs Marion Brownlee or Barr of the sum of £5000, in exchange for a discharge by her of her right of legitim and of all other claims which may be competent to her against me, my son Robert, my daughter Catherine, and Mrs Margaret Irvine or Colquhoun or Brownlee, or any of them.—Yours faithfully,

ROBERT BROWNLEE.

“ Robert Brownlee, Esq.

“ Glasgow, 23d February 1904.

“ Dear Father,—With reference to the foregoing, I hereby guarantee payment to you by my sister Catherine of the sum of £2000 towards payment of the within-mentioned sum of £5000.—Yours faithfully,

“ ROB. BROWNLEE JR.”

case, the assignment of the property was complete, there was no necessity for the defender to prove donation.¹ Even if it were necessary, the documents together with the parole evidence were sufficient to establish not only delivery of the money, but also the intention of the deceased to bestow it on Miss Brownlee as a gift. Nov. 29, 1907.
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Argued for the pursuer;—It was the defender's case on record that Miss Brownlee had acquired the money by donation. In such circumstances it was necessary for the alleged donee to prove not merely delivery, but also the intention to make the gift. This was the law, whether the transference was complete or incomplete, and whether it was effected by delivery of a document of title or of the property itself. This rule had been exemplified mainly in cases relating to the indorsation of deposit-receipts,² but it applied equally to the present case. Here the evidence in support of donation was wholly insufficient. The documents founded on did not shew with what intention the assignation of the property in favour of Miss Brownlee was made

doing so he had the authority of his sister Catherine to pay over a sum of £1718, which was standing at her credit in his books, and that he took the risk of inducing her to contribute also the balance. At the time that this arrangement was made the defender's position was that he declined to contribute any funds towards a settlement with Mrs Barr out of his own pocket, although he strongly resisted a proposed arrangement between Mrs Barr and the deceased that she should accept £3000 from him, and have her claim against the defender reserved.

"Mrs Barr and her agent naturally expected that the settlement would be carried out at once, but as there was some delay in doing so, Mrs Barr served an action on the deceased for payment of the £5000. Further procedure, however, was obviated by the deceased paying, on 14th March, the sum at his credit in the books of Brownlee & Company, Limited, amounting, with interest, to £3018, 14s. 10d. About the same date the defender signed a cheque for £1718, 8s. as his sister's contribution to a settlement, but refused to make any further payment. The balance of £262 was thereupon advanced by the pursuer in order that the settlement might be carried through, and this was accordingly done. In return for the £5000 Mrs Barr delivered a discharge in terms of the letter of 23d February 1904.

"The sum of £1718, 8s. paid by the defender's cheque is said to have consisted of a sum of £1653, 8s. 6d., and interest from 24th December 1903, which at that date stood at the credit of the deceased in the books of the defender, and bore to have been paid in cash. In the same books the exact amount is credited to Miss Brownlee on the same date, and it is to this transaction that the bulk of the evidence relates.

"The pursuer's case is a perfectly simple one. She sues upon the guarantee for £2000, which she found in the repositories of the deceased. She maintains that, according to its true construction, the defender guaranteed the payment by his sister Catherine out of her own funds of the sum of £2000 towards payment of the £5000 which the deceased had agreed to pay Mrs Barr, and she says that she has now discovered that no part of that sum has been contributed by Miss Brownlee. The deceased received no obligation from Miss Brownlee to pay any sum, and accordingly the pursuer now seeks to enforce the guarantee against the defender to its full amount.

"On record the defender disputes his liability to make payment of any sum, his defence being that his father wrote to him to make up the balance

¹ Macfarlane's Trustees v. Miller, July 20, 1898, 25 R. 1201.

² Crosbie's Trustees v. Wright, May 28, 1880, 7 R. 823; Jamieson v. M'Leod, July 13, 1880, 7 R. 1131; Sharp v. Paton, June 21, 1883, 10 R. 1000; Dawson v. M'Kenzie, Dec. 8, 1891, 19 R. 261.

Nov. 29, 1907. by the deceased; they did not even prove that such an assignation was made at all. The parole evidence of donation, resting as it did on the uncorroborated testimony of the defender and his sister, contradicted by such direct evidence as there was of the true state of mind of the deceased, gave no support to the defender's case.

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At advising,—

LORD PRESIDENT.—The facts out of which this case arose are so clearly and fully stated by the Lord Ordinary that it would be useless for me to repeat them. The story of the gradual absorption of old Mr Brownlee's fortune by his nearest relatives is pathetic enough, and were it adequately described would seem more like the closing scenes of the life of Père Goriot than the history of a middle class family in Glasgow. Sympathy, however, is an ill basis for a judgment. And even were it not so, I do not think there

of £262, 17s. 3d., and that, as the result of an interview between the parties, he waived all claim under the guarantee. It is not, however, now disputed that the defender cannot rely upon this alleged verbal waiver as a discharge of his obligation, and that in any event he is liable for a sum of £281, 12s., being the difference between the £2000 guaranteed and the £1718, 8s. On the other hand, the pursuer has not endeavoured to prove that the sum of £50, which was included in that remittance, was not paid out of the proper funds of Miss Brownlee, and accordingly the sole controversy between the parties now relates to the sum of £1653 already referred to. The defender's case on record is that this sum was gifted by his father to Miss Catherine Brownlee on 24th December 1903, and that accordingly, when he remitted it on 16th March thereafter, he to that extent implemented his guarantee.

“On the motion of both parties, a proof was allowed *habili modo*, and parole evidence bearing on the transaction of 24th December was led without objection. The defender's counsel, however, now pleads that the documentary evidence is all that can competently be looked at, and that that evidence instructs that there was in effect an assignment by the deceased to his daughter of this sum of £1653; that either this assignment was by way of gift or was made in trust for behoof of the grantor; that in the latter case the trust can only be established by the writ or oath of the trustee; and that the pursuer's position in this process cannot be any better than if she had brought her action against Catherine Brownlee for payment of the £1653. He protested accordingly against the view that it lay upon the defender to instruct that a donation of £1653 was made to Miss Brownlee on the occasion in question. This ingenious argument, which I hope I have correctly apprehended, was supported by a reference to the case of *Dunn v. Pratt*, 1898, 25 R. 461.

“In order to deal with this argument it is necessary to consider what are the documents founded on. They consist, in the first place, of an account current, No. 17 of process, between the deceased and the defender. It contains an entry opposite the date 24th December ‘To Cash, £1653, 8s. 6d.,’ which squares the account, and contains a docquet signed by the deceased in these terms, ‘Settled this date.’ There is also a simple receipt, No. 18 of process, of the same date, for the same sum. These are the only documents under the hand of the deceased, and so far as they go they instruct that the account was settled by a payment in cash. It is admitted, however, that no cash passed. The defender, however, founds upon two other documents, the first a simple receipt, bearing date 24th December 1903, in favour of Miss Brownlee for the sum of £1653, 8s. 6d., signed by himself, and a corresponding entry to her credit in his books. These four documents, taken together, he contends, are equivalent in law to a simple assignment under the hand of the deceased in favour of Miss Catherine

is room for any in this case. As was naïvely said in the proof by the defender, "the old man had been ground between two millstones," and what your Lordships have to decide is to which of the two millstones this, the very last piece of grist, shall stick. Nov. 29, 1907.
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The case of the pursuer is simple enough, being based on an undisputed guarantee by the defender; and the defence is simply that the sum guaranteed, with the exception of a small sum, has been already paid by Miss Brownlee. All turns on whether the sum of £1653 really belonged to old Mr Brownlee or to Miss Brownlee. That sum of £1653 admittedly first appears as a sum of money due by the defender to his father, old Mr Brownlee. Appearing in the defender's books as a credit entry in an account between the deceased and him, it is squared by a debit entry to cash of the same amount. Admittedly no cash passed. But at the same Ld. President.

Brownlee. If, accordingly, an action had been brought against Miss Brownlee, she would have been entitled to have pleaded the Act of 1696, and as no document has been produced qualifying the absolute character of the assignment, the pursuer's case must necessarily have failed, unless she had chosen to refer it to the oath of the trustee.

"In my opinion, this argument fails on two grounds. In the first place, I do not think that the documents are to be treated as equivalent to a formal assignation by the deceased in favour of Miss Brownlee. If such a document had been subscribed, there would have been *prima facie* evidence of the authority to transfer. Here the documents unconnected by parole evidence instruct no authority. The case of *Dunn v. Pratt* is differentiated because the pursuer himself supplied the link that would otherwise have been required by averring that the title to the property had, by his authority, been taken in the name of the defender. In the second place, the Trust Act can, I think, only be pleaded by the alleged trustee, and not by a third party. The defender suggests that an action for the £1653, 8s. 6d. might properly have been directed against Miss Brownlee. I cannot conceive what claim the pursuer could have had against her. On the assumption that the £1653 belonged to the deceased it has, so far as Miss Brownlee is concerned, been paid. The action against the defender is based on his own letter of guarantee that £2000 of her money should be made available for payment of the money due to Mrs Barr.

"The question, however, remains whether the £1653 was, in March 1904, the property of Miss Brownlee or of the deceased. If it was Miss Brownlee's, it can only have become so by its having been gifted to her by the deceased on the 24th of December 1903. The *onus* of proving donation is, of course, upon the defender; but I am far from saying that the evidence of the donee and of the defender, who is mainly interested in supporting the theory of donation, might not be sufficient, corroborated as it is by the receipt under the deceased's own hand, if that evidence had satisfied me that the deceased intended to make such a donation, and fully understood that he had done so. The value of the receipt as an adminicle of evidence is, however, completely destroyed by the letter No. 85 of process and the subsequent letter, the draft of which is No. 94 of process. The first of these letters [addressed to Mr Sinclair, a clerk in the defender's office] is dated 19th January 1904, less than a month after the alleged gift, and followed upon an examination of the deceased's account by him in the books kept at the office of the Limited Company. It is in these terms:—'Yesterday I understood you to say that my account with Mr Robert was squared, while according to your own statement of 24th December last there was at that date a balance of £1653, 8s. 6d. in my favour. Will you kindly explain by return what became of this balance,

Nov. 29, 1907. time a receipt was granted by old Mr Brownlee, and in the defender's books in an account with his sister a credit entry of the same amount is made to her; and eventually it is this sum which is paid away for the payment secured by the guarantee. In these circumstances the Lord Ordinary, treating

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Ld. President. the case as one of donation, has held that the *onus* on the defender to prove donation has not been discharged, and that accordingly, the £1653 being the property of old Mr Brownlee, no payment was made by Miss Brownlee of that sum, and the obligation in the guarantee becomes prestable.

Before your Lordships, however, the Dean of Faculty strenuously urged that there was here no necessity to prove donation, because the transaction between old Mr Brownlee and Miss Brownlee was a completed one; and that the *onus* of proving donation only arose when there was no completed

and oblige.—Yours truly, Robert Brownlee.' The reply to this letter, dated 20th January (No. 94), was admittedly instructed or dictated by the defender, and is a merely formal letter that the statement had been settled 'as per enclosed copy receipt.' To this a reply was sent asking particulars of the alleged settlement in a perfectly civil way.* The defender does not think he received a letter in these terms; but I am satisfied from the evidence of Sinclair that he did, and that it made him very angry. The letter itself was destroyed and was never answered. These two letters are, to my mind, most instructive. They shew that the deceased Robert Brownlee did not know when he wrote them that he had made a gift of the money to his daughter, and what is even more important, the defender did not venture to suggest that at the time, although in evidence he puts forward a more or less circumstantial story. If he believed that his father's memory was failing him, nothing would have been easier than for him to have reminded his father of what had taken place, and of the £1653 having been transferred to his sister's name with his authority. The letter of 20th January is, to my mind, most disingenuous, because it relies on a receipt for payment of a sum in cash which the defender well knew had never been made.

"It does not avail the defender to say, as he now does, that the two letters I have referred to were written by young Colquhoun, and that his father could not have known the contents of what he was subscribing. If that were so, it would equally apply to the receipt and docquet on the

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"City Saw Mills, Port Dundas,
"Glasgow, 20th January 1904.

"Robert Brownlee, Esq.,
"24 Burnbank Terrace.

"Dear Sir,—Replying to your favour of yesterday, I beg to state that the statement rendered on 24th ult., amounting to £1653, 8s. 6d. was settled by you on that date, and I herewith enclose you copy of your receipt.

"I sent to Mr Findlay a detailed statement of this account.—Yours truly,
JAMES SINCLAIR."

Note in pencil on back of above.

"I have yours to-day and note explanation, but cannot remember either uplifting the £1653 or paying it away afterwards. If you can give me any information as to what I intended to do with it, I shall be obliged. You might say in what form the money was paid to me; also by whose instructions the statement of the account you refer to was sent to Mr Findlay, as I cannot understand for what purpose this was done. I am sorry to give you so much trouble about this, but my memory has quite failed me in this, and I cannot find any note of this transaction in my books.—Yours truly,
"ROBERT BROWNLEE."

transference, but where the *titulus transferendi* was a document of ambiguous Nov. 29, 1907. import, such as, for instance, an indorsed deposit-receipt; indeed, he went so far as to urge that the law on deposit-receipts formed a kind of special chapter which could not be applied to other subjects. In my opinion this position is unsound. I do not think there is any difference in principle between the cases of donation where the subject of the donation is money exigible as against the bank with which it is deposited in virtue of a deposit-receipt, and cases where the subject is something else. The only peculiarities of deposit-receipts consist in the consideration of how far indorsation of the deposit-receipt is equivalent to delivery of the money alleged to be donated.

The rule seems to be this: When a person is asked to give up something, be it land, corporeal moveables, or money, which he has reduced into posses-

account, and would destroy their value as adminicles of evidence in support of the alleged donation. But further, I am of opinion that if there was undue influence used, it was by the defender and his sister, and not by the Colquhouns; and an incident which arose later, and which depended mainly on the evidence led for the defence, illustrates this.

"The defender says he received a third letter, now destroyed, from his father asking him for payment of the balance of £262, being the amount which had been supplied by Mrs Colquhoun in order to make up the £5000. The defender was admittedly due this, and even a larger sum under the guarantee; but the receipt of the letter seems to have put him into a violent temper. He at once went off to his father, and, according to Miss Brownlee, there were high words, I should imagine entirely on the defender's side, which resulted in the defender's father, an old man of 88 or 89, apologising for having made such a demand. This matter is founded upon by the defender in order to establish a verbal waiver by his father of what is now admitted to be a good claim of debt. It could obviously not be used for such a purpose with any effect, seeing that the obligation said to be verbally waived rests upon a writing preserved by the obligee; but it throws a strong light on the defender's methods of dealing with his father; and of the dominant influence which he possessed over him.

"I am not overlooking the fact that at the same time as the deceased is alleged to have made the gift of money to his daughter he also executed gratuitous transfers in her favour of certain shares, and that these have not been challenged. There is no evidence, however, in this process, such as we have in the two letters before referred to, that the deceased did not know what he was doing; and the two transactions, therefore, stand upon an entirely different footing.

"With regard to the parole evidence of gift, it consists almost entirely of the evidence of the defender, but slightly corroborated by his sister, for at the interview, when the gift is said to have been made, nothing seems to have been said by the deceased; but he simply signed the documents, which were already made out for his signature, without observation. The conclusion which I draw from the evidence is that the deceased knew that the money was being transferred into his daughter's name for his behoof; but that he never intended to make her a present of it; and what Miss Brownlee is reported to have said to Mrs Barr is strong confirmation of this theory. It may have been in the defender's mind that he would be able to appropriate this sum standing in his sister's name in his books towards implement of the guarantee, and that he had previously obtained her consent to his doing so; but if, as I hold, it was really the deceased's money, this will not avail the defender. Besides, I do not believe that Miss Brownlee was the kind of person who would readily have consented to give up to the

Nov. 29, 1907. where there was a question both upon donation *inter vivos* and donation *mortis causa*. The donation *inter vivos* had been perfected by the indorsement of a deposit-receipt which was followed up by transference of the money to the account of the donee; and the *dictum* of Lord Adam on Brownlee's Executrix v. Brownlee. which the defenders relied was this: His Lordship, speaking of these deposit-receipts, says ¹:—"This case differs from the preceding in respect that it is not a *donatio mortis causa*, but a present donation *inter vivos*. Mrs Miller's title to these deposit-receipts appears to me to be complete." Upon that *dictum* of Lord Adam the defenders argued that it was complete simply because transference was completely made. But if the case is more narrowly looked at I think it will be found that his Lordship does not mean that, but means that it is complete, taking the evidence as it stands as a whole. On looking back to the Lord Ordinary's judgment, which was being reviewed, the Lord Ordinary treats the matter just in the way in which I have urged that it should be treated, and says this: ²—"In the case of the defender Mrs Miller, the alleged donations were not *mortis causa*, but *inter vivos*—they consisted of deposit-receipts of the National Bank which were handed to Mrs Miller, and re-deposited in her own name"—that is to say, the money was re-deposited in her own name—"accordingly the transfer of title was completed absolutely in the lifetime of Mrs Macfarlane. As to the *animus donandi*, I see no reason to doubt the evidence of Mrs Miller herself, though I did not hear her examined." I think when Lord Adam says that it is made out, it is quite evident he means that it is made out upon the evidence as a whole, and that in that case there was what their Lordships thought was satisfactory evidence of the *animus donandi*.

I am therefore of opinion that the Lord Ordinary was right in treating the case as one in which donation had to be proved. As to the *onus* there is the well-known *dictum* of Lord President Inglis in *Sharp v. Paton*,³ approved by Lord President Robertson in *Dawson v. M'Kenzie*,⁴ that "There is a strong presumption against donation, and it requires very strong and unimpeachable evidence to overcome it." On the facts, tested by that criterion, I agree with the Lord Ordinary, and have nothing to add to what he has said.

LORD M'LAREN.—I concur.

LORD KINNAR.—I am also of the same opinion.

LORD PEARSON.—The letter of guarantee on which this action is founded was granted by the defender to his father, with reference to a claim by his half-sister, Mrs Barr, for a sum of £5000 in discharge of her claim for legitim. It appears that the deceased was unwilling to contribute more than £3000; and it was arranged that Mrs Barr's half-sister Catherine should furnish the balance of £2000, and that a letter should be granted by the defender guaranteeing payment to his father by Catherine of that balance. The guarantee was duly signed and delivered by the defender, and was found in the father's repositories at his death. The sum of £5000

¹ 25 R. 1208.

³ 10 R. 1000, at p. 1006.

² 25 R. 1203.

⁴ 19 R. 261, at p. 271.

was paid over to Mrs Barr, who granted a discharge in terms of the letter Nov. 29, 1907. of 23d February 1904.

It clearly appears from the evidence that this balance of £2000, though ostensibly paid out of a credit standing in name of Catherine, was, to the extent of £1653 and interest, paid out of moneys which originally belonged to the father, and which in the December previous had existed in the form of a debt due by the defender to his father on account. Admittedly this was a liquid debt, presently due, and bearing interest in favour of the father, and by a series of book entries, no one of which represented the passing of cash or of securities, the defender so arranged matters that the credit, which was originally in favour of his father, found its way into another account in favour of Catherine. Thus the payment by Catherine towards the £5000 which was required for the settlement with Mrs Barr, was really made out of money or credit which had belonged to the father, and if that be the true view, the guarantee by the defender which was found in the repositories of the deceased remains unfulfilled, and the pursuer is entitled to insist for implement of it.

It is said that the documents themselves are conclusive in favour of the defender. I cannot assent to that view. There are here no documents of title properly so called, and it appears to me that the documents which do exist urgently demand explanation. The real defence here is donation, or, as it is put in answer 4 for the defender, "that on 24th December 1903 Robert Brownlee senior made a gift to his daughter Catherine of a sum of £1653, 8s. 6d., which was lying in the hands of the defender at interest." It is said that this money, originally the father's, was gifted by him to his daughter in order to enable her to make the contribution towards the settlement of Mrs Barr's claim, and that the defender's letter of guarantee was thereby rendered unnecessary, and was practically discharged. In such a case I have no doubt of the competency of a proof of the facts and circumstances, in order to determine the question of donation. But it lies upon the defender to make good his position, and I think he has entirely failed to do so. On the question of the intention to make a gift the statements of the alleged donor and the alleged donee would in general be the best evidence. In this case we have only secondary evidence as to the intention of Mr Brownlee, the alleged donor, and so far as it goes it is adverse to the argument on intention. As to Catherine Brownlee, the alleged donee, her evidence conveys the impression that she knew nothing about it, except what she was told by her brother. Then as to the documents on which the defender relies, these are, to my mind, highly unsatisfactory. They include an exchange of receipts, which gives an appearance of formality to the transaction. But the exchange of receipts in such circumstances, where no moneys or securities pass, may import any one of several things. There is not enough, in my opinion, to instruct the donation alleged, and whether the documents are regarded in themselves, or in the light of the parole evidence, I think the defender's case fails.

LORD M'LAREN.—I concur also with the judgment of Lord Pearson.

THE COURT adhered.

DOVE, LOCKHART, & SMART, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

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No. 38. THE CORPORATION OF THE CITY OF GLASGOW, Pursuers (Reclaimers).—

Lord-Adv. Shaw—D.-F. Campbell—M. P. Fraser—A. Crawford.

Nov. 29, 1907.

THE CALEDONIAN RAILWAY COMPANY, Defenders (Respondents).—

Clyde, K.C.—Cooper, K.C.—Orr Deas.

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Railway Co.

Railway—Road—Bridge—Bridge carrying highway over railway—“Public Highway”—Maintenance of Road—Railways Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 33), sec. 39—The Railways Clauses Consolidation (Scotland) Act, 1845, sec. 39, enacts that where a line of railway crosses “any turnpike road or public highway,” and the road is carried over the railway by means of a bridge, such bridge and the approaches thereto “shall be executed and at all times thereafter maintained at the expense of the [railway] company.”

Held (aff. judgment of Lord Salvesen) that the words “public highway” applied only to roads which were public de jure.

Railway—Road—Bridge over Railway—Caledonian Railway (Additional Powers) Act, 1872 (35 and 36 Vict. cap. cxiv.), secs. 4, 26.—The Caledonian Railway Act, 1872, sec. 4, enacts that the Company “may make and maintain” certain railways, and “may execute the other works and operations hereinafter mentioned.” With reference to one of the railways authorised, which crossed a certain road, sec. 26 enacts:—“In constructing railway No. 2 the following provisions shall be binding on the Company, which shall construct the works hereinafter specified in manner hereinafter directed . . . (3) the road . . . shall be carried over the railway by a bridge not less than 40 feet wide.”

The railway company by virtue of the powers conferred on them by secs. 4 and 26 of the foregoing special Act, constructed railway No. 2, and, where it crossed the road, carried the road over the railway by means of a bridge.

Held that since the section of the special Act providing for the construction of the bridge did not specify that the road upon it was to be maintained by the railway company, no such duty lay upon it under the provisions of that Act.

1ST DIVISION.
Ld. Salvesen.

(ANTE, 8 F. 755.)

On 8th November 1904 the Corporation of the City of Glasgow brought an action against the Caledonian Railway Company, in which they sought for declarator “(First) that Broomfield Road, Cumbernauld Road, and Strathclyde Street, in the city of Glasgow, are public highways, and are respectively carried over the defenders’ railway or railways by means of a bridge or bridges; and (Second) that the defenders are bound at all times to maintain at their own expense the portion or portions of the said Broomfield Road, Cumbernauld Road, and Strathclyde Street, carried over the defenders’ railway or railways by means of a bridge or bridges, including in such maintenance in each case the immediate approaches of such bridge or bridges.”

The pursuers founded on sec. 39 of the Railways Clauses Consolidation (Scotland) Act, 1845, and pleaded;—(2) The said Broomfield Road, Cumbernauld Road, and Strathclyde Street, being public highways within the meaning of the statute condescended upon, the pursuers are entitled to decree in terms of the first declaratory conclusion of the summons. (3) The defenders being bound in terms of the statute condescended upon to maintain the specified portions of said streets all as condescended upon, and having declined to recognise any obligation on their part for such maintenance, and refused or unreasonably delayed to implement the same, the pursuers are entitled to decree in terms of the second declaratory conclusion of the summons, under reservation as stated.

The defenders pleaded;—(3) The defenders not being bound to maintain the specified portions of said streets, all as condescended on, are entitled to absolvitor from the conclusions of the summons, with expenses. (4) The said streets having been declared public streets within the meaning of the Glasgow Police Acts, the defenders are not under obligation to maintain any portion thereof. (5) Strathclyde Street not being a public highway when the defenders' railway was constructed, the provisions of the Railways Clauses Act, 1845, do not apply to it.

On 17th March 1905 the Lord Ordinary (Low) disposed of the case so far as relating to Broomfield Road and Cumbernauld Road, and appointed the cause to be enrolled for further procedure. On 20th March 1906 his judgment was adhered to by the First Division on a reclaiming note—8 F. 755.

The question as to Strathclyde Street arose in these circumstances:—The Caledonian Railway Company constructed a line of railway in virtue of statutory powers conferred on them by the Caledonian Railway (Additional Powers) Act, 1872, which incorporated the provisions of the Railways Clauses Consolidation (Scotland) Act, 1845.* This line of railway, referred to in the special Act of 1872 as "Railway No. 2," crossed Strathclyde Street, and at the point of crossing the bridge in question was erected by the company to carry the road over the railway.

On 22d May 1906 the Lord Ordinary (Salvesen) allowed the parties a proof of their respective averments with reference to Strathclyde Street.

* The Railways Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 33), enacts:—Sec. 39. "If the line of the railway cross any turnpike road or public highway, then, except where otherwise provided by the special Act, either such road shall be carried over the railway, or the railway shall be carried over such road by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided; and such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company . . ."

The Caledonian Railway (Additional Powers) Act, 1872 (35 and 36 Vict. cap. xiv.), enacts:—Sec. 2. " . . . The Railways Clauses Consolidation (Scotland) Act, 1845 . . . are (except where expressly varied by this Act) incorporated with and form part of this Act."

Sec. 4. "Subject to the provisions of this Act the Company may make and maintain, in the lines and according to the levels shewn on the deposited plans and sections, the railways hereinafter described, and all proper stations, approaches, works, and conveniences in connection therewith respectively, and may execute the other works and operations hereinafter mentioned, and may enter upon, take, and use such of the lands delineated on the said plans and described in the deposited books of reference as may be required for those purposes. The railways and other works and operations hereinbefore referred to and authorised by this Act are . . . a railway in this Act called railway No. 2."

Sec. 26. "In constructing railway No. 2 the following provisions shall be binding on the company, who shall construct the works hereinafter specified in manner hereinafter directed: . . . (3) The road or thoroughfare numbered on the deposited plans 4, in the parish of Calton, may be diverted as shewn on those plans, and shall be carried over the railway by a bridge not less than 40 feet wide between the parapets, and the diverted portion of road shall be not less than 40 feet wide between the fences."

Nov. 29, 1907. On 23d October 1906 the Lord Ordinary (Salvesen) pronounced this interlocutor:—"Assoilzies the defenders from the conclusions of the summons in so far as they relate to Strathclyde Street, and decerns."*

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* "OPINION.—The only conclusion which remains undisposed of in this action is that relating to Strathclyde Street. The pleadings on both sides are singularly meagre. The pursuers aver that Strathclyde Street is a public highway of the city of Glasgow, but there is no averment that at the time when the defenders obtained the private Act of 1872, under which the bridge to which the action relates was constructed, Strathclyde Street was then a public highway. If I had been determining a question of relevancy in the first instance, I should have been prepared to dismiss the conclusions of the action so far as Strathclyde Street was concerned, because, in my opinion, section 39 of the Railways Clauses Consolidation Act does not impose an obligation on the Railway Company to maintain in all time the surface of the roadway which is carried on the bridge, if at the time when the railway bridge was made the road which it crossed was a private road. On the other hand, the defenders do not say that in 1872 Strathclyde Street was not a public highway, their only averment being that it was a private street maintained by the owners of property fronting or abutting thereon, an averment which is not in the least inconsistent, as Lord Low pointed out (8 F. at p. 760), with Strathclyde Street (at that date) being also a public highway. Both parties, however, concurred in asking a proof, and I think I must now decide the case with reference to the evidence that has been adduced, and not with reference to the pleadings in the case, which might easily have been amended had attention been called to their defective nature.

"The first question which I have to solve is the meaning of the words 'public highway,' used in sec. 39. There is no definition of 'public highway' in the statute, nor is there any case which decides what kind of road will answer the description. Both parties are agreed that it must be a carriage-way, because it has been held that the section does not apply to a footpath—*Dartford, L. R.*, [1898] App. Cas. 210. The pursuers maintained that if such a carriage-way is *de facto* open to the public, it answers the description of being a public highway, while the defenders contend that not merely must it be open to the public, but that it must be a road over which the public have a right to pass. I prefer the defenders' definition. A public right to use a carriage road belonging to private proprietors may be acquired by prescriptive use, by express grant, or by dedication, but I am unable to see how a private road can be described as a public highway which, although *de facto* used by the public with consent of the proprietors, may at any time be closed to the public. I proceed, accordingly, to consider whether, in 1872—which is admitted to be the crucial date—Strathclyde Street was a public highway in the sense which I have indicated.

"There is really no substantial controversy between the parties as to the facts although they differ widely as to the inferences to be drawn. Prior to 1854, a carriage road existed substantially on the line of Strathclyde Street as it now exists. It led from Dalmarnock Road to a street which is now called Swanston Street, which also communicates with another part of Dalmarnock Road. Both roads were entirely on the private property of the Dalmarnock Trustees. At that time Swanston Street was known as 'the coal road' having apparently been originally formed in order to give access to a coal pit then being worked on the Dalmarnock estate not very far from the Clyde. There was a line of rails on the road used by the hutchers which conveyed the coal from the pit. Opposite Guthrie's farm there was a gate which went right across the road, and which was always closed on Sundays, but was open the rest of the week. There seems also to have been a gate at the other end. Strathclyde Street was then known as 'the field road,' and apparently passed through agricultural land. It may originally have been a farm road, although its origin has not been ascertained in

The pursuers reclaimed, and argued ;—The words “ public highway ” Nov. 29, 1907.
 in section 39 had a wide signification,¹ and the true test of the question
 whether or not a street was a “ public highway ” within the meaning Corporation of
 of section 39 was not whether the public were entitled to use it as a Glasgow v.
 matter of right, but whether the public did use it as matter of fact. Caledonian
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 From this point of view the pursuers were plainly right, because the
 evidence was all to the effect that in 1872 the road was in daily use
 by members of the public. After the road was taken over as a
 private street in 1870, the Corporation had duties regarding it of
 lighting and cleaning, and powers of assessment, which were incon-
 sistent with the idea of its being anything else than a public high-
 way.² The case of the *Kinning Park Police Commissioners v. Thomson*
& Co.,³ cited by the defenders, was distinguishable on the ground that
 it decided a different question under different statutory provisions.
 Strathclyde Street was, as defined by the Glasgow Police Act, 1866,⁴

this process. In the earliest Ordnance Survey it is described as an occupa-
 tion road ; and in 1858, when the defenders obtained their first Act of
 Parliament to construct a railway across it, it is again so described in the
 Book of Reference. In the disposition by Mr Wilson of Dalmarnock in
 favour of the Caledonian Railway Company, dated 24th November 1858, it
 is spoken of as a private road which ‘ may be altered, shut up, or otherwise
 used by the proprietors of the subjects under description at pleasure, as soon
 as, and at any time after, the tack of the adjoining ground and offices in
 favour of Mr James Buchanan comes to an end, by expiry of the time therein
 stipulated, or in consequence of a sale of the ground, or otherwise.’ I cannot
 doubt, therefore, that prior to 1858 Strathclyde Street was a private road
 belonging to the proprietors of Dalmarnock estate. It is also in favour of
 this contention that the original railway crossed what is now Strathclyde
 Street on the level, although this, of course, is by no means conclusive. In
 1854, however, the owners of Dalmarnock estate commenced to feu the
 ground fronting Strathclyde Street. The earliest feu-contract was one in
 favour of Muir, Brown, & Company, who took a feu of 6 acres for the erection
 of a factory. The northern boundary of this feu is described in the feu-
 contract as ‘ the centre line of a contemplated street of 50 feet wide, and
 about to be formed of its proper breadth (so far, in the meantime, as bound-
 ing the ground thereby disposed) along which it extends 248 feet or thereby.’
 It appears from the same feu-contract that the road was at that time only 15
 feet wide. It is quite obvious from this contract that the proprietors of the
 estate intended and expected that the ground fronting the proposed street
 would be taken off for industrial purposes. This expectation was not im-
 mediately realised. The next feu that was given off was one in April
 1863, and the northern boundary of this feu is ‘ the centre of a proposed
 street of 50 feet in breadth.’ Access is given to the ground ‘ by the road
 presently in use,’ leading in both directions from the conclusion of Hamil-
 ton turnpike road to or near the ground hereby disposed. In 1864 Muir,
 Brown, & Company took a further feu of 2 acres of ground, with a northern
 boundary in the same terms. In 1865, 1868, and 1870 further feus were
 granted, in the last of which the boundary is given as ‘ the centre line of
 street to be formed, 50 feet in breadth from building line to building line.’
 From the parole evidence it appears that by 1872 all these feus had been
 covered with buildings used for manufacturing purposes, and that the road

¹ *Dartford Rural Council v. Bexley Heath Railway Co.*, L. R., [1898] A. C. 210, at p. 215.

² Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), secs. 40, 302, 318, 344, 357.

³ Feb. 22, 1877, 4 R. 528.

⁴ Sec. 4.

Nov. 29, 1907. "open and accessible to the public," who could not have been excluded from it. The fact that it was referred to in the private Act under which the bridge was built¹ shewed that it was then considered to be a public highway, as, had it been a private street, the provisions of the Act would have been inapplicable. In the Book of Reference relative to that Act, the defenders themselves described it as a road occupied by the public, and having obtained their powers on that representation, they were bound by it, and were not now entitled to take up the position that it was a private street.

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But, apart from their obligation under section 39 of the Railways Clauses Act, the defenders were bound to maintain the bridge, in respect of the duty imposed on them by the private Act under which the bridge was built.² These provisions, which must be read as a whole, gave the defenders power to construct the railway, but obliged them, if they built the railway, to build the bridge also, and, with

in question was in daily use by some hundreds of workmen who were there employed. No doubt also it was used by members of the general public, whom there could be no reason to exclude, having in view the character of the district and the number of people who resorted to it for business purposes. Further, in 1870 the road was taken over under the Glasgow Police Act of 1866 as a private street; and the usual assessment notices were from that time onwards issued to the proprietors on both sides. It then became subject to the jurisdiction of the Magistrates of Glasgow for the purposes of the Act of 1866, so far as that Act applies to private streets (I was referred especially to sections 303 to 308, 311, 318, 344, and 347), and for all practical purposes this was a highway used by the public just like any of the other streets in the city of Glasgow. Further, it may be conceded that it was very unlikely indeed that it would ever be closed to public traffic, in view of the desire of the proprietors to promote more extensive feuing and the character and use of the buildings which had already been erected.

"All this, however, is not inconsistent with the road in question remaining a private road in the sense that it was one over which the public had acquired no legal rights. It was decided in the case of *The Kinning Park Commissioners*, 4 R. 528, that a private street within burgh may yet remain the property of the owners, and may be closed to the public, although it has been used by the public for many years, short of the prescriptive period. I have already indicated that I am unable to see how a public right can be acquired, except by express grant, by dedication, or by prescriptive use. It is not alleged that there was ever any express grant in favour of the public, and it is plain that in 1872 the road had not existed long enough to have enabled the public to acquire a right of way over it. Nor do I find any evidence of dedication to the public. It was argued by the pursuers that dedication to a body of feuars was equivalent to dedication to the public. In the present case for practical purposes it may have been so, but in law I do not think it was. That was indeed expressly decided in the *Kinning Park* case, where the street which was closed had been dedicated to the feuars on both sides for purposes of access to their feus, and I fail to see how it can affect the legal question whether the body of feuars is a small or a large one. The right to use the road conferred by the titles is confined to the feuars and tenants on the estate; and although such a contingency was highly improbable, I can see no reason why they should not in 1872 have combined to exclude the public, or even agreed to shut up the road entirely. The road, in other words, was, as Mr Colledge describes it, an estate or feu-

¹ Caledonian Railway (Additional Powers) Act, 1872, sec. 26 (3).

² Caledonian Railway (Additional Powers) Act, 1872, secs. 4, 26 (3).

regard to the whole of the works thus authorised, laid on them the duty, if they constructed them, of maintaining them as well. The duty of maintenance applied not only to the bridge, but also to the roadway, the case of the *Magistrates of Glasgow v. Glasgow and South-Western Railway Co.*,¹ referred to by the Lord Ordinary, having been decided on the construction of a different statute, and having no application to the present case. The obligation to construct the bridge included the obligation to construct and maintain the approaches to the bridge.²

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Argued for the defenders;—The term “public highway” in sec. 39 of the Railways Clauses Act meant a highway over which the public had a right to pass, and the best test of this was the power of the adjoining proprietors to close the road. At the date when the bridge was built there was no doubt that this could have been done

ing road, from which the public were not excluded simply because at that time no interest had emerged which would make that desirable. I accordingly reach the conclusion that Strathclyde Street was not in 1872 a public highway within the meaning of the section founded on.

“It was further contended that the defenders are barred from maintaining that the road was not a public highway by the Book of Reference which they lodged relative to the Act of 1872, and more especially the Book of Reference lodged relative to the Act of 1888, under which they obtained further powers. In the Book of Reference of 1872 the road in question is described as being occupied, *inter alios*, by the public. That seems to have been accurate enough in point of fact; but if the Railway Company had believed that the road was under public administration, the public body administering it would have been entered as occupiers, and not the public, on whom no notice was or fell to be served. So far as it goes the entry in 1872 seems to me in favour of the defenders. In 1888, however, which was six years before the road was taken over as a public street, the defenders in their Book of Reference described the road as being occupied by the public and the Magistrates and Town-Council of Glasgow. In a sense that may have been accurate too, because the Magistrates under the Act of 1866 had certain powers already referred to with regard to the administration of the road as a private street; and they also appear to have been owners of gas and water-pipes in the road. In 1888, however, there was no question as to the maintenance of the road, which was being done entirely at the expense of the frontagers, including the Railway Company. And even if I were satisfied that there was an error in the Book of Reference, I do not see how that can affect the Railway Company’s legal rights, or throw upon them a burden of which, as owners, they had been relieved once and for all when Strathclyde Street was taken over as a public street by the city of Glasgow.

“One other argument for the pursuers remains to be dealt with. They pointed out that the bridge in question remains the property of the defenders, notwithstanding that the street which it now in part supports has been taken over by the city. They contended that the obligation to maintain the bridge therefore remains with the Railway Company; and that it was impracticable to distinguish between the structure of the bridge and the surface of the roadway, which they considered was merely a part of the bridge itself. I confess that I do not see the supposed difficulty. In many parts of the city of Glasgow the *solum* of the streets belongs to the proprietors on each side, and may be, and in many cases no doubt is, occupied as cellars; yet no practical difficulty arises in ascertaining the liabilities of

¹ May 13, 1895, 22 R. (H. L.) 29.

² *Addie’s Trustees v. Caledonian Railway Co.*, July 7, 1906, 8 F. 1047. Railways Clauses Consolidation (Scotland) Act, 1845, sec. 60.

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by the superior and the feuars in concert, for there was no suggestion that the public had acquired any rights, either by express grant or by prescription. That the road had been taken over as a private street under the Glasgow Police Act, 1866, did not constitute it a public thoroughfare.¹ Nor could any inference be drawn from the fact that this street was referred to in the private Act of 1872, for all through the Railways Clauses Act provision was made for bridges over roads, whether the latter were private or public.² The provisions of the private Act of 1872 imposed no duty on the defenders to maintain the bridge, seeing that sec. 26, which provided for its construction, said nothing as to its maintenance. In any event, the obligation to maintain did not extend to the roadway over the bridge, the English cases of the *North Staffordshire Railway Co. v. Dale*,³ and the *Lancashire and Yorkshire Railway Co. v. The Mayor of Bury*,⁴ being distinguishable. Even if such an obligation existed in 1872, it ceased to exist when the road was taken over by the pursuers as a public street in 1894, for it was an obligation in favour only of the Dalmarnock feuars, and did not transmit to their successors, with whom the defenders had entered into no undertaking. A duty to protect a private interest was different from a duty to protect a public interest, and the change of circumstances relieved the defenders from their obligations.⁵

At advising,—

LORD PRESIDENT.—The question in this case is whether the Caledonian Railway Company are bound to maintain the highway which goes over their bridge in Strathclyde Street. The case as argued before the Lord Ordinary seems to have turned entirely upon whether the words “public highway,” as used in section 39 of the Railways Clauses Act, do or do not apply to a road or street in the position of Strathclyde Street. That depends on whether the expression “public highway” means public *de jure*, or means a highway to which as at the date the public are *de facto* admitted. Upon this matter I agree with the Lord Ordinary. I think we must take the

the respective proprietors in maintaining the roadway. But the very distinction which the pursuers regard as impossible has already been successfully drawn by the House of Lords. In the case *Magistrates of Glasgow v. Glasgow and South-Western Railway Co.*, 1895, 22 R. (H. L.) p. 29, it was held that although the Glasgow Magistrates as Public Water Commissioners had authority to lay a line of water pipes in a road which, at two places, was carried on girder bridges belonging to the Railway Company, it was *ultra vires* of the Commissioners to carry pipes through the stone abutments of the bridges, and sling them from the girders. Lord Watson said,—‘From beginning to end of the clause there is no power given to go beyond the soil and pavement of the bridge’; and he distinguishes between such an operation and one involving serious interference with the structure of the bridge. In short, the maintenance of the surface of the roadway is an entirely separate obligation from the maintenance of the bridge which supports it.

“I accordingly reach the conclusion that the defenders fall to be assoilzied from the only undisposed of conclusions of the action, being those relating to Strathclyde Street.”

¹ *Kinning Park Police Commissioners v. Thomson & Co.*, 4 R. 528.

² Railways Clauses Consolidation (Scotland) Act, 1845, secs. 39, 42, 43, 46-49.

³ 1858, 8 E. & B. 836.

⁴ 1889, L. R., 14 A. C. 417.

⁵ *Magistrates of Perth v. Earl of Kinnoull*, June 28, 1872, 10 Macph. 874.

words "public highway" as meaning public *de jure*, because I think that is the only thing that squares with the general conception of the Railways Clauses Act.

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The Railways Clauses Act of course is an Act of general application which is framed with the view of being read into special Acts which should thereafter come into being. When a railway goes through the country it is quite certain that it will meet roads, and those roads must be in one of two conditions. They must either be public roads in the full sense of the term—that is to say, public roads *de jure*—whether these roads were turnpike or whether they were statute labour does not matter—or they must be private roads. In the case of a railway meeting a private road it would, of course, be necessary, quite apart from the question of a road, for the railway company to take the land, because, quite apart from the question of the road as a road, the soil belongs to the proprietor *a caelo usque ad centrum*; and if the railway company want to occupy that soil, at whatever height of the stretch that comes *a caelo ad centrum*, they must of course take the land. Accordingly I think it follows from that quite clearly that there is no necessity for making any special provision as to what railway companies should do when they cross private roads as roads. Of course the effect of taking a person's road, and going through it and blocking it up, may be of great moment to the proprietor in question, and his interests are safeguarded in the Act in other ways, in particular in two ways; in the first place, there are the sections which give compensation for injurious affection; but, more than that, there are all the sections which deal with what are known as accommodation works. I only mention that to shew that I have not forgotten it, and merely in order to exclude that *fasciculus* of sections which, beginning with the 16th section of the Scottish Act—and there are corresponding sections in the English Act—deal with the interference which railways may make with roads, not with the view of permanency, but with the view of construction of the line. Those stand by themselves upon another basis. But passing from private roads to public roads there is, of course, nobody from whom to take the surface of the road; the surface of the road does not belong to anyone who can be compensated and paid. Probably at different periods of legal history there have existed different theories as to the actual property of the *solum* of public roads, and I am not sure that even at this modern time the legal theory in England and in Scotland is quite the same. But however that may be, I think I may say without doubt that no one ever heard of a road authority being compensated for the surface of a public road being taken, and accordingly it was necessary to make some provision that public roads should not be interfered with, and that provision is represented by section 39. It seems to me therefore that upon the construction of the general scope of the Act section 39 was only meant to deal with public roads in the fullest and proper sense of the word—*de jure* public roads.

That, of course, only leaves the question of fact as to whether this was a public road or not. The Lord Ordinary inquired into the whole matter, and I think has come to a conclusion that cannot be avoided, that this road, at the time this railway was authorised, was not a public road, although no doubt it was a road which was used by large numbers of the public, and no

Nov. 29, 1907. doubt practically would always be so ; but still, and none the less, it seems to me the legal position of the road was that, if the superior of the ground and the whole of the feuars had chosen to come to an agreement, they might have shut up the road if they wished, either replacing it by another or not as seemed good to them. Accordingly, on the ground on which the Lord Ordinary has put his judgment, and so far as the case was argued before him, his judgment is perfectly right.

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Ld. President.

But there is another aspect of the case which was argued before your Lordships, but which was not, I think, argued before the Lord Ordinary, and which, I confess, has given me a great deal more trouble to make up my mind upon than the other, and it is this. This particular bridge owes its existence to a special provision of the Act of 1872 under which it was made—Caledonian Railway (Additional Powers) Act, 1872 (35 and 36 Vict. cap. cxiv.). First of all, there is what I may call the ordinary works clause in section 4, and one of the works is a railway called Railway No. 2, which is the railway upon which admittedly this bridge stands. Then in section 26 of the same Act there comes the following provision :—"In constructing Railway No. 2 the following provision shall be binding on the Company, who shall construct the works hereinafter specified in manner hereinafter directed." Then certain works, with which I need not trouble your Lordships, are specified, and then subsection 3 says :—"The road or thoroughfare numbered on the deposited plans 4, in the parish of Calton, may be diverted as shewn on those plans, and shall be carried over the railway by a bridge not less than forty feet wide between the parapets, and the diverted portion of road shall be not less than forty feet wide between the fences." The bridge which is there referred to is admittedly this bridge over Strathclyde Street ; and accordingly the question is whether the fact of this particular bridge being a special work enjoined by the Act of Parliament does not impose upon the Railway Company, quite apart from the general sections of the statute, the duty to maintain.

The 4th section of the Act, the works clause, says that the Company may make and maintain the works aftermentioned, and undoubtedly this bridge is one of the works aftermentioned. But I think it is quite certain that, although at one time it was held both in this Court and in England that such a provision created a contract between the Company and anybody who could shew an interest that the works should be carried out, that doctrine was long ago upset, and the law in this Court was laid down first in the case of *Lord Blantyre*,¹ and was approved by the House of Lords in several cases, and especially in the case of *Edinburgh, Perth, and Dundee Railway Company v. Philip*.² It is not merely well settled, I think, that, as regards construction, the powers are permissive merely, but I notice there is quite a recent case in which that has been in terms applied not only to the construction, but to the maintenance of a work once constructed. I refer to the case *Reg. v. The Great Western Railway Company*.³ Accordingly, upon those authorities it is, I think, quite clear that the Railway Company are not bound to maintain in respect of the works clause.

¹ 1853, 16 D. 90.

² 1857, 2 Macq. 514.

³ 1893, 62 L. J. Q. B. 572.

Clause 26, however, is not permissive. That clause is an obligatory clause Nov. 29, 1907.
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 need not construct Railway No. 2, but if they do, then clause 26 is obligatory. Glasgow v.
 Therefore, it is quite certain that they were bound, whether they liked it or Caledonian
 not, if they diverted the road, to carry it by this bridge over the railway; Railway Co.
 and the whole question therefore comes to be, What is the effect of the Ld. President.
 omission of the word "maintain"?

So far as I can discover, and I have searched with considerable diligence the authorities, this is a new question. I have not been able to discover any case in either England or Scotland where that question arose as in the case of a work which was specially enjoined by the special Act. I have not found a case where the thing in question is a bridge specially enjoined by the special Act and crossing a private road. There are plenty of cases where the bridge specially provided for crosses a public road, but then, of course, the peculiar question does not arise, because it is perfectly obvious that the general sections apply. But upon the best consideration the only conclusion I can come to is that the omission of the word "maintain" is fatal to the construction of the pursuers. It seems to me that the very anxiety with which in the general statute the word "maintain" is always put in shews that if it were not there there would not be an obligation of maintenance. "Maintain" is put in not only in section 39, but it is put in also in all the clauses that deal with accommodation works. In a clause of this sort I think that the person who was stipulating for the work, who, I suppose, would be the proprietor, must fairly be taken as *proferens* of the clause, and that the clause must be construed literally according as it stands. I am not omitting the consideration that I think this argument really logically leads to this, that the Railway Company are not bound to maintain the structure of the bridge any more than they are to maintain the roadway. I say that notwithstanding the concession on the part of the Railway Company's counsel in one part of the argument that they were so bound. I do not think that concession ought logically to be made. But I do not think that fact in any way shocks me, for this very good reason, that it would be perfectly evident that the Railway Company would be bound to maintain the structure of the bridge, not because they were made to by the terms of the obligation, but for their own security. If they allowed the bridge, being an overhead bridge, to get out of order and become in a dangerous condition, it is quite evident that they would subject their own property to grave risk, and subject themselves to very grave risk of damages if through the falling of any portion of the bridge anybody who was using their railway was hurt. Therefore I do not think that the absence of an actual clause binding them to maintain the structure of the bridge very much matters. Upon the whole matter, and I found the point one of some difficulty upon which to make up my mind, I have come to the conclusion that in a doubtful case we must take the Act as we find it, and inasmuch as there is an obvious distinction made between making and maintaining in other sections where we find making and maintaining, this section must be read literally as it stands. Consequently here there is no obligation upon the Railway Company to maintain this bridge upon the ground of the special clause, because maintenance is not there expressed,

Nov. 29, 1907. doubt practically would always be so ; but still, and none the less, it seems to me the legal position of the road was that, if the superior of the ground and the whole of the feuars had chosen to come to an agreement, they might have shut up the road if they wished, either replacing it by another or not as seemed good to them. Accordingly, on the ground on which the Lord Ordinary has put his judgment, and so far as the case was argued before him, his judgment is perfectly right.

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The 4th section of the Act, the works clause, says that the Company may make and maintain the works aftermentioned, and undoubtedly this bridge is one of the works aftermentioned. But I think it is quite certain that, although at one time it was held both in this Court and in England that such a provision created a contract between the Company and anybody who could shew an interest that the works should be carried out, that doctrine was long ago upset, and the law in this Court was laid down first in the case of *Lord Blantyre*,¹ and was approved by the House of Lords in several cases, and especially in the case of *Edinburgh, Perth, and Dundee Railway Company v. Philip*.² It is not merely well settled, I think, that, as regards construction, the powers are permissive merely, but I notice there is quite a recent case in which that has been in terms applied not only to the construction, but to the maintenance of a work once constructed. I refer to the case *Reg. v. The Great Western Railway Company*.³ Accordingly, upon those authorities it is, I think, quite clear that the Railway Company are not bound to maintain in respect of the works clause.

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Clause 26, however, is not permissive. That clause is an obligatory clause on the Railway Company if they construct Railway No. 2 at all. They need not construct Railway No. 2, but if they do, then clause 26 is obligatory. Therefore, it is quite certain that they were bound, whether they liked it or not, if they diverted the road, to carry it by this bridge over the railway; and the whole question therefore comes to be, What is the effect of the omission of the word "maintain"?

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So far as I can discover, and I have searched with considerable diligence the authorities, this is a new question. I have not been able to discover any case in either England or Scotland where that question arose as in the case of a work which was specially enjoined by the special Act. I have not found a case where the thing in question is a bridge specially enjoined by the special Act and crossing a private road. There are plenty of cases where the bridge specially provided for crosses a public road, but then, of course, the peculiar question does not arise, because it is perfectly obvious that the general sections apply. But upon the best consideration the only conclusion I can come to is that the omission of the word "maintain" is fatal to the construction of the pursuers. It seems to me that the very anxiety with which in the general statute the word "maintain" is always put in shews that if it were not there there would not be an obligation of maintenance. "Maintain" is put in not only in section 39, but it is put in also in all the clauses that deal with accommodation works. In a clause of this sort I think that the person who was stipulating for the work, who, I suppose, would be the proprietor, must fairly be taken as *proferens* of the clause, and that the clause must be construed literally according as it stands. I am not omitting the consideration that I think this argument really logically leads to this, that the Railway Company are not bound to maintain the structure of the bridge any more than they are to maintain the roadway. I say that notwithstanding the concession on the part of the Railway Company's counsel in one part of the argument that they were so bound. I do not think that concession ought logically to be made. But I do not think that fact in any way shocks me, for this very good reason, that it would be perfectly evident that the Railway Company would be bound to maintain the structure of the bridge, not because they were made to by the terms of the obligation, but for their own security. If they allowed the bridge, being an overhead bridge, to get out of order and become in a dangerous condition, it is quite evident that they would subject their own property to grave risk, and subject themselves to very grave risk of damages if through the falling of any portion of the bridge anybody who was using their railway was hurt. Therefore I do not think that the absence of an actual clause binding them to maintain the structure of the bridge very much matters. Upon the whole matter, and I found the point one of some difficulty upon which to make up my mind, I have come to the conclusion that in a doubtful case we must take the Act as we find it, and inasmuch as there is an obvious distinction made between making and maintaining in other sections where we find making and maintaining, this section must be read literally as it stands. Consequently here there is no obligation upon the Railway Company to maintain this bridge upon the ground of the special clause, because maintenance is not there expressed,

Nov. 29, 1907. and there is no obligation in the general clause, because this bridge is not over a road to which the general clause applies.

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The fact that there may be bridges to which an obligation of maintenance on the part of a railway company does not apply, seems to me to be recognised—although I do not put too much stress upon this argument—by another statute, namely, the Abandonment of Railways Act, 1850 (13 and 14 Vict. cap. 83), which in sec. 22 deals with the matter thus:—"Be it enacted that, where the line of any railway so authorised to be abandoned shall have been wholly or partially laid out, and any road shall have been carried across such line of railway by means of a bridge or tunnel over or under such railway, which bridge or tunnel the Company to whom such railway belonged would, in case the same had not been abandoned, have been liable to keep in repair, then in every such case except where such bridge or tunnel shall, with the permission of said Commissioners, be by such Company removed, and such road restored to the like or an equally convenient and good state as the same was in before it was interfered with by the makers of such railways, to the satisfaction (in the case of difference between such Company and the owner or persons having the management of such road) of the Commissioners, such Company shall pay to the owner of such road, if it be a private road, or to the trustees, surveyors of highways, or other person having the management of such road, if it be a turnpike or other public road, a sum of money, to be determined by arbitration as aftermentioned, in lieu and discharge of their liability to keep such bridge or tunnel, and also the roadway over the same, in repair." Now, I think that is quite consistent with the view that I have taken, because, in the first place, it distinguishes between the case of public and private roads, and then in all these things it distinguishes between the cases where the Company would, if the railway had not been abandoned, have been liable to keep it in repair, and cases where it would not. Accordingly, I think it is fair to say that it was in the contemplation of Parliament when it enacted that section that there might be bridges in just the condition I have come to the conclusion this one was, namely, a bridge carrying a private road which the Railway Company were not under obligation to repair, and I remind your Lordships that that bridge could not be an accommodation bridge, because, so far as an accommodation bridge is concerned, there is always the obligation to make and maintain.

My conclusion, therefore, is that this special point does not disturb the result arrived at by the Lord Ordinary.

LORD M'LAREN.—I am of the same opinion. I agree with your Lordship that the difficulty in the case is that there are no precedents to guide us as to the construction of the Caledonian Railway Company's private Act. Under the works clause the Company, of course, were under no obligation to make the railway No. 2 over which this bridge is constructed. But then if they did decide to exercise the power to make the railway it was obligatory upon them to construct the bridge. The clause authorising the Company to construct the bridge, from its form and substance, appears to be of the nature of what is called a protection clause—a clause possibly drawn, or at anyrate suggested, by the proprietor whose interests it was intended

to safeguard. Therefore I think it must be taken that this protection clause Nov. 29, 1907. represents all that has been claimed from the Company for the interference with the continuity of the road by the railway being run across it. Now, as the Act only puts the Company under obligation to construct, and says nothing about maintenance, it follows, as I think, that no action can be brought by the city to compel the Company to maintain the road. What would happen in the case of a railway being abandoned seems to be quite clear, but, of course, we have not that point before us. It is only useful by way of illustration of what I venture to think is the conclusion to be drawn from the two clauses of this private Act which are under consideration.

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Lord M'Laren.

LORD KINNEAR and LORD PEARSON concurred.

THE COURT adhered.

CAMPBELL & SMITH, S.S.C.—HOPE, TODD, & KIRK, W.S.—Agents.

THE REVEREND ANGUS CAMERON AND OTHERS (Mrs Sarah Denholm's Trustees), Pursuers (Reclaimers).—*Johnston, K.C.—C. D. Murray.* No. 39.

MRS ISABEL DUNLOP OR DENHOLM AND OTHERS (George Denholm's Trustees), Defenders (Respondents).—*Hunter, K.C.—Constable.* Nov. 29, 1907.

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Succession—Testament—Construction—Subject of Gift—Power to consume—Gift over of portion unconsumed—Trust—Onus.—In a mutual settlement by spouses the husband conveyed his whole estates to trustees and directed them to pay to his wife, if she survived him, as an alimentary allowance for her and their children, the income of his estate and such portions of the capital as his trustees should deem necessary, "and in like manner and in consideration of what is above written," the wife conveyed her whole estates to her husband under the burden of maintaining her whole children, with full power to him "to consume such parts or portions of the capital during his lifetime as he may find or think necessary," and also power "to realise . . . said estates . . . and in general to deal and intromit therewith as freely as" she could have done herself. She appointed him to be her sole executor. Upon the death of her husband if he survived her (as he did), she conveyed her "said estate or such portion thereof as may be unconsumed" by him to trustees for certain purposes.

The wife died in 1893. After the wife's death the husband realised certain properties which had belonged to her and paid the proceeds into his own bank account, so that they became immixed with his own funds, and could not ultimately be traced or identified. The husband died in 1905.

In an action by the wife's trustees against the trustees under a will left by the husband, *held* (aff. judgment of Lord Dundas, *diss.* Lord Ardwall) (1) that under the mutual settlement the husband was not bound to account for his intromissions with his wife's estate, and that consequently his trustees were not bound so to account; (2) that the *onus* of proving what part of the wife's estate was unconsumed by the husband was upon the pursuers; and (3) that the proceeds of the wife's properties sold by the husband having been immixed with the husband's funds and being now incapable of identification, must be held to have been consumed by the husband in the sense of the mutual settlement. Lord Ardwall was of opinion (1) that the power given to the husband to consume such parts of his wife's estate as he might think necessary was a power to be exercised *sub modo*, and as a conscientious trustee would exercise it; (2) that there was no evidence that the husband ever exercised that power or thought it necessary to do

Nov. 29, 1907. so ; and (3) that the husband's using the capital of his wife's estate for his own business, while legitimate under the wide powers of administration given him, did not absolve his trustees from accounting for the value of his wife's estate.

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(SEE *ante*, 1907, S. C. 61.)

2D DIVISION.
Lord Dundas.

George Denholm and Sarah Louisa Liddall M'Laren or Denholm, spouses, residing at 45 Manor Place, Edinburgh, on 10th November 1891, executed a mutual settlement. In this deed the husband conveyed his whole estates, heritable and moveable, to trustees for the purposes mentioned, and, *inter alia*, provided as follows:—"In the event of my said wife surviving me my trustees shall pay to her as an alimentary allowance for herself and our children during the whole days of her life the net income of my estates under burden of" certain "annuities . . . and my trustees are hereby authorised to pay over to her from time to time for her own use such portion or portions of the capital of said residue as my trustees may deem necessary, or which they think she may require, she being always bound to maintain our said children, and that until they are capable of maintaining themselves, and to educate them in a manner befitting their station. . . .

"And in like manner and in consideration of what is before written I, the said Sarah Louisa Liddall M'Laren or Denholm do hereby give, grant, assign, and dispoise to and in favour of the said George Denholm, my husband, in the event of his surviving me, All and Sundry my whole estates, heritable and moveable, real and personal, of whatever description," under burden of paying her debts and two annuities of £10 each, and of maintaining and educating her whole children, including William Benjamin Liddall M'Laren, her child by a former marriage, "with full power to my said husband to consume such parts or portions of the capital during his lifetime as he may find or think necessary, and also power to him to realise, sell, and dispose of my said estates, heritable and moveable, by public roup or private bargain, as he may think proper, and in general to deal and intromit therewith as freely as I could have done myself; and in the event of his surviving me, I appoint my said husband to be my sole executor, and to be tutor to the said William Benjamin Liddall M'Laren should he be in minority at the date of my decease. And upon the death of my said husband if he should survive me, or upon my own death if I should survive him, I give, grant, assign, and dispoise to and in favour of" the persons to whom the husband conveyed his estate in trust under the mutual settlement "All and Sundry my said estate or such portion as may be unconsumed by my said husband, but that in trust only for the uses and purposes following, *videlicet*"—The spouses finally provided:—"And we hereby reserve full power at any time during our joint lives, by writing mutually executed, to alter or revoke these presents, and also, with full power and faculty to the survivor of us to alter or revoke these presents, but only in so far as regards our separate estates; but in so far as not altered or revoked as aforesaid the same shall remain effectual."

Mrs Sarah Louisa Denholm died on 27th December 1893 survived by her husband, by her son by her former marriage, William Benjamin Liddall M'Laren, and by two daughters, the children of her marriage with George Denholm. George Denholm accepted the office of executor conferred upon him by the mutual settlement, gave up

inventories of the wife's personal estate and confirmed thereto. He also made up titles to her heritable estate. Nov. 29, 1907.

The total net amount of the wife's estate was between £10,000 and £11,000. It consisted of the following items:—

I. Heritable Property—(1) 43 Manor Place, Edinburgh; (2) One-half of 92 South Bridge, Edinburgh; (3) One-half of 287 High Street, Edinburgh.

II. Debt due upon bond and disposition in security granted by George Denholm over his estate of Press, dated 15th, and recorded 22d May 1890, £6000.

III. Balance of *jus relictæ* from estate of Mr W. A. M'Laren, £306.

IV. Paraphernal effects, £44.

George Denholm sold 43 Manor Place in 1895. He received the net proceeds (about £2690) on 15th May 1895, and paid them in to his own bank account with the Commercial Bank. The property 92 South Bridge was sold at Whitsunday 1899, and the net proceeds of Mrs Denholm's share (about £1482) were paid into Mr Denholm's bank account with the Commercial Bank. The property 287 High Street was acquired compulsorily for improvement purposes by the Corporation of Edinburgh in 1900, and the net proceeds of Mrs Denholm's share (about £580) were paid into Mr Denholm's bank account with the Commercial Bank on 9th August 1900. The total amount realised from these three heritable properties was about £4752.

Deducting from £11,103, the amount of the four items, £1103 for debts, duties, and expenses, there remained a balance of £10,100.

It was ultimately not disputed that the whole of Mrs Sarah Louisa Denholm's estate, except the £6000 bond, had been realised, that the proceeds had been paid into Mr Denholm's bank account and immixed with his own funds, and that these proceeds could not now be traced.

Mr Denholm kept no private accounts shewing his total income or his expenditure, but there was evidence that he lived in great style, keeping a carriage and pair and a coachman and footman.

Mr Denholm was a stockbroker with a considerable business. The profits realised from it fluctuated a good deal, and in some years he made a loss. He kept several bank accounts. These accounts were frequently overdrawn. At the date of his wife's death he was the owner of two estates, Press and Bee-Edge, in the county of Berwick, and of 30 Great King Street, Edinburgh. These properties were bonded and burdened for considerable sums in proportion to their value. Between 1893 and 1899 the amount of the bonds and burdens on his heritable estate was greatly reduced. In 1899 he succeeded to about £27,000 under the will of a Mrs Booth. Of this amount he received about £9000 in 1899 and the balance in 1900. Thereafter in 1901 and 1902 he purchased York Lodge, Dunbar, for £1200, and the estate of Hillend in Berwickshire for £10,000. By April 1902 his heritable property was freed of bonds and burdens except the £6000 bond above mentioned, and about £1400, the value of certain annuities.

Mr Denholm, who had meantime been married again, died in June 1905, leaving a will dated 17th April 1902, with two relative codicils, by which he revoked all former testamentary writings executed by him, "including the said mutual settlement," and conveyed his whole

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He was survived by his widow, his stepson W. B. L. M'Laren, and his two daughters by his first marriage. There was no issue of his second marriage.

The net value of the estate left by George Denholm, reckoning the £6000 bond as a debt due by him, was about £35,000.

In 1906 the Reverend Angus Cameron and others, as the trustees under the mutual settlement (hereinafter called Mrs Sarah Denholm's trustees), and as Mrs Denholm's executors *ad non executa*, brought an action against Mrs Isabel Dunlop or Denholm, widow of George Denholm, and others, the trustees under his will and codicils above mentioned, in which they concluded (1) for declarator that the £6000 bond above mentioned was a valid and subsisting security, and formed part of Mrs Sarah Denholm's estate, that the pursuers were now in right thereof, and that George Denholm's obligation therein contained was now prestable against the defenders; (2) for delivery of said bond to the pursuers, or failing delivery, for payment of £6000; (3) for an accounting of the intromissions of George Denholm, as trustee or executor of Mrs Sarah Denholm, with her means and estate, for payment of £12,000, or such sum as should appear due on an accounting, and failing an account as aforesaid, for payment of £13,000.

It was ultimately admitted by the defenders that the pursuers were entitled to the £6000 bond.

The pursuers pleaded, *inter alia*;—(2) The said deceased George Denholm having intromitted with the estate of his wife, the said deceased Mrs Denholm, the defenders, as his trustees and executors, are bound to count and reckon to the pursuers for his intromissions.

The defenders pleaded, *inter alia*;—(4) The defenders are under no obligation to account to the pursuers, and should be assoilzied

* By this will Mr Denholm provided, *inter alia*, as follows:—"Further, I specially declare that in the event of my daughters, or either of them, or my stepson, the said William Benjamin Liddall M'Laren, raising any question with reference to the distribution or division of the trust-estate, or taking exception or making any objection to my power to revoke said mutual settlement, or claiming that any part of the trust-estate falls thereunder or is thereby in any way regulated, or raising any question with reference to the distribution or division of the estate left by their mother, my wife, or taking exception or making any objection to the amount thereof, as the same may be set forth in any statement subscribed by me, they or any of them raising such questions regarding such distribution or division or taking exception or making any objection or claiming as aforesaid, with reference either to the trust-estate or to the estate of their mother, shall forfeit right not only for themselves, herself, or himself, but also for their, his, or her issue in and to any share of or interest in the trust-estate as aforesaid."

In Mr Denholm's business ledger there was a statement headed "Statement of the net amount of the estate of the late Mrs Denholm." This statement (No. 10 of process) enumerated the items I. to IV. above mentioned, and gave the net amounts realised by the sale of the heritable properties as narrated above, p. 257, and brought out the net total as £10,100. It concluded as follows:—"The above is as near as possible a correct statement of the estate of my late wife at the date of her death, and is engrossed here with reference to the directions expressed in my will, dated 17th April 1902. The above adopted as holograph. (Signed) GEORGE DENHOLM." It was not dated.

from the remaining conclusion, in respect (a) that under the mutual settlement of the late Mr Denholm and his first wife he took a full vested right in and to her whole estate; (b) that the whole of the said estate was consumed by him within the meaning of the said settlement. Nov. 29, 1907.
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On 5th June 1906 the Lord Ordinary (Dundas) found that under the mutual settlement Mr Denholm did not take a full vested right to the whole estate of Mrs Sarah Denholm, repelled head (a) of plea 4 stated for the defenders, and *quoad ultra* allowed a proof before answer.

The defenders reclaimed, but on 7th November 1906 the Second Division adhered. (See *ante*, 1907, S. C. 61.)

Thereafter proof was led. The facts are sufficiently stated in the narrative, *supra*, and in the opinion of the Lord Ordinary.

On 22d February 1907 the Lord Ordinary (Dundas) pronounced this interlocutor:—"Finds, declares, and decerns in terms of the declaratory conclusion of the summons" (subject to a variation as regards interest and a reservation of any claims competent to the defenders for the maintenance and education of the children): "Of consent decerns and ordains the defenders to deliver up to the pursuers the said bond and disposition in security in terms of the conclusion of the summons for delivery: *Quoad ultra* finds that the whole estate of the said Mrs Sarah Louisa Liddall M'Laren or Denholm, with the exception of the said bond and disposition in security, was consumed by the late George Denholm, her husband, during his lifetime, within the meaning of the mutual settlement referred to on the record: Assolzie the defenders from the whole remaining conclusions of the summons, and decerns." *

* "OPINION.—On 5th June 1906 I decided that, upon a sound construction of Mr and Mrs Denholm's mutual settlement, Mr Denholm did not take a full vested right in and to the whole estate of his deceased wife; and *quoad ultra* I allowed a proof. In the opinion then delivered, I pointed out that I did 'not propose at present to attempt to define the limits of the restriction upon Mr Denholm's right of fee, or those of his power to "consume" his wife's estate.' On 7th November 1906 the Second Division adhered to my interlocutor. The case is reported in 1907, S. C., 61. All, therefore, that was determined up to that point was that Mr Denholm's right was not one of full fee; its precise nature and extent have now to be considered. It may be well to recall the terms of the *sixth* purpose of the mutual settlement. The words used at the outset of the clause were, standing by themselves, sufficient to confer upon Mr Denholm an absolute fee in his wife's estate. The clause continues 'with full power to my said husband to consume such parts or portions of the capital during his lifetime as he may find or think necessary, and also power to him to realise, sell and dispose of my said estates, heritable or moveable, by public roup, or private bargain, as he may think proper, and in general to deal and intromit therewith as freely as I could have done myself.' Mrs Denholm proceeded to appoint her husband to be her sole executor; and upon his death, if he should survive her, she assigned to trustees (who are now represented by the pursuers), 'all and sundry my said estate or such portion as may be unconsumed by my said husband' in trust for the purposes thereafter specified. It seems, therefore, that what would have otherwise been an absolute fee in Mr Denholm is limited by the destination to other parties of so much of the wife's estate as might be 'unconsumed' by him at his death. In Lord Stormonth-Darling's words (1907, S. C., at p. 64), Mr Denholm had 'a right limited to sale, administration, and consumption during his lifetime.' To attempt a closer definition of his right, one must, I apprehend, study the

Nov. 29, 1907. The pursuers reclaimed. The case was heard before the Second Division on 5th and 6th November 1907.

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Argued for the pursuers and reclaimers;—The husband's position here was that he had certain powers *qua* administrator, and certain powers *qua* beneficiary. These powers must be clearly distinguished. So far as he acted *qua* administrator, he was in a fiduciary position and was bound to account for everything which he could not shew was consumed under his powers *qua* beneficiary. His position *qua* beneficiary was really indistinguishable from that of a liferenter with a power of encroachment. *Qua* beneficiary he was not a fiar,¹ but merely a liferenter with extended powers.² Such a power of encroaching, or, as the pursuers submitted, consuming, could only be utilised for purposes of personal user.³ The *onus* of shewing a due exercise of the power of consumption was upon the defenders. It could not be disputed (1) that the wife's estate, with the exception of the £6000

clause as a whole, and endeavour to give due weight to all its parts. On the one hand, I think that the wide expression—'and in general to deal and intromit therewith as freely as I could have done myself'—must be read so as to harmonise with the power to 'consume such parts or portions of the capital during his lifetime as he may find or think necessary'; and, on the other hand, the latter phrase must be taken in conjunction with the wider words. The result, in my judgment, is that Mr Denholm was undoubtedly entitled to 'consume' the whole of his wife's estate during his lifetime—though he might not dispose of it by *mortis causa* deed—subject to the rather unsubstantial qualification that he himself should 'find or think' it necessary to do so. The word 'consume' has no special or technical signification. The main idea etymologically is, I think, that of taking complete possession. Dr Johnson defines it as 'to waste; to spend; to destroy.' The 'unconsumed' portion, if any, of Mrs Denholm's estate must, therefore, in my judgment, be represented by what now remains extant, and can be identified as having formed part of it. I was referred to cases in which clauses, more or less similar to the present, were construed by the Court. The light to be derived from these is at best indirect. It may be sufficient to allude quite briefly to two of the decisions. In *Reddie's Trustees*, 1890, 17 R. 558, a surviving widow had power under a mutual settlement 'to use or encroach on the funds, means and estate hereby conveyed on either side.' The Court held that these words must be 'read in a reasonable sense'; that the widow was not entitled to give the estate away without consideration; but that, in so far as necessary for her maintenance, she might encroach upon the capital,—'only for herself, and not for anyone else.' The language of the deed in *Reddie's* case was obviously much more restricted than that here under consideration. A case more nearly resembling the present is *Sprot*, 1855, 17 D. 840. There, a husband declared that his wife, if she survived him—(which she did),—should 'be at liberty to appropriate out of the stock of my said trust-estate such sum or sums, from time to time, as she may find useful for her own use, over and above the free income, or as she desires to have for her own purposes and disposal, without limitation as to the amount of such sum or sums.' It was held that the widow was not entitled, as in exercise of this power, to dispose of the whole estate by *mortis causa* deed. The Lord Justice-Clerk (Hope) pointed out that the 'appropriation out of the stock . . . clearly refers to an act of the wife, in her lifetime, taking the sums herself for her own use. Her

¹ Denholm's Trustees v. Denholm's Trustees, 1907, S. C. 61.

² *In re Thomson's Estate*, (1879) L. R. 13 Ch. D. 144.

³ *Reddie's Trustees v. Lindsay*, 1890, 17 R. 558; *Sprot v. Pennycook*, 1855, 17 D. 840.

bond, was realised; (2) that the proceeds were paid into the husband's bank account and immixed with his own funds; and (3) that the proceeds could not now be traced. But this was not enough. Proof of immixture was not proof of "consumption." The defenders must prove that the husband had found or thought it necessary to consume the wife's estate for his personal user—for his greater personal comfort. The defenders had totally failed to prove this. This was especially so as regards the subjects which were acquired compulsorily, but it was really so as regards all the estate that was realised. It might be that the husband was the final judge as to what was necessary for his personal user, but he and his representatives were bound to shew that he had considered the question. The evidence as to the state of his bank accounts proved nothing as to his real financial position. There was no ground for saying that he was pressed for money. The statement of the wife's estate entered by

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deed of settlement is not such an act at all. She has appropriated nothing out of the stock'; but his Lordship also made it plain that the widow could, during her life 'have gone any length in the way of expenditure.'

"Subject, then, to the views which I have expressed, the question that arises seems to be one of fact, viz., what, if any, 'portion' of Mrs Denholm's estate can be shewn to have remained extant and 'unconsumed' by Mr Denholm at the time of his death? It is now admitted by the defenders—although they disputed it down to the date of their letter of 21st January 1907, No. 191 of pro.—that one such portion of the estate remains 'unconsumed'; namely a bond in Mrs Denholm's favour for £6000 over the estate of Press, which is described in the summons and condescendence. But it appears that the whole rest of her estate was realised by Mr Denholm during his life, and its proceeds immixed with his own funds, so as to make it impossible to identify them or trace their subsequent history. Mr Denholm was a stockbroker, and prior to 1894 had also an insurance agency. His business books were kept with regularity, but he seems to have made no private record at all of the income and out-goings, either of his own means or of his wife's estate. He had several bank accounts, and would shift money from one to another of these. When he realised successive portions of his wife's heritable estate, he immediately placed the proceeds in one or other of these accounts, immixed them with his own funds, and went on drawing upon the account for his ordinary expenditure and other purposes. Upon this general sketch of the situation, a question as to *onus probandi* arises. The pursuers' counsel argued that it was for the defenders to prove 'consumption' by Mr Denholm so far as they could do so; that to 'immix' is not necessarily to 'consume'; that, as Mr Denholm had kept no private accounts, it was impossible for the defenders to prove that any definite portion of his wife's estate had been 'consumed' by him; and that the pursuers were, therefore, entitled to receive and administer the amount of her estate as known to exist at the date of her death. I think that this argument is erroneous. It lies, in my opinion, upon those who seek to administer 'such portion' of Mrs Denholm's estate 'as may be unconsumed by' her husband, to identify the whole portion of it which they say is unconsumed, as they have succeeded in identifying the bond for £6000. It is true that Mr Denholm was his wife's executor; but he was also the *fiar* (subject to the qualifications already explained) in her estate. He was not, I apprehend, under any obligation to keep account of that estate, though it would have been more regular to do so. He intromitted with her estate and mixed it with his own, and if the pursuers are, in these circumstances, unable—as I think they are—to trace or identify it (with the exception of the bond), they fail, in my judgment, to discharge the *onus* of proving that it remained 'unconsumed' at Mr Denholm's death. Now, the nature and

Nov. 29, 1907. the husband in his books with reference to the will he made in 1902 shewed that at that date he regarded it as still then existing unconsumed and apart from his own estate. It could not be maintained that he had consumed it since 1902.

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Argued for the defenders and respondents;—(1) *Onus*. The *onus* was not on the defenders, but on the pursuers. Under the mutual settlement there was an absolute conveyance to the husband, with full power to realise and consume. All that the pursuers were entitled to was what was “unconsumed.” It was for them to establish the identity of any property of the wife which was unconsumed. The husband was not in the position of a trustee, bound to keep accounts and shew vouchers. If that were so the defenders could not be held to account now. (2) Even if the *onus* was on the defenders they had proved that the wife's estate, except the £6000 bond, had been consumed. Consumption meant primarily loss of identity. In a

value of Mrs Denholm's estate at her death are shewn in a statement, No. 10 of pro., to which I shall afterwards have to allude more particularly. The correctness of the statement is impugned upon certain heads by both parties, but may be held as sufficient for present purposes. If one discards the bond for £6000, which remains ‘unconsumed’; a balance of *jus relicte* from the estate of Mrs Denholm's former husband; and ‘paraphernal effects’ of trifling value; it appears that that lady's estate consisted, at her death, of three heritable properties. The first of these—a house in Manor Place—was sold by Mr Denholm in 1895 and the price placed immediately in one of his bank accounts. I may observe in passing that I think the pursuers have failed to prove in fact that a part of these proceeds was used in paying off a bond for £917 or thereby upon another property belonging to Mr Denholm; and further that, even if the alleged application of this money had been established, I should have been disposed to hold that Mr Denholm had ‘consumed’ it, within the meaning of the settlement. In 1900, the subjects in High Street were acquired by the Corporation of Edinburgh; and the property in South Bridge had been sold by Mr Denholm in the previous year. In both of these cases, as in that of Manor Place, the price was placed by Mr Denholm in bank, and immixed with his other funds. In my opinion, Mr Denholm thus ‘consumed’ his wife's estate (except the bond), according to the ordinary use of the word, and its meaning in the mutual settlement. But the pursuers' counsel argued that it would be little short of absurdity to say that Mr Denholm could ‘find or think’ it necessary to ‘consume’ the whole of his wife's estate,—excepting the said bond. It was, they urged, proved that he had a stockbroking business worth not less than £2000 a year, besides heritable properties of his own; and in 1899 he succeeded to a fortune of about £27,000 under the will of a Mrs Booth. I think that Mr Denholm's professional income is overstated at the above figure; but the truth is that, as Mr Cockburn Millar frankly puts it, ‘it is somewhat difficult to determine accurately the position of a man who has not made a balance-sheet shewing his own affairs, and I do not know if we have knowledge of all his assets or liabilities.’ Further, it appears to be at least highly probable that, when Mr Denholm sold the Manor Place house in 1895, he might ‘find or think’ it necessary to use and consume the price for his own purposes; because his assets consisted chiefly of heritage, and of certain bank stock which he utilised as cover against overdrafts on his account. A similar observation may, I think, be fairly made as to the sales of Mrs Denholm's other two properties and the ‘consumption’ of their prices by Mr Denholm; for he had not, it seems, actually received any part of his succession from Mrs Booth's estate until after the completion of these transactions. There is at all events no evidence to shew that Mr Denholm did not find or think it necessary to consume the estate which he had in

secondary sense, as applied to funds, it involved realisation, conversion, appropriation, and loss of identity. On the pursuers' contention capital consumed productively in the economic sense would not be consumed at all. If consumption involved spending, then spending to pay debts generally was as much consumption as spending to pay a particular debt. The evidence shewed that the husband, although the owner of a considerable amount of property, was in a chronic state of indebtedness, and worked his business on overdrafts. He spent £3000 a year. His average net profits from his business were not more than £1000 a year, and his average income, apart from his business, including the income of the wife's estate, was not more than £700. His heritable estate was heavily bonded. He used his wife's estate to free himself from indebtedness, and it was all so used before he got Mrs Booth's legacy. The proceeds went into his bank accounts, and either were wiped out at once by an overdraft, or were drawn

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fact mixed with his own funds. The pursuers' counsel presented a further argument, based upon the statement, No. 10 of pro., to which I have already referred. This statement is contained in Mr Denholm's ledger, and is signed by him as being as near as possible a correct statement of the estate of his late wife at the date of her death, 'and is engrossed here with reference to the directions expressed in my will, dated 17th April 1902.' This will (No. 14 of pro.) is a very lengthy document, and seems to have been the outcome of deliberations between the testator and his law-agent extending over a series of years. It contains a clause of forfeiture directed against his two daughters and his stepson in the event (which has not occurred) of any of them raising questions, *inter alia*, 'with reference to the distribution or division of the estate left by their mother, my wife, or taking exception or making any objection to the amount thereof as the same may be set forth in any statement subscribed by me.' The pursuers' counsel maintained that Mr Denholm's subscription of No. 10 of pro., coupled with the clause just quoted, sufficiently instruct an intention on his part that the amount or value of the estate belonging to Mrs Denholm at her death should, upon his death, pass to the trustees of her own will, for the purposes expressed by her in the mutual settlement, notwithstanding his intromissions with it during his life. I leave out of account entirely such fragments of oral testimony as exist in the proof as to Mr Denholm's expressions of intention in regard to his wife's estate. Such passages, if competent—which I doubt—are quite vague and inconclusive. In my opinion, the documents founded upon are not sufficient to rebut the strong presumption, arising from the facts of the case, that Mr Denholm intended to consume, as, in my judgment, he actually did consume, during his lifetime, the whole of his wife's estate, except the bond for £6000. The evidence discloses that Mr Denholm was made fully aware by his successive law-agents, Mr Dalziel and Mr Kerr, of his powers of consumption, and that he deliberately abstained from putting his wife's estate beyond those powers by creating a separate trust. Further, it is made clear by Mr Kerr's evidence that the purpose for which the statement No. 10 of pro. was prepared and subscribed was not that which was suggested in the argument for the pursuers. Mr Kerr states that he had no knowledge of Mr Denholm's dealings with his wife's estate; but that he advised him to put upon record a definite statement of the amount of it, as received by him at her death, 'to prevent any question when he was dead. The real purpose was to fix the amount of the estate as at her death as received by him, so that there might be no question by beneficiaries coming forward and saying "this is far more than the sum our mother left."' I confess that I am unable to understand from Mr Kerr's evidence—the truth of which I accept implicitly—the precise idea which he had in mind in so advising Mr Denholm; but, whatever the idea

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out for his own purposes within a few months. Such being the evidence, it proved that the wife's estate, with the exception of the £6000 bond, had been consumed. When something was left to a man's judgment the Court could not go behind his judgment and inquire whether it was justified.¹ Whatever was not extant and identified at the husband's death was "consumed."

At advising,—

LORD JUSTICE-CLERK.—This case is not unattended with difficulty, as is demonstrated by the fact that there is a difference of opinion between your Lordships upon it. Your Lordships have both very fully and very clearly stated the grounds of the opinion you have formed, and by your kindness I have had an opportunity of considering these opinions. Before doing so I had arrived at the conclusion that it could not be held in this case that there was any ground for holding that the funds which are in question had not been consumed by the deceased Mr Denholm during his life, and that having been so consumed, the demand made in this case cannot receive effect, as I hold he was entitled to consume as he did, and was not bound to keep accounts by which the mode and details of consumption should be capable of ascertainment. Having considered your Lordships' opinions, I have come to the conclusion that my view formed on consideration is right. And as Lord Stormonth-Darling's carefully formed and expressed opinion expresses very fully and exactly my views on the case, I feel it to be unnecessary to restate them at length.

LORD STORMONTH-DARLING.—This case came before this Division more than a year ago, and was then heard by Lord Kyllachy, Lord Low, and myself. What we then decided, affirming the Lord Ordinary, was that on a sound construction of the mutual settlement by the spouses the late Mr Denholm did not take a full and unlimited right of fee in the estate of his first wife. I then said, delivering the judgment of the Court, that taking all the clauses of the deed together "their true effect was to cut down the

may have been, Mr Kerr's statements establish beyond question that it was not in order to secure that the original amount of Mrs Denholm's estate should be taken out of Mr Denholm's estate, so as to be made subject to the trust purposes of her settlement. I may add that, in considering the case, doubts have occurred to my mind as to the admissibility of Mr Kerr's evidence upon this matter, though no objection to its competency was suggested by the pursuers' counsel either at the proof or in his speech at its conclusion. But, for the reasons stated, I should arrive at the same result apart altogether from Mr Kerr's evidence. Upon the whole matter, therefore, I think that the pursuers are entitled to decree substantially in terms of the conclusions of the summons for declarator and delivery; and that, *quoad ultra*, the defenders are entitled to absolvitor.

"I have not found it necessary to advert in detail to the evidence given by the accountants engaged on either side. But I may say that these gentlemen appear to have gone into the whole case, upon such materials as were available, with great ability and industry; and I have not failed to study carefully their oral evidence, and the numerous 'states' which they produced as explanatory of and relative to the same."

¹ Houldsworth v. Brand's Trustees, 1875, 2 R. 683, *per* Lord Justice-Clerk, at p. 690.

absolute right of fee originally conferred on the husband, not to a liferent (because a liferent would have been inconsistent with the powers which she (the wife) wished him to have) but to a right limited to sale, administration, and consumption during his lifetime." The Lord Ordinary has now taken a proof, and as the result of it has in substance found that the whole estate of the first wife, with the exception of a bond for £6000 over the heritable estate of the husband, was "consumed" by him during his lifetime within the meaning of the mutual settlement. I think the Lord Ordinary is right.

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If the passage I have quoted from the former judgment of this Court be well founded (and it was not challenged), there was an absolute right of fee originally conferred on the husband by the wife's conveyance. It is not qualified in any way by trust or otherwise. It is a conveyance of "my whole estates" under burden of debts, as well as of certain annuities which the lady creates by the settlement, and under burden also of maintaining and educating her whole children, including her son by a former marriage. Then follow certain powers which, as we formerly found, were truly rather limitations of the husband's rights than powers properly so-called, and in the event of his surviving her she appoints him her sole executor. Consistently with that, the trust conveyance which she goes on to make to her own trustees at her husband's death is limited to "my said estate, or such portion as may be unconsumed by my said husband." The conveyance to the husband, therefore, is in point of title absolute, and differs in that respect from the right conferred on the wife in the English case cited by Mr C. D. Murray of *In re Thomson's Estate*,¹ where it was controlled by the words "for the term of her natural life," although words were added which gave the wife some power of disposition over the capital. These words were,—“To be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof, subject only to the payment of my just debts and funeral expenses and the charge of proving and registering this my will.” The practical effect of this form of conveyance was as nearly as possible the same as Mrs Denholm's conveyance here. But in point of title the Court could not hold that the donee of this power had anything but a life interest, or any right to affect by testamentary instrument what remained undisposed of at her death, which was what the donee in that case tried to do. Here there was no such attempt by Mr Denholm, for he did not try to take advantage of the circumstance that his title was absolute in point of form. I agree that the attempt would have been unsuccessful if he had made it, because of the limitation of his powers to consumption during his lifetime, and there was no real repugnancy between that limitation and the absolute nature of the title.

But that leaves untouched the question, What was the meaning of the "full power to my said husband to consume such parts or portions of the capital during his lifetime as he may find or think necessary" which Mrs Denholm gave him? It may be that such a power is exceptional, and, if you like, rather anomalous. It does not fit in exactly with our ideas of either fee or liferent. But it was used by a testatrix who had plainly un-

¹ 13 Ch. Div. 144.

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bounded confidence in her husband (as shewn, *e.g.*, by her entrusting him with the maintenance and education of her son by a former marriage and making him guardian of the boy), and she must also be taken to have known that although he was a landowner and living at a very bountiful rate, he was a stockbroker and liable to considerable risks in business. Accordingly when she made him the absolute judge of what parts or portions of her estate (amounting in all to between £10,000 and £11,000 in houses and money) it was "necessary" for him to "consume" during his lifetime, and what portion he was to leave "unconsumed" at his death, I think she was doing a very different thing from giving the net income of her whole estate to trustees, and superadding a discretionary power to them to encroach upon capital as they might deem necessary, which was what the husband did in his part of this mutual deed. I therefore attach no importance, except as affecting mutuality, to the recital with which the wife's conveyance opens,—“In like manner and in consideration of what is before written.” The two conveyances, so far as affecting construction, must each be regulated by its own terms. And therefore when the Lord Ordinary comes to the conclusion that the “unconsumed” portion of Mrs Denholm's estate must be represented by what now remains extant, and can be identified as having formed part of it, I cannot but agree with him. Mr Robertson-Durham, after a careful examination of the documents in process and of the books kept by the late Mr Denholm shewing his financial transactions, is asked whether he can identify any of the estate extant at his death as belonging to his wife. And his answer is,—“Only the £6000 bond over Press; everything else, so far as I can follow the items, was consumed by Mr Denholm, immixed with his estate, and swallowed up.”

Now, it is not disputed by the wife's trustees that her estate, both heritable and moveable, was in point of fact realised and immixed with the husband's funds by being paid into his various bank accounts, and that it is impossible now to trace the proceeds. The case would have been different if all that the husband did, when he realised the house property belonging to his wife, had been to reinvest the proceeds in some other recognisable form. That might not have been “consuming” the proceeds any more than if he had put them into the traditional old stocking and had kept them there. But what he did was not that. He used the money to pay off debt and reduce overdrafts, and he dealt with it generally in such a way that the most skilled accountants cannot tell what became of it in the end. For aught I know this very impossibility of tracing the proceeds may account for the extremely wide terms of Mrs Denholm's part of the will. Knowing that her husband was immersed in fairly large money transactions; that he had several bank accounts (frequently overdrawn); that his landed and house property was burdened, and that he had need of capital both for his own and his clients' purposes, she may have wished to give no third party the right to inquire what he did with her money any more than with his own, and so may have used an indefinite term to cover his use of the money in any way that he found most for his advantage. Certainly I cannot accept the reclaimers' main argument, viz., that “consumption” means only personal user, for it seems to me that that, besides creating at the outset the difficulty of settling what “personal

user" means, would be giving no effect to the words "as he may find or think necessary," which are the words of the will. Nor do I think that this difficulty is got over by implying some vague kind of trust where there is none. There is always, of course, the ultimate arbitrament of conscience. But I must say, in fairness to the late Mr Denholm, that nothing has either been established by the proof or advanced in argument to shew that there was any failure on his part to observe the rules of good conscience as regards the beneficiaries ultimately and contingently called under his wife's part of the settlement. By his own will he seems to have dealt with them all (his stepson as well as his own two daughters) as one family. By that instrument he no doubt mentions provisions as made both by her and himself for their children, and there is a clause of forfeiture of any share or interest under his own will in the event of any of the children making any claim (inconsistent with his will), or raising any question about a statement subscribed by him relative to her estate at the date of her death. But that statement merely referred (and referred apparently with substantial accuracy) to the different items of her property, heritable and moveable, and does not of course touch the question in any way of what Mr Denholm was entitled to do by way of consumption of his wife's estate during his own life. I do not therefore see that either the statement No. 10 of process or the passages in Mr Denholm's own will materially affect the only question of importance in the case, viz., whether the husband did "consume" the wife's estate by using it to pay his debts, and so making it impossible of identification.

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I think that the test proposed by Mr Constable for the husband's trustees is the true one, viz., whether the husband was bound to keep accounts of his wife's estate? And I think there is no ground for saying that he was. If he was not so bound, there is an end of the argument that the mutual will contained anything in the nature of a trust or *quasi* trust. I demur altogether to the notion that although Mr Denholm may not have been bound himself to keep accounts, his trustees are under an obligation to account to his wife's trustees for anything except the bond for £6000. Beyond that, what are they to account for, and where are the materials for enabling them to do so? It is suggested that the document No. 10 of process forms an acknowledgment under Mr Denholm's own hand that, to the extent of the difference between the sum of £6000 in the bond and the sum of £10,100 which he acknowledges to have received as the net amount of his late wife's estate at the date of her death, he never "consumed" his wife's estate, nor intended to consume it. That seems to me rather a strong inference to draw from a document made out *alio intuitu* altogether. It is also an attempt to divert the question from the construction of Mrs Denholm's will in 1893 to the meaning to be attached to a jotting of Mr Denholm's made with reference to his own will in 1902. But the strongest objection to this suggested inference is that the fact of consumption or non-consumption is to be ascertained, not from ambiguous declarations, but from positive acts of his own.

I agree with the Lord Ordinary that the *onus probandi* lies on the pursuers. It is for them to shew that there was any portion of the wife's estate "unconsumed" at the husband's death; it is the very groundwork of their

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LORD ARDWALL.—This is an action raised by the trustees of the deceased Mrs Denholm against the trustees of her husband, the deceased George Denholm. It concludes, first, for declarator regarding a sum of £6000 contained in a heritable bond by Mr Denholm in favour of his wife; the Lord Ordinary has granted decree in terms of that conclusion, and the defenders acquiesce therein. The second conclusion of the action is for count, reckoning, and payment, whereby the amount due by Mr Denholm at the time of his death to the pursuers may be determined. A proof has been led with reference to this conclusion, and it has now to be decided whether, under the mutual settlement of Mr and Mrs Denholm dated 10th November 1891 the pursuers, who are Mrs Denholm's trustees under that settlement, are entitled to the accounting and payment they ask.

The important facts seem to be as follows:—

On 10th November 1891 Mr and Mrs Denholm executed the mutual settlement under consideration. Mrs Denholm died in 1893. She left heritable estate which, after discharging the bonds secured over it, realised about £4752, the bond for £6000 above referred to, and a small amount of money, in all about £10,100. The details of the estate are given with sufficient accuracy in the statement signed and authenticated by Mr Denholm in reference to his own will, to which I shall afterwards refer.

At Whitsunday 1895 Mr Denholm sold the house, 43 Manor Place, Edinburgh, which had belonged to his wife, at a price which, after paying the bond thereon and expenses, left £2690. At Whitsunday 1899 he sold the one-half of the property 92 South Bridge at a price which, after paying expenses, left £1482. The High Street property was compulsorily taken by the Corporation of Edinburgh in pursuance of an improvement scheme in August 1900, and the value of Mrs Denholm's half thereof, after deducting expenses, amounted to about £580. The proceeds of all these properties were at once carried into one or other of Mr Denholm's three bank accounts and merged with his other funds. It is explained by the accountants who examined his books that he kept no private accounts of his expenses of living, education of children, or anything else, so that it cannot be said what he spent year by year in these ways. It is important to notice, however, that long before his wife's death he was possessed of capital to the amount of about £5000, and that in February 1899 he succeeded to a sum of £27,000 under the will of a certain Mrs Booth.

On 17th April 1902 he made a will in which he revoked the mutual settlement so far as regarded his own estate, and gave directions with regard to it, and shortly after he drew up the statement already referred to and had it engrossed in one of his books with reference to the directions expressed in his will. He adopted the statement and docquet as holograph, and in addition had it witnessed by his cashier.

At his death Mr Denholm's estate was found to amount to about £40,000.

He had been from the time of his marriage to Mrs Denholm onwards in Nov. 29, 1907. business as a stockbroker, and it is estimated that he had a professional income, generally speaking, of about £2000 a year, but as he speculated a good deal on his own account it is difficult to say precisely what his annual income was, and possibly the figures above given as to his capital at various times and at his death are sufficient for the purposes of this case.

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From the above statement it appears that the only portion of Mrs Denholm's estate which can now be said to exist *in forma specifica* is the £6000, about which there is now no question. The whole of the rest of her estate was immixed with her husband's funds and may be regarded as having been invested in his business, because although it appears, so far as the direct application of it was concerned, to have been used for general expenses, yet by so using it Mr Denholm was enabled to keep more money in his business. It is now indistinguishable from the rest of Mr Denholm's estate, but if the defenders are bound to account for it to the pursuers, there seems no practical difficulty in recovering it, as Mr Denholm's estate is well able to pay the whole amount sued for.

On these facts the Lord Ordinary has held that the whole estate of Mrs Denholm, "with the exception of the bond for £6000, was consumed by the late George Denholm, her husband, within the meaning of the mutual settlement referred to on the record," and he says in his note that the question is what portion of Mrs Denholm's estate can be shewn to have remained extant and unconsumed by Mr Denholm at the time of his death.

I cannot agree with the view taken by the Lord Ordinary and now concurred in by your Lordships. This case was formerly brought before this Division on a reclaiming note by the defenders, and it was then decided¹ that under the said mutual settlement the husband "did not take a full and unlimited right of fee in the whole estate of the wife," and the first question to be determined is what was the nature of the husband's right in that estate. In my opinion he was constituted a trustee upon the said estate, in the first place for payment of Mrs Denholm's debts, deathbed and funeral expenses and executry expenses; second, for paying her two aunts free annuities of £10 sterling each at Whitsunday and Martinmas in each year, and for the purpose of maintaining and educating the whole of her children out of the income of the estate. It is not said that Mr Denholm is to have a liferent of the estate subject to these burdens, but I think that must be held as implied.

With regard to the capital there are two powers given to Mr Denholm. First, the power of consuming such parts or portions of the capital during his lifetime as he might think necessary, in other words a power of encroachment—on the construction of which this case largely turns—and, second, a power of administering and using the estate. Then upon the death of her husband, should he survive her, Mrs Denholm disposes and assigns to certain trustees, who are the pursuers in this action, "all and sundry my said estate or such portion as may be unconsumed by" her husband, in trust for certain purposes which are therein specified. I think it plain that these provisions have the effect of placing the husband in the position of a trustee

¹ S. C. 1907, 61.

Nov. 29, 1907. with very large powers of administration and use of the estate but with a limited power of consumption, and the result in law is that should he use the estate by mixing it up with his own or taking investments in his own name, his trustees would, notwithstanding, be liable to account for that estate upon his death, subject only to deduction of such portions as they could shew to have been consumed in terms of the only power to encroach on capital conferred by the deed.

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From the provisions above recited it is, I think, apparent that the husband as trustee was bound to defray out of the income of the estate the life annuities and the expense of maintaining and educating the children, and this could only be done by his retaining the capital of the estate and applying the income to these purposes. The only power given to him to encroach upon the capital I shall afterwards more particularly consider, but it is plain that so far as not consumed in terms of the power, the testatrix intended that the whole of the capital of the estate, however dealt with under the power of administration, should be available for the purposes of her trust after her husband's death, to carry out which trust she appointed trustees in succession to him.

I have difficulty in understanding what view the Lord Ordinary takes of the character in which Mr Denholm held his wife's estate, but he has apparently reached the conclusion that under the combined powers of consumption and administration Mr Denholm was entitled, as soon after his wife's death as he pleased, to realise her whole estate and mix it with his own funds, and thus free himself and his executors from all obligation whatever to account for it to the beneficiaries under the mutual settlement. I do not think that this view is tenable. It is, I think, at variance with the former decision in this case, because it results in this, that while by the general scheme of the deed the husband had not an absolute right to the fee, yet under the powers in the same deed he could at once secure such right to himself, as soon as he pleased after the death of his wife, by the simple process of realising the estate and mixing it with his own, and thus defeat the whole of the carefully drawn provisions with regard to the use to which the income, and finally the capital, of the estate were to be put. The Lord Ordinary adverts to the dispositive clause as helping to lead to this result. It is as follows:—"I the said Sarah Louisa Liddall M'Laren or Denholm do hereby give, grant, assign, and dispone to the said George Denholm, my husband, in the event of his surviving me, all and sundry my whole estates, heritable and moveable, real and personal, of whatever description, together with the whole writs, titles, and instructions thereof, but under burden always," &c. Now, I would point out that the terms of this gift are of little importance in the present question, because they are the terms in which almost every trust-disposition is granted, and are, as near as may be, the same terms as Mr Denholm himself uses in giving his part of the trust-estate over to his trustees, and although Mr Denholm is not named a trustee, yet, if the directions given him and the powers and duties entrusted to him were those appertaining to trustees, I do not think that his character, as such, is altered by what the Lord Ordinary calls the absolute terms in which the disposition is granted. Mr Denholm by the deed is nominated his wife's "executor," and it has been decided that if an executor is charged with

duties implying a continuing trust he is in the same position as if he had been nominated a trustee.—*Ainslie v. Ainslie*.¹ In the next place it appears to me that the Lord Ordinary has mixed up with the power to consume the power of realising and administering the estate which is a totally separate power and ought not in my opinion to be confused with the very special power given Mr Denholm to consume the capital thereof which precedes it.

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I will now proceed to consider what is the meaning and effect of the clause giving power to consume capital.

(1) I first take the clause by itself, prefixing, however, the words which immediately precede it in the mutual settlement, and which I think are not unimportant. It is in these terms :—"Also under burden of maintaining my whole children including the said William Benjamin Liddall M'Laren, until they are capable of maintaining themselves, and of educating them in a manner befitting their station, with full power to my said husband to consume such parts or portions of the capital during his lifetime as he may find or think necessary." The word "consume" I take it, simply means to use up, but it is a word which is appropriate to designate use by way of supporting or keeping in comfort a husband or children, and is not so appropriate to designate the squandering and dilapidating of an estate. In Mr Denholm's part of the mutual settlement, which I shall presently advert to, the trustees are directed to pay over parts of the capital to Mrs Denholm, but of course in Mrs Denholm's part, Mr Denholm being himself the trustee, it would have been ridiculous to direct him to pay over to himself, and accordingly the power takes the form of a power "to consume" such parts or portions, &c.—the capital being in his own hands. But the power given is not to consume such parts of the capital as he may think proper, or as he may please, but as "he may find or think necessary." Effect must be given to these last words, and the only reasonable effect which can be given to them is to hold that they limit the husband's power of consuming to what he might find or think necessary for the comfortable maintenance of himself and his own and his wife's children. It would be doing violence to these words to hold that they could possibly apply to such a case as mixing the whole of his wife's estate with his own, or that his doing so can be held in any sense to be an exercise of the limited power of consumption conferred on him.

(2) This settlement, however, is a mutual settlement, and although there was a power of revocation given to the husband, which he has exercised with regard to his part, yet the original mutual deed should be read as one, and being a mutual settlement it ought to be so interpreted as to render the provisions made by the husband and wife, in favour of each other respectively, as nearly as possible counterparts of each other. This observation is applicable to all mutual settlements. It is so more particularly in this case because the provision made by Mrs Denholm, in favour of her husband, which is now under consideration is introduced by these words :—"And in like manner and in consideration of what is before written, I the said Sarah Louisa Liddall M'Laren or Denholm do hereby," &c.

Taking then, first, the provisions under the fourth head of Mr Denholm's part of the mutual settlement, we find them to be these :—(1) The net

Nov. 29, 1907. income of his whole estate, under burden of certain annuities, is to be paid to his wife as an alimentary allowance for herself and "our children"; then follows this clause:—"And my trustees are hereby authorised to pay over to her from time to time for her use such portion or portions of the capital of the said residue as my trustees may deem necessary, or which they think she may require, she being always bound to maintain our said children, and that until they are capable of maintaining themselves, and to educate them in a manner befitting their station." I have above quoted the corresponding clause in Mrs Denholm's part of the deed, and comparing these two clauses I remark that the contemplation of the later clause in the deed is that the capital of the estate shall be preserved for the ultimate beneficiaries, except such portion, not as her husband may consume, but as he may find or think necessary to consume. This is almost in terms the same direction as is given to the trustees by the first portion of the deed, and I think it would do violence to the intentions of both parties to the deed—and it is a mutual one—to hold that the husband was entitled to squander or appropriate all his wife's estate as he pleased, without ever putting the question to himself whether the consumption of capital was necessary presumably for the purposes of the needful expenses of himself and the children. It will be noticed that what the trustees in the former part of the deed are bound to do is to pay over to Mrs Denholm such parts of the capital as they may deem necessary, or which they think she may require, and my opinion is that the power given to Mr Denholm was not intended to be a whit wider than that given to the trustees; in other words, that the power given to Mr Denholm to consume parts or portions of the capital during his lifetime as he might find or think necessary was a limited power only—a power to be exercised *sub modo*, although the duty is put upon himself, and not other trustees, to act as a good trustee ought to act, and as the trustees in his own portion of the deed are directed to act.

But now follows a clause which, I think, has been mixed up by the Lord Ordinary with the power to consume capital, but which has nothing to do with it, being concerned with a wholly different power, namely, of administration. That clause is in the following terms:—"As also power to him to realise, sell, and dispose of my said estates, heritable and moveable, by public roup or private bargain as he may think proper, and in general to deal and intromit therewith as freely as I could have done myself." It will be noticed that this clause is introduced by the words "and also," and that it deals with a power which seems to be purposely kept quite distinct from the power to consume given in the immediately preceding clause. I think, therefore, that it cannot be supposed that the words "to deal and intromit therewith as freely as I could have done myself" apply at all to the power to consume, but only to the power of realising, sale, and administration. A power of administration and reinvestment will be found in almost every trust-deed, but the peculiarity of the power under consideration is that while in the ordinary case trustees are by law strictly prohibited from using trust funds for their own purposes or investing them in their own businesses, in the present case Mr Denholm has practically unlimited power of using and investing the money, just, in fact, as if for these purposes it was his own, as the power indeed sets forth, and I cannot help

thinking that it was the intention of both parties by this clause to enable Nov. 29, 1907.

Mr Denholm to invest in his own business, directly or indirectly, such portions of his wife's realised estate as he thought proper. This, of course, would be a great convenience to him in carrying on the business of a stock-broker, but the fact that he did so invest it in his business through his bank accounts cannot reasonably be held to have the effect of absolving him from all obligation to account for money so invested to those who ultimately have the beneficial right to it. I accordingly am of opinion that this clause adds nothing whatever to the power to consume portions of the capital, and indeed has nothing to do with it. And as matter of construction I consider it out of the question to hold that the words "to deal and intromit therewith as freely as I could have done myself," are to be tacked on to the clause giving power to the husband to consume such portion of the capital as he might think necessary. It was doubtless with the view of giving Mr Denholm full power to change these investments, and, if he pleased, to have the command of this money during his lifetime for the purposes of his business, that the power took the somewhat unusual form it did, but I think that on a sound construction of the whole of this part of the deed, keeping always in view the provision made by Mr Denholm himself regarding his capital, the intention was that Mr Denholm should have the use of the income of the estate, for the word "liferent" is used in no part of the deed, that he should be entitled to consume such portions of the capital as he might think or find necessary, and should have practically unlimited power to handle the estate and invest it in such way as he pleased. I therefore revert to what I have already said that the deed by first giving an absolute disposition, and then inserting provisions which imply, as has been held by the former decision, limitations on the absolute right, has truly the effect of placing Mr Denholm in the position of a trustee with power to encroach on the capital of the estate should he think or find it necessary for certain purposes, and with the widest powers to invest and use the rest of the capital as he pleased during his lifetime, but subject, of course, to an obligation to account for such capital to the ultimate beneficiaries, an obligation, I may observe, not the least inconsistent with the right to use the capital in his business or otherwise, and to mix it with his own funds.

If I am right in what I have already said, I think it follows that the defenders are bound to account to the pursuers as Mrs Denholm's trustees under the mutual settlement for the whole value of Mrs Denholm's estate except such part thereof as they can shew to have been consumed under the power to consume which I have just been dealing with. In all cases where trustees, or persons in the position of trustees, are charged with the management and administration of funds belonging to a deceased person, it is undoubted that it is for them to account for those funds to persons having the ultimate beneficial interest in the reversion, and if they cannot shew affirmatively that capital funds have been properly consumed or used under the powers in the trust-deed, they must make good these funds out of the general estate of the trustee in the event of his death if such estate is sufficient for the purpose.

Now, there is no doubt here of the sufficiency of the estate, for Mr Denholm left some £40,000, and the fact that under the power of admini-

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Lord Ardwall. stration in the trust-deed he mixed his wife's funds with his own cannot absolve his trustees from the obligation to account. It appears to me, I must say, absurd to hold that they can escape that obligation merely because Mr Denholm mixed his wife's estate with his own, and because that estate accordingly does not now exist in its original form. I can find nothing in the scheme of the mutual settlement to countenance such an extraordinary result.

But I think that the pursuer's case derives great support from a consideration of Mr Denholm's will, and the statement which is incorporated and practically forms part of it. I may first observe that Mr Denholm having left the sum I have mentioned, and having been all his life apparently in prosperous circumstances, and all along having had considerable capital at his command, there was really no necessity for him to consume any portion of the capital of his wife's estate, and there are indications in some parts of the oral evidence, the competency of which I cannot admit, that it was not his wish to do so. But a consideration of the deeds I have referred to, I think, makes it plain that not only did he never exercise the power to consume the estate, but that he never intended to do so, and was under the belief that after his death the whole of the capital of Mrs Denholm's estate as at her death should be and would be disposed of in terms of her part of the mutual disposition and settlement. Mr Denholm's will is dated 17th April 1902. It sets forth the reserved power to revoke in the mutual settlement as regarded the separate estate of each party, and that his estate had been very considerably increased since the date of the mutual settlement. The deed then proceeds thus:—"All which make it highly expedient that I should execute a new will giving expression to my wishes as regards the disposal of my means and estate after my death." He then defines that estate, and says that it is to be referred to hereinafter as the "trust-estate."

It may be mentioned that Mrs Denholm had been previously married to a Mr M'Laren, and that her son of that marriage, named William Benjamin Liddall M'Laren, survived both Mr and Mrs Denholm. Then by her marriage with Mr Denholm Mrs Denholm had two daughters, both of whom survived their parents. In Mr Denholm's will the following provisions occur:—"Further, I specially declare that in the event of my daughters, or either of them, or my stepson, the said William Benjamin Liddall M'Laren, raising any question with reference to the distribution or division of the trust-estate, or taking exception or making any objection to my power to revoke said mutual settlement, or claiming that any part of the trust-estate falls thereunder or is thereby in any way regulated, or raising any question with reference to the distribution or division of the estate left by their mother, my wife, or taking exception or making any objection to the amount thereof, as the same may be set forth in any statement subscribed by me, they or any of them raising such questions regarding such distribution or division or taking exception or making any objection or claiming as aforesaid, with reference either to the trust-estate or to the estate of their mother, shall forfeit right not only for themselves, herself, or himself, but also for their, his, or her issue, in and to any share of or interest in the trust-estate as aforesaid, which shall thereupon accrete to the other

beneficiaries in their order and in terms of this my will and any codicil thereto." Nov. 29, 1907.

The statement referred to in the foregoing passage is the statement No. 10 of process. It sets forth the whole net value of Mrs Denholm's estate at the date of her death (being over £10,000), and appended to it is the following docquet:—

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"The above is as near as possible a correct statement of the estate of my late wife at the date of her death, and is engrossed here with reference to the directions expressed in my will, dated 17th April 1902.

"The above adopted as holograph. (Signed) GEORGE DENHOLM.

"(Signed) WILLIAM DICKISON, *witness*, cashier to George Denholm."

But although it is, as it professes to be, a statement of Mrs Denholm's estate "at the date of her death," it is clear from the directions expressed in Mr Denholm's will, and which the statement is signed with reference to, that Mr Denholm intended that the whole amount there set forth should be regarded as the estate of his wife and as falling under the mutual disposition and settlement executed by her. No other satisfactory construction can be put on the passage in his will taken along with the statement. He refers to the possibility of his stepson jeopardising "the provisions made for him by his mother and myself." It will be noticed that what he provides against is any of the children raising questions with reference to the distribution or division of "the estate left by my wife"; not the balance or the unconsumed portion of my wife's "estate," but the "estate left by my wife," and he fixes the amount of it by a reference to the statement. Now, the three heritable properties belonging to his wife had been realised and the proceeds carried into Mr Denholm's bank accounts in the years 1895, 1899, and 1900, and now in 1902 he treats the whole of his wife's estate as extant and as subject to the provisions of her settlement, and he warns her children under penalties against calling in question the amount of that estate as set forth by him in the statement under his hand. I think these propositions are legitimate inferences from the paragraph above quoted from the will taken in connection with the statement I have referred to. (First) That by the phrase "the estate of their mother" or "the estate left by their mother" is meant the estate set forth in the separate statement above referred to, amounting, as therein stated, to £10,100. (Second) That the trust-estate (that is the estate dealt with by Mr Denholm in his will) excludes and is contrasted with the estate of Mrs Denholm, or, as it is called, the estate of their mother. (Third) That Mr Denholm regarded the amount of his wife's estate, as defined in the separate statement, as still extant and falling to be dealt with under the mutual settlement, Mr Denholm's own trust-estate being dealt with by his will.

I do not think it is possible to have clearer evidence that Mr Denholm considered that he had not consumed any part of his wife's estate in the sense now contended for by the defenders, and that notwithstanding that he had taken the use of it in his business and otherwise by throwing a great part of it into his bank accounts, he contemplated that it should be dealt with after his death as his wife's separate estate, and that his trustees should account to Mrs Denholm's trustees for the amount set forth in the statement referred to which is signed with reference to his will, and which includes

Nov. 29, 1907. all the moneys which for many years before had been mixed with his own funds, and could not be traced as separate sums of money. I consider it manifest from this that Mr Denholm did not consider that he had consumed any part of his wife's estate or exercised the power to do so, and this, I think, is the best evidence we can have that he did not, in the words of the mutual settlement, "find or think necessary" to consume any portion of it, and never supposed for one moment that the effect of his taking the use of the money was equivalent to "consuming" it.

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On the whole matter I am of opinion (first) that the power to consume such parts or portions of his wife's estate as he might find or think necessary was a power to be exercised *sub modo*, and as a conscientious trustee would exercise it; (second) that there is no evidence that Mr Denholm ever exercised that power or ever found or thought it necessary to do so. On the contrary there is to be found in his own will and the statement referred to therein the best evidence now possible that he did not consider that he had either consumed or appropriated his wife's estate to any extent; (third) that Mr Denholm's using the proceeds of the realised portions of his wife's estate in his own business and for his own purposes, while legitimate under the very wide powers of use and administration given to him, does not absolve his trustees from accounting for the value of his wife's estate, although that may no longer exist *in forma specifica*, the estate left by him, which includes *ex hypothesi* the proceeds of part of his wife's estate, being amply sufficient to allow for the payment of the amount of his wife's estate to the pursuers, who are the persons entitled to administer it under the mutual trust-disposition and settlement.

I am accordingly of opinion that the latter part of the Lord Ordinary's interlocutor should be recalled, and that the defenders should be ordered to lodge an account bringing out the amount of the capital of Mrs Denholm's estate as at this date, subject to all burdens and expenses properly chargeable against it.

LORD LOW was absent.

THE COURT adhered.

M. J. BROWN, SON, & Co., S.S.C.—BRUCE, KERR, & BURNS, W.S.—Agents.

No. 40. JAMES MARSHALL & COMPANY AND ANOTHER, Pursuers (Respondents).
—Hunter, K.C.—J. G. Jameson.

Nov. 29, 1907. JAMES PENNYCOOK, Defender (Appellant).—Morison, K.C.—Macmillan.

Marshall & Co.
v. Pennycook.

Cautioner—Relief—Cautioner personally completing executory contract—Obligation of co-cautioner for share of loss.—Under a contract for the construction of water-works for a town-council undertaken by M'Donald, Marshall and Pennycook were taken bound, jointly and severally, as cautioners for the due performance of the contract. On 24th May 1904 the town-council intimated to the cautioners that if the work was not carried on satisfactorily within eight days the contract would be taken off M'Donald's hands, and the cautioners would be held liable for any loss. The work was thereafter carried on satisfactorily till 13th July when M'Donald became incapacitated by ill-health from continuing the contract, whereupon Marshall, who was himself a builder and contractor, after asking and being refused the co-operation of Pennycook, with consent of the town-council but without

any further formal demand by them upon him, took up the contract as Nov. 29, 1907. cautioner and completed it. The result was that there was never any failure to carry it on regularly. In completing the contract Marshall sustained loss. It was proved that if he had not acted as he did the loss would have been greater. Marshall & Co.
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Held that in these circumstances Marshall was entitled to intervene personally at the time when he did so, and that Pennycook was bound to pay to him one-half of the loss sustained by him, including half of a fee to him for superintending the work.

Cautioner—Extinction of Obligation—Release of Security—Water-works Contract—Retention Money.—By a contract for the construction of water-works for a town-council it was stipulated that payments should be made to the contractor monthly on certificates of the engineer at the rate of 80 per cent of the value of the work executed, the remaining 20 per cent being payable half on completion of the work, and the balance at a later period, the town-council “always having power to withhold payment on any certificate should the works not be carried on regularly or to their satisfaction.” The contractor became incapacitated by ill-health from completing the contract. A sum of £400 was then certified as payable to the contractor by the town-council. One of two cautioners for the contractor intervened and completed the contract, with the effect that there was never any failure to carry it on regularly. The town-council, after the cautioner had intervened, with his consent but not with consent of the other cautioner, paid away the £400 to assignees of the contractor.

Held that as the works had been carried on regularly the council would not have been entitled under the contract to withhold payment of the £400, and that by paying it over they did not free the non-consenting cautioner from his obligation.

Observed that the cautioners would have been freed if the town-council had paid over the 20 per cent before the time stipulated.

By contract, dated 13th October 1902, entered into between the 2D DIVISION.
Provost, Magistrates, and Councillors of the burgh of Selkirk, first Sheriff of
party, and D. M'Donald & Sons, contractors, Hawick, and James Roxburgh, &c.
Alexander M'Donald, the sole partner of that firm, second party, the second party agreed to construct certain water-works for the first parties. Under this contract (first) James Marshall & Company, builders and contractors, Hawick, and James Marshall, sole partner of that firm, and (second) James Pennycook, builder, Hawick, bound themselves, jointly and severally, as cautioners “for the due performance and execution of the above contract” by M'Donald. The contract provided:—“It is hereby declared and agreed to, that the” sum payable to the contractor under the contract “shall be paid to the second party and their foresaids, at the times and in the manner and subject to the conditions set forth in the aforesaid specification, bill of quantities, and general conditions and stipulations, and under any reservations therein or herein mentioned, and particularly and without prejudice to said generality, payments shall be made monthly only on certificates of the said engineer, at the rate of 80 per cent of the estimated value of the work executed by the second party, the remainder being paid, one-half on the date of completion of the work, and the balance on the expiration of the period of maintenance before mentioned, the first party, however, always having power to withhold payment on any certificate should the works not be carried on regularly or to their satisfaction.” *

* The general conditions and stipulations mentioned in the contract provided:—“(15) *Bankruptcy*.—If the contractor shall from bankruptcy,

Nov. 29, 1907. **Marshall & Co. v. Pennycook.** M'Donald proceeded to carry out the work specified in the contract. The work was delayed by unavoidable causes during the winter of 1902-3. Part of it was executed in the summer of 1903, and operations were resumed in 1904. The rate of progress was not satisfactory to the Town-Council of Selkirk, and on 23d May 1904 they resolved to inform M'Donald and his cautioners that if the work was not carried on satisfactorily after the expiry of eight days the contract would be taken off M'Donald's hands, and the cautioners held liable for any loss sustained in the completion of the work by the Town-Council. On 24th May the Town-clerk by letter informed M'Donald and his cautioners of this resolution, and at a subsequent interview with Marshall further explained the effect of it. Marshall went to Selkirk to see about the work, and with his assistance satisfactory progress was made until 13th July, when M'Donald was taken seriously ill, and became incapacitated, mentally, bodily, and financially, from continuing the contract. Marshall thereupon, without any further demand from the Town-Council, but with their consent, and after asking Pennycook to assist him, and being refused any assistance by him, alone took up the work and completed the contract as cautioner, and in doing so sustained loss.

On 13th July, when M'Donald became incapacitated, there was a sum of £400, due to him on the contract, for payment of which the engineer had granted a certificate. Subsequently the Town-Council with consent of Marshall, but without the consent of Pennycook, paid this £400—£266, 13s. 4d. to a Glasgow firm (Stevenson & Company) who had supplied to M'Donald the pipes required for the works, and £133, 6s. 8d. to Messrs Purdom, solicitors, Hawick, for a bank which had advanced the money for wages, M'Donald having assigned his rights to these persons prior to 13th July by cash orders and formal assignation respectively, all duly intimated to the Town-Council before that date.

insolvency, or any other cause, be prevented from proceeding, or neglect to proceed, with the work with the requisite expedition, or at any time fail to perform the same in a proper manner, or to comply with the orders of the engineer, the Council may, by writing under the hand of their Town-clerk for the time being, give notice to him to suspend the works forthwith, when they may take the same either wholly or in part out of his hands, and take possession of, and retain either for their own use, or for the use of the parties they may employ, all or any tools, materials, engines, or implements which the contractor may have or leave upon the works, and employ such other workmen by contract, or day work, or otherwise, and procure additional plant and materials, and proceed with the said works or the part thereof taken out of the hands of the contractor, and complete the same. Should a part only of the works be taken out of the hands of the contractor, all expenses incurred in completing such part according to the specification shall be awarded by the engineer, and paid by the contractor, or deducted from the unpaid contract moneys in the hands of the Council, but should the Council by such notice take the whole of the works out of the hands of the contractor, on the expiration of such notice this contract shall, at the option of the Council, become void as to the said contractor, but without prejudice to any right of action by the Council to which the said contractor may be subject for any neglect or breach of contract as aforesaid; and in that case the amount already paid to the contractor shall be deemed to be the full value of the works executed by him up to that time when such notice shall have expired, and no further claim shall be made by the contractor for work which may have been done by him up to that time."

Marshall after completing the contract claimed one-half of the loss sustained by him in doing so from Pennycook. In his account, by which he brought out the sum claimed by him, Marshall included this item, "To fee for superintending and expenses for 9 months, £75." Nov. 29, 1907.
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Pennycook having refused to pay the sum claimed from him, James Marshall & Company, and Marshall, as sole partner of that firm, raised an action against Pennycook in the Sheriff Court at Hawick, in which they craved decree for payment of £129, 12s. 3d. subsequently restricted to £121, 8s. 2d., being the defender's half of the cost incurred by the pursuer in performing the Selkirk Water-Works contract.

The pursuers pleaded, *inter alia*;—(1) The principals having failed, and the parties being jointly and severally bound as cautioners and sureties for the due fulfilment and execution of said contract, were equally bound on the failure of the principals to complete the same. (2) The defender having failed to discharge or to join with the pursuers in discharging his obligations under said agreement, and the pursuers having duly executed the work themselves are entitled to relief against the defender, their co-cautioner, all as craved. (4) Pursuers were not in the circumstances bound to wait till called upon before taking up said contract, and are not barred by having taken it up as they did.

The defender pleaded, *inter alia*;—(6) No intimation of failure of performance by the principal having been made, and the cautioners never having been called upon, they were not bound to complete the contract, and, *separatim*, the defender not having been called upon or consented to the completion of the contract by the pursuers, he is entitled to absolvitor, with expenses. (7) The pursuers not having been called upon were not entitled to execute the work themselves and to claim relief against the defender, unless with his previous consent. (8) The cautioners having been freed . . . by the Selkirk Town-Council homologating payments to the assignees, they were not under any legal obligation to finish the contract. (10) In any event the sum sued for is excessive, and the pursuers' position being one of trust, they are not entitled to charge for their services.

Proof was allowed and led.

It was ultimately held to be proved that the pursuer had intervened as cautioner and because he was cautioner; that he had asked the defender to assist him as his co-cautioner; that the loss to the cautioners would have been greater if the pursuer had not, immediately on M'Donald's incapacity emerging in July 1904, taken up the work and completed it; and that in consequence of Marshall's prompt intervention there never was any failure to carry on the work with due expedition or to perform the same in a proper manner. Certain circumstances which rendered it highly advisable in the interests of all concerned—including the cautioners—that Marshall should intervene as he did are stated in the opinion of Lord Low, *infra*.

On 26th July 1906 the Sheriff-substitute (Baillie) pronounced this interlocutor:—"Finds in fact that M'Donald & Son and James M'Donald, the sole partner, on 13th October 1902, entered into a contract with the Selkirk Town-Council for the construction of the Selkirk Water-works, and that pursuer and defender became bound, jointly and severally, as cautioners for due execution of the contract; that in May 1904, M'Donald was not implementing said contract expeditiously, and that on 23d May the Town-Council resolved to inform him and his cautioners that if the work was not carried on

Nov. 29, 1907. **Marshall & Co. v. Pennycook.** satisfactorily after an expiry of eight days the contract would be taken off M'Donald's hands and the cautioners held liable for any loss sustained in the completion of the work by the Town-Council; that on 24th May the Town-clerk by letter informed the cautioners of said resolution, and at a subsequent interview with pursuer further explained to him the effect of the Town-Council's resolution; that satisfactory progress was with pursuer's assistance made until 13th July, when M'Donald was taken seriously ill and incapacitated from continuing the contract; that pursuer thereupon asked defender to assist him, and on his refusal, alone took up and completed the contract as cautioner, and has incurred loss thereby: That the half of said loss is, for the reasons stated in the note, computed at £92, 15s. 8d.: Finds in law that pursuer, having under said circumstances undertaken the work as cautioner on default of the principal obligant, is entitled to be repaid the half of said loss: Therefore grants decree against defender for £92, 15s. 8d.," &c.

The defender appealed to the Sheriff (Chisholm), who, on 14th December 1906, pronounced this interlocutor:—"Refuses the appeal; adheres to the interlocutor . . . complained of, with these variations—(1) That in the last finding in fact, the figures '£93, 14s. 8½d.' are substituted for the figures '£92, 15s. 8d.'; (2) that in the decree granted, the said sum of £93, 14s. 8½d. is substituted for £92, 15s. 8d.; and (3) that before said finding in fact this additional finding in fact is inserted, viz.:—"That the loss to the cautioners would have been greater if the pursuer had not, immediately on M'Donald's incapacity emerging in July 1904, taken up the work and completed it"; and decerns."

The defender appealed. The case was heard before the Second Division on 13th and 14th November 1907.

Argued for the defender and appellant;—(1) The pursuer did not intervene as cautioner, but as *negotiorum gestor* for M'Donald. (2) There was never any default in the sense of the contract. The obligation of a cautioner *ad factum præstandum* was not himself to perform the obligation specifically but to pay damages if there was default on the part of the principal contractor. Such a cautioner, with consent of his co-cautioners, on default occurring, and demand being made on the cautioners, might come forward and perform the obligation specifically, and if by doing so he minimised the loss his co-cautioners would be liable to him in relief. But he could not be compelled to do anything except to pay damages. Here the Town-Council never declared the contractor in default or ordered him to stop work, and never called upon the cautioners either to pay or perform. The pursuer intervened ultroneously without any demand having been made upon him. The warning of 24th May was not a demand, and in any view its effect was spent, for the work after that date and after the expiry of eight days thereafter, was carried on satisfactorily till 13th July. The Town-Council ought to have made a fresh demand on the cautioners on 16th July. The only explanation of their not having done this was that there was no default. What the pursuer did was to prevent the cautionary obligation arising. He was not entitled to call upon the defender to share the loss which he had incurred by doing so. (3) But if there was default in the carrying out of the contract, and the pursuer intervened legitimately as a cautioner, then the defender was released from his obligation by the payment away of the £400 with consent of the pursuer. It could

not be said, at the same time, that there was default, and that the work was being satisfactorily carried on. If the Town-Council were entitled to call upon the cautioners, then they were bound to retain the £400, and if they failed to do so, a cautioner who did not consent to the payment was freed, either in a question with them, or with a co-cautioner who consented to the payment.¹ The liability of the cautioner, and the right to retain, arose at the same moment. Omission to exercise the right of retention was sufficient.² The creditor had a duty to see that the position of the cautioner was not prejudiced by the loss of a security. This was not a case of giving time, but of giving up a security. The principle was that the cautioner was entitled to the *beneficium cedendarum actionum*. The assignments in favour of the contractor's creditors made no difference. The assignees were in no better position than their assignor.³ The right to retain was preferable to the assignments. The benefit to the work, and so indirectly to the cautioners, from the payment being made, was irrelevant in a question with a cautioner who did not consent to the payment.⁴ If the Town-Council had retained the £400 that would have been more than sufficient to defray the pursuer's loss, which therefore arose not from the performance of the contract, but from his consent to the payment. After default had occurred the right to retain the whole of the amount certified to be due was the same as the right to retain the 20 per cent. (4) In any view, the pursuer was not entitled to charge a fee for superintendence against his co-cautioner. If he had employed and paid someone else he might have been entitled to make the charge, but if he chose to do it himself he could not. He was in this respect in the same position as a trustee.

Argued for the pursuer and respondent;—When the principal obligant in fact failed to perform his obligation, the accessory obligation of the cautioner became prestable, and a cautioner became entitled and bound immediately to intervene and perform the obligation in the way least burdensome to himself, and on such performance to obtain relief from his co-cautioners for their shares. This was clear in the case of money obligations, but there was no difference in the case of obligations *ad factum præstandum*. Notice to the cautioners was not necessary. The pursuer here was bound to intervene, but it was enough for the purposes of his contention that he was entitled to do so. If notice were necessary, then there had been notice here. The intimation of 24th May was sufficient notice. The right of the cautioner to intervene was specially clear in this case. M'Donald was incapacitated in mind, body, and estate. Instant action was essential to avoid the risk of great loss from floods and the disorganisation of the whole work by dispersion of workmen and otherwise. The pursuer, in any view, in this case was entitled to intervene to protect himself by minimising the loss. It was proved here that the course

¹ Bell's Prin. secs. 254, 255, and 264; Bell's Com. (ed. M'L.) vol. i. pp. 366, 376, and 377; Sligo v. Menzies, 1840, 2 D. 1478, *per* Lord Mackenzie, at pp. 1489-90; Hume v. Youngson, 1830, 8 S. 295; Calvert v. London Dock Co., 1838, 2 Keen, 638, 44 R. R. 300; Mayor of Kingston-upon-Hull v. Harding, L. R., [1892] 2 Q. B. 494, *per* Bowen, L. J., at p. 507.

² Ersk. Inst. iii. 5, 11.

³ Hudson on Building Contracts, (3d ed.) vol. i. pp. 646 and 661.

⁴ Calvert v. London Dock Co., 1838, 2 Keen, 638, *per* Lord Langdale, M. R., at p. 644.

Nov. 29, 1907. *Marshall & Co. v. Pennycook.* adopted by the pursuer was the most economical, and in fact minimised the loss of the cautioners. It was also proved that in fact there was default on the part of the principal contractor on 13th July. It was not essential to the occurrence of a breach under this contract that the contract should be formally taken out of the contractor's hands under article 15 of the conditions. The rights conferred by that article were purely optional, and formed no part of the bargain with the cautioners. The law regarding a cautioner's right of relief was conveniently reviewed and summarised by Wright, J., in the case of *Wolmershausen v. Gullick*.¹ (2) The power to withhold payment of a sum certified as payable was purely discretionary in its nature. The creditor was not bound to exercise it in the interest of the cautioners. No security fund was established as matter of contract with the cautioners by the clause founded on. This was not a case of a heritable or other security. It was more analogous to the case of a landlord's hypothec.² If the money had been held back the work would have been stopped. The creditor was not bound to exercise this discretionary power to his own detriment. The 20 per cent to be retained under the contract was in a different position. The right to retain it was an absolute right, to the benefit of which the cautioners were entitled. That was the kind of right of retention which was under consideration in the case of *Mayor of Kingston-upon-Hull*.³ The ground upon which a cautioner was freed from his obligation by the creditor giving time or releasing a security was the same, namely, that the creditor had innovated upon the contract with the cautioner. Unless what the creditor did amounted to such innovation the cautioner was not freed. Mere omission to do anything at all was not sufficient.⁴ But further, the circumstances in which the creditor was entitled to exercise this right to withhold payment never arose. The works were never in the position of not being carried on regularly and to the satisfaction of the creditor. Further, the creditor before the breach had recognised the rights of the contractor's creditors, and could not have thereafter withheld payment from them. (3) The pursuer was entitled to charge a reasonable fee for supervision. There was no analogy between his position and that of a trustee.

At advising,—

The opinion of the Court (LORD JUSTICE-CLERK, LORD STORMONT-DARLING, LORD LOW, and LORD ARDWALL) was read by

LORD LOW.—A cautionary obligation for the due performance of a contract for the construction of works, generally, I imagine, results in a payment of damages for any loss sustained by the employer in the event of the contract not being duly performed. If, however, upon the failure of the contractor, the cautioner is able and willing to step in and complete the work, I see no reason in principle why he should not implement his cautionary obligation in that way, especially if, as in the present case, the creditor in the obligation consents to his doing so.

¹ L. R., [1893] 2 Ch. 514, at p. 518.

² See *Hume v. Youngson*, 8 S. 295, per Lord Pitmilley, at p. 298.

³ L. R., [1892] 2 Q. B. 494.

⁴ *Hume v. Youngson*, 8 S. 295, per Lord Pitmilley, at p. 298; *Fleming v. Wilson*, 1823, 2 S. 336.

Upon the evidence I think that there is no doubt that the pursuer inter-^{Nov. 29, 1907.}
vened and carried on M'Donald's contract because he was cautioner, and as ^{Marshall & Co.}
cautioner, and it seems to me also to be proved that that was the best course ^{v. Pennycook.}
to follow in the interests of the cautioners, because the pursuer's witnesses, ^{Lord Low.}
whose evidence is uncontradicted, say that if when M'Donald became
incapacitated the pursuer had not carried on the contract, and the Town-
Council of Selkirk had been forced to do the work themselves, the loss
would have been much greater.

If that be so, then the action of the pursuer was for the benefit of the
defender, because if the Town-Council had been compelled to take up the
work, the defender would undoubtedly have been liable for any loss which
was incurred.

The defender denies that he was aware that the pursuer had taken up the
contract as cautioner, and although he admits that the pursuer asked him
to go to Selkirk and assist with the work, he says that he understood that
he was asked to do so merely in the capacity of a friend and not as
co-cautioner. I regret to say that I cannot regard the defender's evidence
as being at all trustworthy. I am satisfied that he knew perfectly well that
the pursuer was taking up the work as cautioner, and it is also proved that
he was pressed both by the pursuer and Mr Purdom to co-operate, but that
he refused to do anything, or to express any opinion upon the course which
ought to be adopted. My impression is that he hoped that by refusing to
say or do anything, while the pursuer completed the work, he might ulti-
mately escape liability altogether.

If there were nothing else in the case I should have no hesitation in
agreeing with the learned Sheriffs, but there was one point argued before
us which does not seem to have been stated in the Court below, and which
requires careful consideration.

In the contract for the execution of the works it was provided that monthly
payments should be made to the contractors "only on certificates of the said
engineer, at the rate of 80 per cent of the estimated value of the work exe-
cuted by the second party, the remainder being paid, one-half on the date of
completion of the work, and the balance on the expiration of the period
of maintenance before mentioned, the first party, however" (and these
are the important words), "always having power to withhold payment on
any certificate should the works not be carried on regularly or to their
satisfaction."

Now, when on the 13th of July 1904 M'Donald was seized with an illness
which incapacitated him bodily and mentally, there was a sum of £400 due
to him, for payment of which the engineer had granted a certificate. Sub-
sequently the Town-Council, with the consent of the pursuer, paid that sum
partly to a Glasgow firm who had supplied to M'Donald the pipes required
for the works, and partly to a bank which had advanced the money required
for wages, M'Donald having assigned his right to these parties. The defen-
der argued that the Town-Council ought to have exercised the right given to
them by the clause which I have quoted, and withheld payment of the £400,
which would have been more than sufficient to cover the loss sustained by
the pursuer in completing the works; and that as the Town-Council chose to
pay away the fund, and thereby deprive the defender, as cautioner, of a

Nov. 29, 1907. security to the benefit of which he was entitled, he was freed from his obligation, and neither the Town-Council nor the pursuer, who consented to the Marshall & Co. v. Pennycook. payment, had any claim against him.

Lord Low.

In considering that argument I think that it is necessary to read, along with the clause in the contract upon which the defender founds, certain provisions in the general conditions and stipulations which were appended to, and formed part of, the contract.

By the 15th of these conditions it was provided that if the contractor should from bankruptcy, insolvency, or any other cause, be prevented from proceeding with the work with the requisite expedition, or fail to perform the same in a proper manner, the Town-Council might, after written notice to the contractor, take the whole works out of his hands, and complete them themselves, in which case the contract should, at the option of the Council, become void as to the contractor, and "the amount already paid to the contractor shall be deemed to be the full value of the work executed by him up to that time, and no further claim shall be made by the contractor for work which may have been done by him up to that time."

Now, if the pursuer had not intervened it seems to be certain that the result of M'Donald's illness would have been that the work would have come to a standstill, because M'Donald had no means and no one to carry on the contract for him. The position of matters contemplated by the 15th condition would therefore have arisen, and the Council would have been compelled to take the work into their own hands, or to employ another contractor. In that event I do not doubt that they would have been entitled to retain, and probably, in a question with the cautioners, would have been bound to retain, the £400 in question. But the occasion never arose for the Council to consider whether or not they would put an end to the contract and do the work themselves, because the pursuer stepped in and carried on the contract in M'Donald's name, and there was never any failure to carry on the work with the requisite expedition, or to perform the same in a proper manner. And it seems to me that the pursuer gives very good reasons for taking up the contract at once, and not allowing any interruption or delay to take place. He had for some time been visiting the work every day and keeping M'Donald up to the mark, and he knew exactly what the position of matters was. It appears that the pipes were being laid near the River Ettrick, and below the level of the river, and during the very week in which M'Donald became ill, the pipe trench had been flooded, and it was very important that the damage thereby caused should be put right at once, as delay would apparently have resulted in increased damage and greater expense. Then there was a squad of men employed who knew the work, and the pursuer desired to retain their services, because if he had not done so there might have been considerable delay in getting another set of workmen together, and in the meantime the works would have been stopped and the Council might have exercised their powers under the 15th condition, which according to the evidence would have resulted in greater loss to the cautioners. It therefore seems to me that the pursuer by his prompt action did what was best in the interests of all concerned—of the cautioners as well as of the Town-Council.

The circumstances, therefore, never having arisen in which the Town-

Council were entitled to put in force the powers of the 15th condition, were Nov. 29, 1907.
they entitled (and therefore bound in the interest of the cautioners) to Marshall & Co.
withhold payment of the £400 in terms of the clause in the contract? v. Pennycook.

Now, under that clause the Council are authorised to withhold payment Lord Low.
only "should the works not be carried on regularly and to their satisfaction." As matter of fact that condition of matters did not exist, because, owing to the intervention of the pursuer both before and after M'Donald's illness, the works had been and were being carried on regularly and to the entire satisfaction of the Council. No doubt the Council knew that what had induced the pursuer to carry on the contract was the fact that he was cautioner, but I do not think that that is of any importance as regards the present question. What is of importance is that M'Donald's contract was carried on without interruption and in a satisfactory manner. That being so, the Council had no right to withhold payment of a sum which had been certified as due and payable to M'Donald. In like manner the pursuer could not have required the Council to withhold payment of the money, because, by virtue of the right to intervene which his position as cautioner gave him, he had simply stepped into M'Donald's place, and was carrying on the contract for and in the name of the latter.

It therefore seems to me that the pursuer having adopted the course which he did, there could be no question of withholding payment of the £400. Accordingly, the defender cannot found upon payment of that sum as freeing him from his obligation. If he is freed from his obligation it must be because the pursuer was not justified in adopting the course which he did, and that his having done so has been to the defender's prejudice. I have already said that in my opinion, so far from that being the case, the course adopted by the pursuer was the best which he could have followed in the interests of the cautioners, and accordingly the defender is, in my judgment, bound to relieve the pursuer of one-half of the loss which has been incurred.

Some English authorities were quoted for the purpose of shewing that payment, by an employer in a contract such as the present to the contractor, of money which the employer was entitled to retain as security for the due completion and maintenance of the work had the effect of freeing the contractor's surety or cautioner, at all events to the amount so paid. These authorities would have been directly applicable to the present case had the Town-Council of Selkirk paid away the 20 per cent which under the contract they were entitled to retain, one-half till the completion of the work and the balance till the expiration of the period of maintenance, but, in my judgment, they have no application to the £400 in question, which was not a security fund under the contract, but a sum which, although it had been certified as due and payable to the contractor, the Council would have been entitled to retain if a condition of matters had arisen which in fact never did arise.

The only other question is in regard to one item in the account lodged by the pursuer, bringing out the loss sustained in completing the contract. That item is a charge of £75, being fee for superintending the work for nine months. It is proved that if a fee for superintendence is allowable at all the amount charged is moderate. I am of opinion that the charge

Nov. 29, 1907. must be allowed. It was necessary that someone should superintend the work, and if the pursuer had not done so himself he would have required Marshall & Co. v. Pennycook. to employ and pay someone else. I think, however, that the pursuer was quite right to supervise the work himself, because the attitude taken up by the defender had placed him in a very delicate position, and he was bound to see that the work was conducted as economically and efficiently as possible. To superintend the work, however, took up time which the pursuer would otherwise have devoted to his own business, and caused him additional expense in carrying on that business to an amount apparently, at all events, equal to the fee charged.

Upon the whole matter I am of opinion that the appeal should be dismissed and the interlocutor of the Sheriff affirmed.

THE COURT pronounced this interlocutor:—"The Lords having heard counsel for the parties on the defender's appeal against the interlocutors of the Sheriff-substitute and the Sheriff of Roxburgh dated respectively 26th July and 14th December 1906, find in fact and in law in terms of the findings in fact and in law in the said interlocutor of 26th July 1906, as varied by the said interlocutor of 14th December 1906: Of new ordain the defender to make payment to the pursuer of the sum of £93, 14s. 8½d., with interest at 5 per cent from the date of the Sheriff-substitute's decree.

P. MORISON & SON, S.S.C.—FYFE, IRELAND, & Co., S.S.C.—Agents.

No. 41. MRS ELIZABETH MARGARET M'DOUGALL OR FENTON LIVINGSTONE,
Pursuer (Reclaimer).—*Sol.-Gen. Ure—Macphail.*

Mar. 9, 1907. JOHN NIGEL EDENSOR FENTON LIVINGSTONE, Defender (Respondent).—
Hunter, K.C.—Sandeman.

Fenton
Livingstone v.
Fenton
Livingstone.

Husband and Wife—Donation inter virum et uxorem—Revocation—Sums of money consumed.—In an action by a wife against her husband for the recovery of certain sums of money, she alleged that these sums had been lent or paid to, or applied for behoof of, her husband by her, as donations *inter virum et uxorem*, and that these donations had been revoked by her.

The Court (*aff.* the judgment of Lord Mackenzie, Ordinary) allowed a proof *prout de jure quoad* those sums which *ex facie* did not bear to have been applied and consumed, but *quoad* those sums which *ex facie* had been applied and consumed, repelled the pursuer's claim as irrelevant.

1st Division. Lord Mac-
kenzie. MRS ELIZABETH MARGARET M'DOUGALL OR FENTON LIVINGSTONE brought an action against her husband, John Nigel Edensor Fenton Livingstone of Westquarter, Stirlingshire, for payment of £2187, 2s. 1d.

The pursuer averred that the sum sued for was made up of various sums which she had at various dates during the marriage lent or paid to, or applied for behoof of the defender; that these various sums were either loans to him or donations *inter virum et uxorem*; that she had revoked all donations during the subsistence of the marriage; and that the sums in question, whether loans or donations, now fell to be repaid.

The pursuer also averred that the money so paid and applied was part of the capital of a trust-estate in which she had a vested right of fee, and which she had, with the consent of the liferentrix, uplifted from time to time under pressure by the defender.

The defender denied the pursuer's statements, and averred that the alleged payments by the pursuer, so far as not for individual debts incurred by the pursuer, were payments for family expenses, and otherwise for the joint welfare of the pursuer and defender and their family.

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The pursuer pleaded;—The various sums of money detailed in the statement referred to in the condescendence being of the nature either of donations *inter virum et uxorem*, which have been revoked, or of loans by the pursuer to the defender, decree ought to be pronounced in terms of the conclusions of the summons.

The defender pleaded, *inter alia*;—(1) The pursuer's statements are irrelevant.

On 24th October 1906 the Lord Ordinary (Mackenzie) ordained the pursuer to lodge a minute specifying which sums were loans and which donations.

Thereupon the pursuer lodged in process (first) a statement, No. 75 of process, detailing the sums lent by her to the defender, and (second) a statement, No. 76 of process, of the donations which she had revoked.*

On 26th December 1906 the Lord Ordinary pronounced this interlocutor:—“(1) Allows the pursuer a proof by writ or oath, in support of her statement No. 75 of process; (2) allows the pursuer a proof *prout de jure* in support of her statement No. 76 of process *quoad* the sums which do not bear, on the face of said statement, to have been

* The statement of donations, No. 76 of process, was as follows:—

Date.	Particulars of Payment.	Amount.
1893.		
Aug. 4.	(1) George S. Bellfield, jeweller, Edinburgh, being payment for brooch presented by defender to pursuer on her twenty-first birthday, the latter being compelled to meet the account owing to the defender's lack of funds,	£42 0 0
	(2) George M'Intosh, W.S., defender's agent, being payment for two accounts due by pursuer, for settlement of which defender had previously been supplied by her with funds,	24 13 8
„ 11.	(3) J. N. E. Fenton Livingstone, the defender,	35 0 0
„ 28.	(4) J. N. E. Fenton Livingstone, the defender,	15 0 0
Sept. 1.	(5) Mrs A. Sinclair, nurse, being payment of wages due by defender,	3 6 8
„ 9.	(6) J. N. E. Fenton Livingstone, the defender, for his expenses in London,	15 0 0
Dec. 15.	(7) Barbara Humphrey, servant, being payment of wages due by defender,	1 17 6
1898.		
Mar. 1.	(8) Mrs M'Dougall, 30 Stafford Street, Edinburgh, being payment for board of pursuer and family,	40 0 0
„ 23.	(9) Helen Batcham, servant, being payment of wages due by defender,	3 0 0
Apr. 1.	(10) Professional and Civil Service Supply Association, Limited, Edinburgh, for household supplies,	2 10 0

Items 12, 19, 20, 23, 26, 28, and 30 were in the same terms as 3 and 4, but for various sums, the highest being £400.

The other items were similar to 5, 7, 8, 9, and 10 above quoted.

Mar. 9, 1907. applied and consumed, viz.:—Items Nos. 3, 4, 12, 19, 20, 23, 26, 28, and 30, and to the defender a conjunct probation: Finds as regards the sums which *ex facie* of the statement have been applied and consumed, viz.:—Items Nos. 1, 2, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 21, 22, 24, 25, 27, 29, 31, 32, 33, and 34, that the same are not relevant to be remitted to probation: Repels the pursuer's claim thereto accordingly, and decerns. . . .” *

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The pursuer reclaimed.

Argued for the pursuer;—The pursuer was entitled to proof *prout de jure* of all the items in No. 76 of process. It was averred by the pursuer that donations by her to her husband were made out of capital and not out of income, and the plea of *bona fide* consumption did not apply to such donations. *Hutchison v. Hutchison's Trustees*¹ did not apply as there (as was shewn by the interlocutor in *Allan v. Hutchison's Trustees*²) the payments were made out of income. This was true also of the payments referred to by Lord Watson in *Edward v. Cheyne*.³ It was a question of intention whether the payment of money was a donation, and if it were shewn that the payments in question were intended to be donations to be put to use as capital, the pursuer was entitled to recover the sums sued for whether the money was extant or not.⁴ The payments were not of the nature of a remuneratory grant, as was the case in *Cuthill v. Burns*.⁵

Argued for the defender and respondent;—There was no authority for the proposition that where a wife gives money to her husband to spend on a purpose agreed on between them she can recover that money as a debt. Contributions made by a wife for the joint welfare of the spouses could not be recovered.⁶ Unless money were given to be applied to a capital use, as an investment, and was in that way earmarked and extant, it could not be recovered.⁷ In the case of all the items, as to which the Lord Ordinary had held that the pursuer's claim was irrele-

* “OPINION.—The pursuer has now lodged two statements, No. 75 specifying the sums said to have been lent, No. 76 specifying the sums said to have been given, by the pursuer to the defender.

“As regards No. 75 there is no difficulty. The pursuer is entitled to a proof by writ or oath. As regards No. 76, her case is that these are donations which she is now entitled to revoke. In my opinion a distinction must be drawn between the sums which on the face of the statement have been applied and consumed, and those which *ex facie* of the statement may or may not have been. As regards the former, I think the cases cited establish that the pursuer has no claim. *Hedderwick v. Morison*, 4 F. 163; *Hutchison v. Hutchison's Trustees*, 4 D. 1399, 5 D. 469, at p. 472; *Edward v. Cheyne*, 15 R. (H. L.) 37, affirming 13 R. 1209.

“As regards the latter, I am of opinion that the pursuer is entitled to a proof *prout de jure*. I may say, however, that if all the pursuer is able to prove is that the sums specified were given to the defender without earmarking them in any way as now extant, this would not avail her. The intimation by the pursuer that she revokes a donation made to the defender does not create the relationship of debtor and creditor between them.”

¹ June 10, 1842, 4 D. 1399.

² Feb. 1, 1843, 5 D. 469, at p. 472.

³ March 12, 1880, 15 R. (H. L.) 37.

⁴ *Laidlaw v. Laidlaw's Trustee*, Dec. 16, 1882, 10 R. 374.

⁵ March 20, 1862, 24 D. 849.

⁶ *Allan v. Hutchison*, Feb. 1, 1843, 5 D. 469, at p. 472.

⁷ *Hedderwick v. Morison*, Nov. 22, 1901, 4 F. 163.

vant, the pursuer had obviously from their nature acquiesced in the money being spent. Mar. 9, 1907.

At advising,—

Fenton
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Livingstone.

LORD PRESIDENT.—The only question here is whether the allowance of proof as to certain items, and the disallowance of proof as to certain other items, made by the Lord Ordinary is right.

I am of opinion that it is, and I think that the opposite view was really based on an error as to what donation between husband and wife properly is. A donation between husband and wife may, of course, be revoked, but the thing to be revoked must, I think, be a thing which is in the proper sense of the word extant. Of course if we take the cases in the books, the commonest cases are of revocation of deeds, and a deed sought to be revoked is always extant. So, too, in the case of corporeal moveables; if the subject of the donation be still extant, the donation can be recalled and the corporeal moveable brought back to the person who gave it. With regard, however, to sums of money, I do not think it possible *ab ante* to lay down a rule, because a sum of money may be in an extant state in which it can be revoked, or it may not. But I think the great confusion made in the argument addressed to us on behalf of a universal proof lies in this, that it is not everything which in a popular sense may be said to be a donation that truly is so. That is to say, that if a husband or wife, as the case may be, allows part of their funds to be devoted to what are, after all, mutual purposes, then, though one spouse may have more enjoyment out of the money than the other, that would not be donation between husband and wife. Thus, for example, if a husband were to give his wife money to buy a ticket and go on holiday to the seaside, or to take lodgings at the seaside, in one sense no doubt he has given her the money, but he has not made a donation in the sense of the law. It is simply a husband saying, "I will allow my money to be spent in a certain way for household purposes, though you are to get more enjoyment out of it." On the whole matter I am of opinion that the Lord Ordinary, looking at the particular items which I have gone carefully through, is perfectly right, and that the allowance of proof must be as he has fixed it. Of course I say nothing at all at present as to what will be the fate of these particular sums of money, because that will depend on the circumstances of each case, of which I know nothing.

LORD KINNEAR.—I agree with your Lordship, for the reasons you have stated.

LORD PEARSON.—I also agree.

The LORD PRESIDENT intimated that Lord M'Laren, who was absent at the advising, concurred in the judgment.

THE COURT adhered.

J. K. & W. P. LINDSAY, W.S.—WADDELL & M'INTOSH, W.S.—Agents.

No. 42.

ARCHIBALD L. NIVEN, Appellant.—*Scott Brown*.

JOHN STEWART, Respondent.

Nov. 29, 1907.

Niven v.
Stewart.

Election Law—Burgh Occupation Franchise—Tenant and Occupant—Joint Tenants—Valuation-Roll—Occupancy—Representation of the People (Scotland) Act, 1832 (2 and 3 Will. IV. cap. 65), secs. 11 and 12.—The Representation of the People (Scotland) Act, 1832, enacts:—Sec. 11. "Every person . . . shall be entitled to be registered . . . and to vote at elections for" any burgh "who, when the Sheriff proceeds to consider his claim for registration, shall have been, for a period of not less than twelve calendar months next previous to the last day of July . . . in the occupancy, either as proprietor, tenant, or liferenter, of any house," within the limits of the burgh of the yearly value of £10. Sec. 12. "Where such premises shall be of the yearly value of £20 or upwards, and shall be jointly occupied by more than one person, each of such joint occupiers shall be entitled to be registered and to vote, provided his share and interest in the same shall be of the yearly value of £10 or upwards."

A and B and three other persons were, at a rent of £45, joint tenants under a lease of premises in a burgh which were used as billiard and reading rooms by an organisation (consisting of about 100 persons) of which they were members. During the currency of the year ending 31st July 1907 B ceased to be a member of the organisation and his name was deleted from the Valuation-roll.

A having been put on the roll of burgh voters as joint tenant and joint occupant of the premises, on the ground that the rent of the premises was sufficient to afford a £10 qualification to him and to each of the other three remaining occupants, the Court in an appeal *held* that A's name fell to be deleted from the roll, on the ground that as B still remained a joint tenant under the lease A's interest was under £10.

Question, per Lord Johnston, whether the four persons occupied the premises as joint tenants or merely as members of the organisation, sharing the occupancy with the other hundred members.

Registration
Appeal Court.
LdStormonth-
Darling.
Lord Pearson.
Ld. Johnston.

AT a Registration Court for the burgh of Glasgow, held on 2d October 1907, Archibald L. Niven, a voter on the roll, objected to the names of John Stewart, brush manufacturer, residing at Park Road, Giffnock, and three other persons being on the roll in respect of premises at 207 Rutherglen Road, Glasgow.

The Sheriff-substitute (Balfour) repelled the objections.

The objector obtained a case for appeal with respect to Stewart's right to be on the roll, which was taken to rule the right of the other three persons.

The case set forth that the objections as lodged in Court were to the following effect:—

"The parties objected to have not been the occupants of the premises at 207 Rutherglen Road, Glasgow, for the statutory period, and they are not the occupants of the premises.

"There are five parties responsible for the rent of these premises, and the rent is insufficient to give a £10 qualification to each."

The case further set forth that the following facts were disclosed at the hearing:—

"1. That the name of the said John Stewart appeared in the list of voters for the Blackfriars and Hutchesontown division of the burgh of Glasgow for the year 1907-8 as joint tenant and joint occupant of premises at 207 Rutherglen Road.

"2. That in said list of voters the names of Peter G. Stewart, brush manufacturer, residing at 27 Queen Mary Avenue, Glasgow; William

D. Tait, compositor, 17 Castle Mansions, Cathcart; and John Watt, Nov. 29, 1907.
compositor, residing at 110 Thistle Street, Glasgow, also appeared as joint tenants and joint occupants of said premises.

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"3. That under the lease (which was produced in Court) said premises are let to the said John Stewart, Peter G. Stewart, William G. Tait and John Watt, and Thomas Anderson, Glasgow, at an annual rent of £45.

"4. That under said lease the said premises are let to be occupied for the purposes of an organisation termed the Independent Labour Party.

"5. That, under the provisions of the Lands Valuation Acts, the factor for said premises returned to the Assessor for the burgh of Glasgow the names of the said John Stewart, Peter G. Stewart, William D. Tait, John Watt, and Thomas Anderson, as tenants and occupants of said premises for the year 1907-8, and that said names were entered in the Valuation-roll by said Assessor.

"6. That the name of the said Thomas Anderson was deleted on appeal from the Valuation-roll by the Assessor, on the ground that he had ceased to be a member of the said Independent Labour Party, and proof was led before me which established that Thomas Anderson had no connection with the Independent Labour Party as occupiers of the premises in question.

"7. That the rental of said premises entered in the Valuation-roll is £45 per annum.

"8. That the said premises are occupied as reading and billiard-rooms of the said Independent Labour Party, and are the headquarters of said organisation in the locality, and that there are about 100 members of the said organisation.

"9. That the said premises have been occupied in this way for the qualifying period, and that the names of the said John Stewart, Peter G. Stewart, and John Watt, were enrolled as voters for the burgh of Glasgow in respect of said premises for the year 1906-7."

The questions of law were:—"(1) Was the said John Stewart properly entered in the list of voters for the Blackfriars and Hutchesontown division of the burgh of Glasgow for the year 1907-8 as joint tenant and joint occupant of premises at 207 Rutherglen Road, Glasgow? (2) Was the rental qualification of the said John Stewart sufficient to entitle his name to be entered in said list in respect of said premises?"

The undernoted authorities were cited at the hearing by the appellant.¹

There was no appearance for the respondent.

At advising,—

LORD STORMONTH-DARLING.—This is an appeal from a decision of the Sheriff-substitute of Lanarkshire pronounced in a Registration Court for the burgh of Glasgow, repelling certain objections to the entry of the name of John Stewart in the list of voters for the Blackfriars and Hutchesontown Division of the burgh as joint tenant and joint occupant of premises at 207 Rutherglen Road, Glasgow. It appears from the facts stated in the case that there is a written lease, which was produced in Court; that under it the premises are let to John Stewart and four other persons at an annual

¹ Russell, Jan. 24, 1863, 1 Macph. 306; Blair v. Torrance, Dec. 19, 1868, 7 Macph. 319; Blackwood v. Moffat, Oct. 24, 1870, 9 Macph. 7; Wainwright v. Aitken, Nov. 27, 1893, 21 R. 162.

Nov. 29, 1907. rent of £45, and that they are so let to be occupied as reading and billiard-rooms for the purposes of an organisation termed the Independent Labour Party, which contains about one hundred members. It is also stated in the case that the name of one of these five persons (Thomas Anderson) was deleted on appeal from the Valuation-roll by the Assessor on the ground that he had ceased to be a member of the said Independent Labour Party, and the Sheriff-substitute adds that a proof was led before him which established that Thomas Anderson had no connection with the Independent Labour Party as occupiers of the premises in question. The effect of this deletion of Anderson's name from the Valuation-roll (I assume on his own appeal, for I do not see that anybody else had any right or interest to bring it) and the establishment of the fact of his want of connection with the Labour Party may have thrown some doubt on his right to occupy the premises at the date when the Sheriff considered the case, but of course it could not affect the question of his liability for the rent during the endurance of the lease, both past and future.

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Darling.

The Sheriff-substitute notes that the qualification of three persons, being three of the five persons named in the lease (other than the respondent and Thomas Anderson), depend on the same questions of law, and the questions are—“(1) Was the said John Stewart properly entered in the list of voters for the Blackfriars and Hutchesontown division of the burgh of Glasgow for the year 1907-8 as joint tenant and joint occupant of premises at 207 Rutherglen Road, Glasgow? (2) Was the rental qualification of the said John Stewart sufficient to entitle his name to be entered in said list in respect of said premises?” I am of opinion that both questions must be answered in the negative.

The statutory right of a person to be entered in the list of voters for a burgh as joint tenant and joint occupant of premises in that burgh depends on the combined effect of section 5 of the Representation of the People Act, 1884, section 7 (7), and section 12 of the same Act, and sections 11 and 12 of the Act 2 and 3 Will. IV. c. 65. Section 5 of the Act of 1884 provides —“Every man occupying any land or tenement in a county or borough in the United Kingdom of a clear yearly value of not less than ten pounds shall be entitled to be registered as a voter, and when registered to vote at an election for such county or borough in respect of such occupation, subject to the like conditions respectively as a man is, at the passing of this Act, entitled to be registered as a voter and to vote at an election for such county in respect of the county occupation franchise, and at an election for such borough in respect of the borough occupation franchise.” Section 7 (7) defines the “borough occupation franchise” in Scotland as meaning the franchise enacted by the 11th section of the Act of 1832. That section is only partially repealed by the Act of 1884, section 12, and even this partial repeal is subject to the exceptions of enactments containing “conditions made applicable by this Act to any franchise enacted by this Act.” Now, one of the conditions of section 11 of the Act of 1832 which are thus saved is that the person whose claim is under consideration by the Sheriff must have been for a period of not less than twelve calendar months previous to the last day of July in any year after 1832 in the occupancy of any qualifying subjects in such burgh. So far nothing is said about joint occupants.

But section 12 of the Act of 1832, after enacting certain provisions about Nov. 29, 1907. successive occupancy of premises of the requisite value and so on, provides ^{Niven v.} that "where such premises shall be of the yearly value of twenty pounds or ^{Stewart.} upwards, and shall be jointly occupied by more than one person, each of ^{LdStormonth-} such joint occupiers shall be entitled to be registered and to vote, provided ^{Darling.} his share and interest in the same shall be of the yearly value of ten pounds or upwards."

Now, keeping in view that during part at least of the qualifying period of twelve calendar months previous to the last day of July five persons were responsible for the rent of £45, can it be said that the share and interest of any one of them was of the yearly value of ten pounds or upwards? Clearly not, and on this short ground I move your Lordships to sustain the appeal and delete from the roll the names of the respondent and the other persons whose rights are dependent on the same questions of law.

LORD PEARSON.—In this appeal we are under the disadvantage of having no appearance for the respondent. After careful consideration I have not been able to find any sufficient answer to the appellant's argument on the case as stated by the learned Sheriff. It is agreed that the value of the premises is £45 a year. That value will afford a £10 qualification for four joint tenants and occupiers but not for five. Now, it is true that the result of the Sheriff's judgment is to place four joint tenants and occupiers on the roll and no more, and this is in conformity with the Valuation-roll as altered by the Assessor on appeal. But the Valuation-roll, while it is *prima facie* evidence of the statements which it contains, may be overruled by better evidence; and here the Sheriff expressly finds that under the lease (which was produced in Court) the premises were let to five gentlemen, including the claimant, at an annual rent of £45. Now, that is the best possible evidence that five persons were joint tenants of the subjects, and as the value will not support five votes it seems to follow of necessity that none are qualified. The learned Sheriff, in paragraph 6, explains the Assessor's deletion of one of the names upon a ground which has no necessary connection whatever with the continuance or cessation of his liability as tenant under the lease. And while the remainder of that paragraph may be read, though I doubt whether it really can be read, as meaning that there were only four occupiers during the qualifying period, there were at any rate five joint tenants during that period or during part of it, and that is enough to shew that none of them is entitled to be put upon the voters'-roll.

LORD JOHNSTON.—The first question which requires to be considered in this case is the effect of the entry in the Valuation-roll. The original entry in that roll was of five persons, including the respondent John Stewart, as tenants and occupants of the premises 207 Rutherglen Road, Glasgow. But on appeal the Valuation-roll was altered by the deletion of the name of one of the said five persons, Thomas Anderson, not because he had ceased to be tenant, but because he had ceased to be a member of the Independent Labour Party, for whose behoof the said five persons were tenants, apparently in trust, of the premises. I am at a loss to know what concern the Valuation Appeal Court had with this fact. Anderson's defection from the ranks of the party did not affect his tenancy, however

Nov. 29, 1907. much it may have affected his actual occupancy of the premises, and the Assessor was perfectly right in inserting his name as tenant in the Valuation-roll. The rental is fixed by the Valuation-roll at £45.

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Ld. Johnston.

The Valuation-roll is made conclusive as to the value of premises by the Representation of the People Act, 1884, sec. 11—*Harkness v. Scott*,¹ the authority of such cases as *Stevenson v. Millar*,² and *Dunbar v. Rule*,³ decided under prior statutes, being now superseded. But the Valuation-roll is not made conclusive on any other point, and is therefore no bar to our considering the real facts of this case so long as we accept the value of the premises as £45 as appearing in the Valuation-roll.

This, then, being a claim to the burgh occupation franchise, the evolution of that franchise has been as follows:—The Reform Act of 1832 conferred the franchise in respect of “occupancy” either on “proprietor, tenant, or liferenter” of premises in burghs of the value of £10.

The Representation of the People Act, 1868, introduced the household franchise irrespective of value, which is in a sense an occupation franchise but involves occupation, not merely as owner or tenant or liferenter, but as inhabitant, and is irrespective of the value of the premises. It is therefore designated not as an occupation, but as a household franchise. This Act further introduced a county occupation franchise depending on tenancy of a £14 value in counties, but it leaves the burgh occupation franchise of 1832 untouched.

The Representation of the People Act, 1884, assimilated the occupation franchise in counties and burghs, declaring by section 5 that “every man occupying any land or tenement in a county or burgh” of £10 value shall be entitled to the franchise in the county or burgh respectively, subject to the like conditions respectively as governed the county occupation franchise and the burgh occupation franchise at the passing of the Act. Although this section refers to nothing except “occupation,” the interpretation clause, section 7, subsection 7, refers back for the meaning of burgh occupation franchise to the Reform Act of 1832, section 11. This section I have already referred to, and pointed out that it requires as the basis of the occupancy either ownership, tenancy, or liferent. But then the interpretation section of the Representation of the People Act, 1884, section 7, subsection 8, adds that “any enactments amending or relating to the county occupation franchise or burgh occupation franchise other than the sections in this Act on that behalf mentioned shall be deemed to be referred to in the definition of the county occupation franchise and the burgh occupation franchise in this Act mentioned”—(see also the same Act, section 12). That appears to me to let in the provisions of the Reform Act, 1832, section 12, which, with reference to the occupation franchise created by the previous sections of that Act, provides thus for a case of joint occupancy:—“Where such premises shall be of the yearly rent or value of £10 or upwards, and shall be jointly occupied by more than one person, each of such joint occupiers shall be entitled to be registered and to vote provided his share and interest in the same shall be of the yearly value of £10 or upwards.” There must therefore not only be joint occupancy, but that occupancy must be as owner,

¹ 1899, 2 F. 268.

² 1880, 8 R. 8.

³ 1883 11 R. 167.

tenant, or liferenter, and the share and interest in the tenancy must be of Nov. 29, 1907. £10 value. Mr Anderson having retired from the Independent Labour Party the four other tenants may have the sole occupancy, but their share and interest depends, not on the occupancy, but on the tenancy, and in calculating that share and interest they cannot discard Mr Anderson, their joint tenant. The share of each is therefore only a fifth of £45, or less than £10 in value. Stewart has therefore no sufficient tenancy qualification for the occupation franchise.

I desire at the same time to reserve my opinion as to whether Stewart, and the other three persons who are in the same position, are occupiers in the sense of the statutes. They may be joint tenants, but I doubt whether they occupy as joint tenants, and not merely by reason of membership of the Independent Labour Party's Club, sharing the occupancy with the 100 other members of whom we are told it is composed.

THE COURT pronounced this interlocutor:—"Answer the questions of law in the case in the negative: Sustain the appeal: Remit to the Sheriff to alter the register of voters for the burgh of Glasgow by deleting the names of John Stewart, designed in the case, and of Peter G. Stewart, William D. Tait, and John Watt, designed in the list annexed to the case, and decern: Find the appellant entitled to £3, 3s. of modified expenses, and decern."

S. F. SUTHERLAND, S.S.C., Agent.

WILLIAM CORY & SON, LIMITED (Owners of the s.s. "James Joicey"), No. 43.

Pursuers (Respondents).—*Hunter, K.C.—Spens.*

ANDREA KOPAJTIC (Master of the s.s. "Kostrena"), Defender
(Reclaimer).—*Murray—Carmont.*

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Et e contra.

Ship—Collision—Fog—Duty of stopping—Foreign Vessel—Regulations for Preventing Collisions at Sea, 1897, Art. 16—Merchant Shipping Act, 1897 (57 and 58 Vict. cap. 60), sec. 419, subsec. (4).—The Merchant Shipping Act, 1894, sec. 419, subsec. (4), enacts, that where in a case of collision it is proved that any of the collision regulations have been infringed, the ship infringing the regulation shall be deemed to be in fault unless the circumstances made departure from the regulation necessary.

The Regulations for Preventing Collisions at Sea, 1897, Art. 16, provide, *inter alia*:—"A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

About noon on 10th February 1907 a collision took place off the coast of Norfolk in a dense fog between the British steamer "James Joicey," proceeding south to London, and the Austrian steamer "Kostrena," proceeding north to Methil. In cross actions of damages the following facts were held to be proved:—The vessels were proceeding on nearly parallel courses. The "Kostrena" heard a fog-signal from the "James Joicey" but did not stop as required by Art. 16 of the Regulations. Believing that she had the "James Joicey" on her port bow, whereas in point of fact the "James Joicey" was on her starboard bow, the "Kostrena" on approaching the "James Joicey," ported her helm with the result that she went to starboard and collided with the "James Joicey." Austria had adopted the Regula-

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tions for the Prevention of Collisions at Sea, but had not adopted the collision sections of the Merchant Shipping Act; and the "Kostrena" therefore maintained that the statutory presumption of fault enacted by sec. 419, subsec. (4), of the Act did not apply to her.

Held (1) that whether sec. 419, subsec. (4), applied to the "Kostrena" or not, it was essentially bad seamanship for a steam vessel on hearing the fog-signal of another vessel not to stop in order to ascertain the position of the signalling vessel when she next sounded; and (2) that the collision was due to the fault of the "Kostrena," she not having stopped, and having in consequence failed to ascertain the position of the "James Joicey," with the result that the "Kostrena" executed the manœuvre which brought about the collision.

Ship—Collision—Fog—Vessel "not under command"—"Moderate speed"—Regulations for Preventing Collisions at Sea, 1897, Arts. 15 and 16.—The Regulations of 1897 for Preventing Collisions at Sea, *inter alia*, provide—Art. 15—"In fog . . . (e) . . . A vessel under way which is unable to get out of the way of an approaching vessel through being not under command, or unable to manœuvre as required by these rules, shall . . . at intervals of not more than two minutes, sound three blasts in succession, viz., one prolonged blast followed by two short blasts. . . ." Art. 16—"Every vessel shall, in a fog . . . go at a moderate speed, having careful regard to the existing circumstances and conditions."

The steamer "James Joicey" through a collision with the steamer "Syria," in a dense fog, had her stem cut away from a little above the water line upwards with the result that her forward compartment soon filled, but her engines and steering-gear were uninjured, and she was able to proceed and to manœuvre slowly, but she could not go at full speed. She hoisted the signals for a vessel "not under command," but she sounded the ordinary fog-signals and not those required by Art. 15 of the Regulations for a vessel not under command. Some hours afterwards, the fog still continuing, she came into collision with the steamer "Kostrena." In cross actions of damages the "Kostrena" pleaded that the "James Joicey" being a vessel not under command, was in fault in not sounding the signals required by Art. 15. It appeared that the "Kostrena" did not stop on hearing an ordinary fog-signal from the "James Joicey" in order to ascertain the position of the "James Joicey" when she sounded again, and that this failure to stop was the cause of the collision.

Held that as the "James Joicey" was not going at other than a "moderate" speed, in terms of Art. 16, and as when going at a moderate speed she was under command, she could not in the circumstances be described as a vessel not under command, and therefore that she was not in fault in not giving the signals required by Art. 15; and further, that in any view her failure to give these signals did not contribute to the collision, which was due to the "Kostrena" not having stopped on hearing the ordinary fog-signal from the "James Joicey."

The "Kostrena" was going at a speed through the water of about 3 knots an hour, but as the tide, which was with her, was running at about $2\frac{1}{2}$ knots an hour, her speed over the ground was about $5\frac{1}{2}$ knots an hour.

Held by Lord Salvesen, Ordinary, that her progress over the ground was to be taken as the measure of her speed, and that $5\frac{1}{2}$ knots was not a "moderate" rate within the meaning of Art. 16 of the Regulations.

2D DIVISION.
Lord Salvesen.

ABOUT mid-day on Sunday, 10th February 1907, during a dense fog, a collision took place between the s.s. "James Joicey" of London and the s.s. "Kostrena" of Fiume, Austria, at a point (outside the three-mile limit) some distance north of the Middle Cross Sand Lightship, which was situated off the coast of Norfolk in a north-easterly direction from Yarmouth. At the time of the collision the

"James Joicey" was proceeding south from Blyth in Northumberland to London, and the "Kostrena" was proceeding north from Dunkirk to Methil. Nov. 27, 1907.
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Thereafter cross actions were brought by William Cory & Son, Limited, the owners of the "James Joicey," and Andrea Kopajtic, the master of the "Kostrena," and as such in this country representing her owners, for damages on account of the injuries sustained by the vessels respectively through the collision.

In the action at their instance the owners of the "James Joicey" averred:—(Cond. 2) "The steamship 'James Joicey,' on the morning of Sunday, the 10th February 1907, encountered a dense fog near the Cross Sands off Yarmouth. She had previously been in collision with the s.s. 'Syria' on the evening of Saturday, the 9th February, and was proceeding at the time dead slow in a damaged condition, with two black balls on her masthead. The whistle of the 'James Joicey' was being sounded at intervals in terms of the regulations. A fog-signal was heard by her forward of her beam and on the starboard bow, and her engines were at once stopped and the fog-signal answered. A second blast was heard forward of the beam and still on the starboard bow, and this was again answered. Immediately thereafter the 'Kostrena' loomed up out of the fog close on the 'James Joicey's' starboard bow, heading about N.-E., and going at an excessive rate of speed. The 'James Joicey' at once gave two short blasts, put her engines full speed astern, and gave three short blasts, but before any alteration could be made on the helm the 'Kostrena,' coming on very fast across the bows of the 'James Joicey,' struck with the bluff of her port bow the 'James Joicey' on the starboard bow. The 'Kostrena' had some time before the collision ported her helm. The 'James Joicey's' course at the time was about S.½W." (Cond. 3) "The collision was caused entirely through the careless navigation of those in charge of the 'Kostrena,' for whom the defender is responsible. In particular, they failed to go at a moderate rate of speed in the fog, and when the fog-signal from the 'James Joicey' was heard, apparently forward of their beam, to stop their engines and navigate with caution. They also failed to go full speed astern before the collision, and improperly altered their course before the collision by porting their helm; they also failed to keep a proper lookout, and regularly to give the appropriate fog-signals, all in contravention of the Regulations for Prevention of Collisions at Sea, and particularly Arts. 15, 16, 19, 21, and 29 thereof, and of the ordinary rules of good seamanship." *

* The Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), enacts:—

Sec. 419, subsec. (4),—"Where in a case of collision it is proved to the Court before whom the case is tried that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary."

The Regulations of 1897 for Preventing Collisions at Sea, provide:—

"Art. 15. In fog, mist, falling snow, or heavy rainstorms, whether by day or night, the signals described in this article shall be used as follows, viz.:— . . .

"(e) A vessel under way which is unable to get out of the way of an approaching vessel through being not under command, or unable to manœuvre as required by these rules, shall . . . at intervals of not

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trena."

In the action at his instance the master of the "Kostrena" averred:—(Cond. 2) " . . . About 11.56 A.M., while the 'Kostrena' was steering N. by E. $\frac{1}{2}$ E. and was about $3\frac{1}{2}$ miles from the Middle Cross Sand Lightship, the fog-signal of a steamer, which ultimately proved to be the 'James Joicey,' was heard on the 'Kostrena's' port bow. Owing to the number of whistles which were heard in close proximity to and abaft the beam of the 'Kostrena' from steamers proceeding in the same direction, it would have been dangerous to stop the engines of the 'Kostrena,' but her speed was only such as would keep steerage way on the vessel. The whistle of the 'James Joicey' was answered. Another prolonged blast was heard from the 'James Joicey,' followed after a short interval by two short blasts. As these two short blasts appeared to be very close to the 'Kostrena,' the latter's engines were at once stopped, the helm ported, and one short blast sounded, that being in the opinion of the master the only means left to him to avert the collision. Practically at the same time as the short blast was sounded from the 'Kostrena's' whistle, the 'James Joicey' loomed out of the fog. The 'James Joicey' was then seen to be carrying two black balls on her foremast to indicate that she was not under command, owing to her having been in a collision with the s.s. 'Syria.' On sighting the 'James Joicey' the engines of the 'Kostrena' were at once reversed, and three short blasts sounded, but notwithstanding this the 'James Joicey' struck the 'Kostrena' on the bluff of the port bow with her stem, inflicting considerable damage." (Cond. 3) "The said collision was caused entirely through the fault and unskilful navigation of those in charge of the 'James Joicey,' and by their failing to observe the Regulations for Prevention of Collisions at Sea, and in particular Arts. 15, 16, 18, 19, 22, and 29. The 'James Joicey' was in fault (1) in being under way in the fog, having regard to the fact that she was not under command and that there was a large number of steamers in the immediate vicinity; (2) in proceeding at an excessive speed in the fog; (3) in failing to stop her engines on hearing forward of her beam the fog-signals of the 'Kostrena,' and thereafter to navigate with caution; (4) in failing, on approaching the 'Kostrena,' to slacken her speed or stop or reverse; (5) in failing to keep a proper lookout; (6) in failing to keep out of the way of the 'Kostrena'; and (7) in failing to give the signals provided for by Art. 15 (e) of the said Regulations. In contravening the said Regulations the 'James Joicey' is, in terms of section 419, subsection (4), of the Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), deemed to be in fault."

The actions were conjoined, and a proof was allowed and led. The import of the proof is given in the Lord Ordinary's opinion.

On 11th June 1907 the Lord Ordinary (Salvesen) pronounced an interlocutor finding that the collision was caused solely through the

more than two minutes, sound three blasts in succession, viz., one prolonged blast followed by two short blasts.

"Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

fault of those in charge of the "Kostrena," and granting leave to Nov. 27, 1907. reclaim.*

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* "OPINION.—These counter actions arise out of a collision which took place on the 10th of February 1907, between the Austrian steamship 'Kostrena' and the British steamship 'James Joicey.' At the time of the collision there was a dense fog. The sea was smooth, and there was a light wind from the south-west. The collision took place some distance north of the Middle Cross Sand Lightship, which is situated off the coast of Norfolk, and in a north-easterly direction from Yarmouth. Both vessels were seriously damaged, but the question of liability is the only one which I have to determine at present.

"There is a remarkable agreement as to the point of time at which the collision occurred. Roughly speaking, it may be taken that the moment of impact was about twelve o'clock noon on the 10th, which was a Sunday. At that time the fog was so dense that, according to the evidence of those on board the 'Kostrena,' a vessel could not be seen at a greater distance than 400 or 500 yards; while, according to the evidence of the master of the 'James Joicey,' a vessel could only be seen 100 yards away. The second officer of the 'Kostrena' says that the 'James Joicey' only became visible at 200 to 300 metres from the 'Kostrena'; and probably the truth lies somewhere between his figure and that of the master of the 'James Joicey.' The fog was therefore of such a character that it was incumbent on both vessels to proceed at a moderate rate of speed, more especially in the locality in question, which is in the direct track of all the traffic passing from Scotland and the Baltic southwards to London and through the English Channel.

"The fog had commenced on the evening of the preceding day; and about 9 P.M. the 'James Joicey' was in collision with another vessel called the 'Syria.' In that collision she had her stem from the 13-foot line upwards carried away; and although the damage was somewhat above the water-line it was so near it that the forward collision compartment soon completely filled. For some time thereafter she was accompanied by the 'Syria,' but about 2 A.M., as there appeared to be no immediate danger to the 'James Joicey,' the vessels parted company, and the 'James Joicey' proceeded on her course. At 9.30 A.M. she passed the Newarp Buoy at so short a distance that the officer in charge was able to see the buoy itself, notwithstanding the continuance of the fog. According to the whole evidence the engines were from that time kept moving dead slow, except for ten minutes between 10.50 and 11, during which they were put to half speed.

"After this collision with the 'Syria' the 'James Joicey' exhibited two red lights, indicating that she was not under command; and next morning the captain had them replaced with two black balls, which constitutes the corresponding day signal. In my opinion this latter signal ought never to have been exhibited. The engines of the 'James Joicey' were uninjured, and so was her steering gear. It is true that she was not able to proceed at full speed, and could not therefore manœuvre so rapidly as if she had been uninjured; but there was nothing to prevent her proceeding dead slow or even with her engines at half speed, which according to the expert evidence would give her a movement through the water of about six knots. I was referred on this point to two cases. The '*Hawthornbank*,' [1904], P., pp. 120 and 129, and the '*P. Caland*,' A. C. [1893], p. 207. The former was the case of a sailing ship which had been injured by a collision, her foretopmast and head stays with sails and gear having been carried away, and her bows stove in. She had hoisted her lower maintopsail, and was moving through the water at about three knots, and she was held to be not under command although she was being steered in a definite course which she was able to alter, although very slowly. That was a very special case, and the present seems to me to be practically ruled by the decision of the

Nov. 27, 1907. The master of the "Kostrena" reclaimed. The case was heard before the Second Division.

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trena."

There was a nautical assessor at the hearing on the reclaiming note. Argued for the reclaimer;—I. The Lord Ordinary had held that the "Kostrena" was in fault in three respects, namely, (1) that she was not going at "a moderate speed," and was thus in breach of the first paragraph of Art. 16 of the Regulations for Preventing Collisions at Sea of 1897; (2) that she failed to stop on hearing the fog-signal of the "James Joicey," contrary to the second paragraph of the same Article; and (3) that she ported her helm, with the result that she went to starboard and so caused the collision. In all these respects the Lord Ordinary had reached an erroneous conclusion. (1) The Lord Ordinary held that the "Kostrena" was going at a speed of about $5\frac{1}{2}$ knots. The Lord Ordinary reached that figure by taking, not the speed through the water, *i.e.*, the engine speed, but

Privy Council in the second case referred to. Here the vessel was able to proceed at five or six knots an hour. She could stop and reverse her engines, which were uninjured; and she could steer, although she would not answer her helm so quickly as when going at a higher speed. A vessel in such circumstances cannot, in my opinion, be described as being 'not under command'; and I think the master of the 'James Joicey' made a mistake in exhibiting a signal to that effect. Fortunately for her, however, it is not said that the signal in any way misled the 'Kostrena,' or could have done so looking to the very short period which elapsed from the time that it was seen until the collision. The sounds signal, which in a fog is prescribed with the view of warning vessels that they are in the vicinity of a ship not under command, was not sounded, and strange to say, does not appear even to have been known to the master of the 'James Joicey.'

"As neither vessel had an opportunity of observing the other until the collision was imminent, the evidence as to speeds, courses, and navigation must be derived exclusively from the witnesses on board each. There is only one matter with regard to which there is a complete conflict of evidence. According to the 'Kostrena,' the whistle of the 'James Joicey' was heard about three points on her port bow, and before the collision she was seen on the port side crossing at an angle of 45 degrees from port to starboard. The witnesses from the 'James Joicey,' on the other hand, deponed that the 'Kostrena' was on her starboard bow when her whistle was first heard, and that she was seen crossing at a broad angle on a port helm from the port to the starboard side of the 'James Joicey.' This curious conflict is difficult to explain; but the real evidence enables me to prefer the story of the 'James Joicey.' The vessels were practically approaching on parallel courses; and I am satisfied, for reasons that I shall afterwards explain, that the 'Kostrena' was going at a much higher rate of speed than the 'James Joicey.' If therefore the 'Kostrena' ported her helm, as her witnesses say, some short time before the collision, it was impossible that the collision could have occurred, unless the 'James Joicey' had previously starboarded and was proceeding at a much higher rate of speed. On the other hand, the collision is amply explained by the 'Kostrena' porting her helm when she had the 'James Joicey' on her starboard bow. The only evidence for the 'Kostrena' that tends to support her case is that given by Captain Tait, who says that, taking the courses of the two vessels described in their logs, the 'James Joicey' would pass to the westward of the 'Kostrena.' The value of that evidence, however, depends on the distance at which the 'Kostrena' passed the Middle Cross Sand Lightship, which is a mere matter of estimate, and also on the assumption that the courses of the two vessels were maintained with mathematical accuracy.

"The next question is what were the respective speeds of the two vessels

the speed over the ground. That was to say about $2\frac{1}{2}$ knots, the estimated speed at which the tide, which was with the "Kostrena," was running was added to 3 knots, her estimated speed through the water. That was an erroneous method of calculation. The proper test was speed through the water only, when both vessels were in motion.¹ A speed of 3 knots was a moderate speed. To have gone slower would have involved the risk of losing steerage way. (2) Admittedly the "Kostrena" did not stop when she heard the fog-signal of the "James Joicey." She was justified in not stopping, as there were a number of vessels in the neighbourhood, which made it important that she should not lose her steerage way. Even if she was not justified, and was thus in breach of the second paragraph of Art. 16 of the Regulations, it did not follow that she was to be held to have been in fault. Had she been a British vessel, no doubt the statutory presumption of fault enacted by sec. 419, subsec. (4), of the

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prior to the collision? It is admitted that for an hour the 'James Joicey' had been going against the tide, while the 'Kostrena' had the tide with her. If, therefore, each vessel had her engines going dead slow, which would represent a speed through the water of 3 knots, the actual speed over the ground of the 'Kostrena' would be much greater than that of the 'James Joicey.' The only scientific calculation of the strength of the tide during the hour preceding the collision is made by Captain Cowie, who puts it at 2.64 knots per hour. On that assumption the 'Kostrena' would be moving at least 5.64 knots as against a speed of .36 knots for the 'James Joicey.' Even if the tide was only flowing a knot and a half an hour, as some of the witnesses estimate, the 'Kostrena' would still be going at $4\frac{1}{2}$ knots, or three times as fast as the 'James Joicey.' Mr Dickson asked me to hold that the 'James Joicey' must have been going at half speed. There is no evidence whatever from which I could draw that inference. The engineer's log-book, which is carefully kept, records that for nearly an hour before the collision her engines were kept moving dead slow; and the distance she covered in the previous four hours is entirely consistent with the entries in the log. The Solicitor-General in the same way asked me to hold that the 'Kostrena' had her engines moving at half speed. I think I am not at liberty to draw this inference either, and I cannot hold it proved that the 'Kostrena' was going at a greater rate of speed over the ground than $5\frac{1}{2}$ or 6 knots. Considering the fog which prevailed, I am of opinion that this was in excess of a moderate speed. It was sought to be justified on the ground that the 'Kostrena' would not have steerage way unless she were going at least 3 knots through the water. I cannot accept that evidence, because cases frequently occur of vessels moving only from 1 to 2 knots through the water, and yet having sufficient steerage way to navigate narrow channels. The 'Kostrena' was therefore to blame for infringing the first part of Article 16 of the Regulations for Preventing Collisions at Sea.

"The 'Kostrena' was also, in my opinion, further to blame for infringing the second paragraph of Article 16. This paragraph is in the following terms:—'A steam vessel hearing apparently forward of her beam the fog-signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over.' On her own shewing, the 'Kostrena' did not observe this regulation. At 11.45 she heard the whistle of a vessel that she now believes to have been the 'James Joicey' about three points on her port bow. It was imperative that she should then stop her

¹ The "Resolution," 1889, 6 Asp. Mar. Cases, 363; The "Germanic," reported in the *Times* of date Feb. 22, 1896; Marsden on Collisions at Sea, 5th ed., p. 374.

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Merchant Shipping Act, 1894, would have applied. But she was an Austrian vessel, and secs. 418 and 424 of the Act shewed that the collision sections of the Act did not apply to a foreign vessel outside British jurisdiction, that was to say, outside the three-mile limit, unless the country to which the vessel belonged had adopted these sections,¹ and as Austria had not adopted them, and the collision here took place outside the three-mile limit, it followed that the "Kostrena" was not to be presumed to have been in fault; on the contrary, the *onus* was on the "James Joicey" to prove that the breach of the Article caused, or contributed to cause, the collision. The "James Joicey" had failed to discharge that *onus*. (3) The "Kostrena" was not in fault in porting her helm, for the "James Joicey" was to begin with on her port bow; that was the fair result of the evidence.

II. The "James Joicey" was in fault in respect (1) that she was not going at a moderate speed, as required by the first paragraph of

engines. The reason of the rule, as explained by the Lord Justice-Clerk in the case of *The 'Warsaw,'* 8 F. 1013, is 'to give opportunity of accurate observation of sound'; and it is noticeable that according to the engineer's log the 'Kostrena' had done this on previous occasions. The excuse suggested for not complying with the rule, viz., that if the 'Kostrena' lost steerage way her position might be endangered because of the number of vessels whose signals she heard on all sides, is untenable. The fact that the locality was crowded with shipping made it all the more necessary for the 'Kostrena' to observe the rule. It does not, of course, follow that the engines should remain stopped, but I think it may be assumed in this case that if the rule had been complied with, the 'Kostrena' would in all probability have correctly located the position of the 'James Joicey' as on her starboard bow, and not on her port bow; and that she would further have made the collision less likely by having had her way considerably reduced.

"It follows from what I have said, that the 'Kostrena' was still further to blame in porting her helm before she had ascertained the exact position of the approaching vessel. On the theory that that vessel was still three or four points on the 'Kostrena's' port bow the manœuvre is unintelligible; although, if the position of the 'James Joicey' had been correctly located, it would of course have been harmless. It was this manœuvre which directly led to the collision, and brought the 'Kostrena' across the 'James Joicey's' bows at an angle variously estimated at from 60 to 90 degrees. The only possible explanation seems to be that the master of the 'Kostrena' realised when he heard the second blast from the 'James Joicey' that she was not in the position he originally believed, and that for the moment he lost his head.

"It is a more difficult question whether the 'James Joicey' was also to blame, and no less than seven charges are made against her in cond. 3, some of which, however, are no longer insisted in. I have already dealt with the first two and the seventh. The fourth, fifth, and sixth are not supported by the evidence; and, as I understood from the counsel for the 'Kostrena,' were not insisted in. There remains the third charge, which is to the effect that the 'James Joicey' was to blame in failing to stop her engines on hearing forward of her port beam the fog-signals of the 'Kostrena,' and, thereafter, to navigate with caution. This charge rests on a single entry in the mate's log, which puts the time when the 'Kostrena's'

¹ *Mortensen v. Peters*, July 19, 1906, 8 F. (J. C.) 93; *The "Hibernia,"* 1874, 2 Asp. Mar. Cases, 454; *The "Fanny M. Carvill,"* 1875, L. R., 13 App. Cases, 455, note; *The "Magnet,"* 1875, L. R., 4 Ad. & Ecc. 417; *The Queen v. Keyn*, 1876, L. R., 2 Exch. Div. 63; *The "Saxonia,"* 1862, 1 Lush. 410.

Article 15 of the Regulations. (2) That she did not stop on hearing the "Kostrena's" whistle. The mate's log bore that she heard the "Kostrena's" whistle "about 11.50," and the engineer's log that she was stopped at 11.57—a delay of seven minutes. The evidence of a ship's log against herself was very strong.¹ In any view the *onus* was on the "James Joicey" to shew that she complied with the Article.² (3) That she went astern on a starboard helm. (4) That being a vessel not under command she did not give the signals required by Article 15 (e) of the Regulations. She was partially waterlogged and was unable to go ahead at full speed, and consequently she was unable to manœuvre as quickly as other vessels were entitled to expect, which was the test of not being under command.³ It was said that as the "Kostrena" did not stop for the signal which the "James Joicey" actually gave, she would not have stopped for the signal which the "James Joicey" ought to have given. It was needless to go into speculations of that sort; the "James Joicey" being in breach of Article 15 (e) it was for her to prove that the breach could not possibly have contributed to the collision.⁴

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whistle was heard at 11.50 A.M.; whereas, according to the evidence, the engines were not stopped until a few minutes before the collision. The complete entry is as follows:—'About 11.50 A.M. heard a steamer's whistle on our starboard bow, our engines were stopped, and a whistle was again heard on starboard bow, and almost at the same time a steamer loomed out of the fog.' The engineer's log records that the engines were stopped at 11.57, and were put full speed astern at 11.59. Reading these two documents together, it was powerfully argued that the 'James Joicey' must be taken to have heard the first whistle of the 'Kostrena' on her starboard bow at 11.50, that the engines were not stopped until seven minutes later, and that the collision occurred about 11.59 or 12 o'clock. In my opinion, this is not the only construction of the documents. The mate's log, which records the time of hearing the first whistle as about 11.50, may also be read as implying that the engines were thereafter immediately stopped; and that is what the captain and mate say in their evidence, the only difference being that they place the time when they heard the first blast at 11.54 or 11.55, and put the collision at 11.57, or two or three minutes earlier than the engineer. It is no doubt strange, if the 'Kostrena's' whistle was being regularly sounded, that it had not been heard by those on board the 'James Joicey.' But the *onus* of proving a breach of a statutory regulation, which raises a presumption of fault, is on the person who alleges it; and, in my opinion, the evidence is insufficient to justify the conclusion which the 'Kostrena's' counsel pressed upon me. Even if the 'James Joicey' heard the whistle at 11.50, and failed to stop, I do not see how that could have contributed to the collision. Moving, as she was, only from a half to one knot per hour over the ground, she could not have remained stopped for more than a fraction of a minute before she would entirely lose her way; and it is difficult to suggest how she could have been navigated with greater caution than she actually was. I accordingly pronounce the 'Kostrena' solely to blame for the collision."

¹Campbell v. Tyson, Dec. 22, 1841, 4 D. 342; Clyde Shipping Co., Limited, v. Miller, 1907, S. C. 1145; The "Eleanor," 1809, 1 Edwards, 135; The "L'Etoile," 1816, 2 Dodson, 106.

²The "John Harley" v. The "William Tell," 1865, 13 L. T. R. 413.

³The "P. Caland," L. R., [1893] A. C. 207, Lord Herschell at p. 213; The "Hawthornbank," L. R., [1904] p. 120.

⁴The "Duke of Buccleuch," L. R., [1891] A. C. 310; The "Fanny M. Carvill," L. R., 13 App. Cas. 455; The "Arratoon Apar," 1889, L. R. 15 A. C. 37.

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trena."

Argued for the "James Joicey";—I. (1) The Lord Ordinary had rightly held, and on the right grounds, that the "Kostrena" was not going at a moderate speed. (2) Whether the statutory presumption of fault, enacted by section 419 of the Merchant Shipping Act, 1894, applied or did not apply to the "Kostrena," for a vessel in a fog not to stop on hearing a signal from another vessel was fundamentally bad seamanship. Besides, the regulations admittedly applied to the "Kostrena," and she had admittedly violated Article 16. It was said that her failure to stop did not in any way contribute to the collision, but one purpose of requiring a vessel to stop on hearing a signal from another vessel was by lessening the noise on board to enable her to locate the position of the signalling vessel when she signalled again,¹ and the reasonable inference was that the neglect of this precaution by the master of the "Kostrena" caused him to commit the blunder which was the immediate cause of the collision; for (3) the real evidence in the case pointed clearly to the conclusion that the two vessels were proceeding on nearly parallel courses, but in opposite directions, starboard to starboard. The master of the "Kostrena" however thought that he had the "James Joicey" on his port bow, and acting on that assumption he ported his helm, with the result that the "Kostrena" went to starboard and collided with the "James Joicey." In these three respects the "Kostrena" was in fault.

II. On the other hand the "James Joicey" was not in fault in any of the respects alleged against her by the "Kostrena." (1) She was going at a moderate speed. A speed over the ground, which was the correct test, of from half a knot to one knot an hour could not be described as other than a moderate speed. (2) She stopped on hearing the "Kostrena's" whistle. The mate's log, fairly read, implied that the engines of the "James Joicey" were stopped on hearing the whistle, and all that the engineer's log shewed was that he and the mate were not agreed as to the exact minute at which the engines were stopped. (3) To go astern on a starboard helm was a correct manœuvre. (4) The "James Joicey" was not a vessel "not under command." It was a question depending on the circumstances of the particular case.² The circumstances here were that there was a dense fog which made it the duty of the "James Joicey" to go at slow speed in any case, and that going at that slow speed she was perfectly under command, her engines and her steering gear being uninjured. True, she was not in a condition to go at full speed, which, had it been open weather, would have given room for the argument that if the "James Joicey" did not exhibit the signals for a vessel not under command, the "Kostrena" would have been entitled to assume that the "James Joicey" was a vessel able to manœuvre at full speed. *De facto* however, she had hoisted the day-signals for a vessel not under command. In any view, as the "Kostrena" did not stop for the signal which the "James Joicey" actually gave, it was not to be supposed that she would have stopped for the signal which she now said ought to have been given. Therefore, even if the "James Joicey" omitted to give the proper signal the omission did not contribute to the collision.

¹ Crawford v. Granite City Steamship, Co., Limited, July 5, 1906, 8 F. 1013, *per* the Lord Justice-Clerk, at p. 1021; The "Resolution," 6 Asp. Mar. Cases, 363.

² The "P. Caland," L. R., [1893] A. C. 207.

LORD JUSTICE-CLERK.—We have had a very able debate in this case, Nov. 27, 1907. and have had very able assistance from the Nautical Assessor. The conclusion to which I have come, and in which your Lordships concur, is ^{The "James Joicey" v. The "Kostrena."} that the decision of the Lord Ordinary is right. As in those cases generally, so in this case, there is a considerable conflict of evidence. I have found myself quite unable to accept the estimate given by the captain of the "Kostrena" as to her distance eastward from the Middle Cross Sand Light when she passed. It is quite certain that she was a great deal nearer than the captain thought, and that if she had not been a great deal nearer this collision could not possibly have happened whatever the "James Joicey" might have done. That they were approaching one another, the "James Joicey" going southwards towards the Middle Cross Sand Light, and the "Kostrena" going northward, and that they were within narrowish limits as regards their courses, I cannot doubt. It is clear that if the "Kostrena" had kept the course her captain says she was keeping she could hardly have got into the position of being on the "James Joicey's" starboard bow. I am not satisfied that she kept that course accurately. I am not well satisfied with the accuracy of the evidence given by those on board the "Kostrena." It seems that this steamer was steered by hand, and steering in the fog the steersman may often have got off his course, and before he got on to it again he might be on a line which, while it looked quite correct, was only parallel with the course originally intended to be steered. That he came up to the eastward of the Middle Cross Sand Lightship I have not the slightest doubt. Now, when he got a certain distance up he heard the sound of a steamer, as he says, broadish upon his port bow. That was his belief, and I shall assume that it was his honest belief, but in that he may have been considerably mistaken, and unless he looked at his compass at the very time at which he heard the blast he could not be certain that at that moment the head of his vessel was exactly on the course which he intended. If so, that might make a great difference.

Now, what was his duty when he heard that sound? I think the whole question turns upon this. I think his duty under the Regulations plainly was at once to stop his engines until he had located the sound correctly. The Regulation ordering the stoppage of a vessel in such circumstances is imperative, being a Regulation based entirely upon the necessity of stopping as much as possible all sound on board the vessel in order that those in charge may more accurately locate the sound when they hear it again. The captain of the "Kostrena" did not do that, but went on, and in that I think he was distinctly at fault unless he can put forward circumstances which made it impossible for him to obey the rule. What are the circumstances that he says necessitated his disobeying that rule? They are that there were a number of other vessels there blowing horns. There was no corroboration of that, although there was a special signal given probably by a fishing boat at anchor. But even if he had heard several other horns blowing round him in different directions, then, wherever they were, there was no reason in the world why he should not stop. By stopping he would not be any the more in danger from these other vessels, and hearing several signals the duty to stop so as to locate sound correctly was all the more essential. So far as I can see, therefore, we have the "Kostrena" in direct

Nov. 27, 1907. violation of one of the most imperative regulations applicable to foggy weather. Then what happens is that the captain, without having stopped so as to locate the sound, took it for granted that he had a right to port his helm, and did port his helm; and the case against him is that he should not have altered his course until he had located the vessel, which he certainly had not done. Now, there the "Kostrena" is found committing two distinct faults. One was going on without stopping and thereby preventing the locating of the sound, and the other was porting the helm when nothing had been done to ensure correct location.

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Lord Justice-Clerk.

Now, let us turn to the "James Joicey." The "James Joicey" was going south upon a course S. half W., having passed close to the North Cross Sand buoy, and her case is that when the "Kostrena" loomed in sight she was on her starboard bow and was upon a port helm. That the "Kostrena" was upon a port helm is true, and that she was upon the "James Joicey's" starboard bow may be taken to be true in the whole circumstances of the case. The "James Joicey" stopped her engines and the order was given to reverse the engines and to starboard the helm. Now, the Nautical Assessor told us that when that order was given the effect of the starboarding action would not take place without some time elapsing—within the time probably that the two vessels might meet. The Assessor tells us that so far as the course of the vessel is concerned if the master of the "James Joicey" did that—reversed his engines and went astern on a starboard helm—the effect would necessarily be the same as if he had ported and gone ahead; and he would be right in reversing his engines and starboarding if the other vessel was going to starboard upon a port helm, seeing that the starboarding of the helm when the vessel was going astern would produce the same effect as porting the helm when going ahead. Up to this point I can see no fault that can be attributed to the "James Joicey." But then it is argued that the "James Joicey" was in fault in respect that she did not give the signal for a vessel not under command. I am not satisfied from all that we have learned that she was a vessel not under command. The only thing that was in question as to whether she was under command or not was the effect of the injuries to her in a previous collision, resulting in water coming in at the bows and setting her down forward so that she could not steer. But the fact is that she could steer, and did steer. But then it is said, further, that she was giving signals in daylight and at night which indicated that she was a vessel not under command. That, of course, would be prudent on the part of the master of a vessel not under command, even in a degree. But we must hold on the advice we have received that she was a vessel under command—that is to say, she was under command at the speed at which she could move, and in the circumstances was quite capable of doing what another vessel could do in the case of an emergency. No doubt it was not a high speed; a high speed could never have been attained in her state, and would have been wrong even if possible, as she was in fog, but going at this slow speed she was under command. In the case of *The "P. Caland,"*¹ the vessel in question was a great deal more out of command than the vessel in this case. There it was held that it could not be said reasonably that the

¹ L. R., [1893] A. C. 207.

vessel was out of command. Even if it were otherwise, and the question was whether the "James Joicey" might have misled the "Kostrena" by not giving the signal that she was not under command, that question would resolve itself into this: Did that in any way contribute to what happened? In my opinion it did not, because what the "Kostrena" had to do according to the Regulations, and knowing that a steamer was there, was to stop and wait until she could locate the position. The purpose of the stopping is for location, and she should have stopped and located the other vessel, and that was an absolute duty on the part of the master whether the other vessel was a vessel under command or a vessel not under command. Therefore I come to the conclusion that the Lord Ordinary is right in holding that the "James Joicey" was not to blame for what occurred. There is another point to which I need to refer, and that is the question whether the Regulations in the circumstances apply to a foreign vessel. I can only say this, I never heard of that question being raised before. We had a case of exactly the same kind as this in this Division and the point was not raised, and there was also a case in England in which it was not raised. In these circumstances I do not think that we are called upon to decide any such question, nor do I think it would affect the decision in this case, because I am clearly of opinion that the "Kostrena" was to blame by taking the wrong course. What she did was essentially bad seamanship.

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I would therefore move your Lordships to adhere to the interlocutor of the Lord Ordinary.

LORD STORMONTH-DARLING.—I concur.

LORD LOW.—I also concur.

LORD ARDWALL.—I am of the same opinion. The "Kostrena" was undoubtedly in fault. The first and very serious fault on her part was that she did not comply with article 16 of the Regulations as soon as she heard the fog-signal of the other vessel in a position which she had not ascertained. The imperative requisition in article 16 is that "a steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over." It is unquestionable, according to the evidence of those on board of the "Kostrena" herself, that she did not stop. Of course, the object of stopping in such a case is to locate the sound so as to find the position of the other vessel. She cannot locate the sound well until her engines are stopped. As was pointed out in the passage read from the Lord Justice-Clerk's opinion in the case of *The "Warsaw,"*¹ the object of a vessel stopping in these circumstances is that those on board should be freed from the noise of her own engines and of rushing through the water, so as to be able to distinguish by the sounds made by the other vessel the direction and distance from which they come. Now, the "Kostrena" failed to stop her engines. The only excuse given for that failure is that there were a great

¹ 8 F. 1013, at p. 1021.

Nov. 27, 1907. number of steamers about, but the evidence shews that that really was no excuse at all. The second mistake which the "Kostrena" made was that she improperly ported her helm. That raises the question of the position in which these two ships approached each other. We have had the advantage of a consultation with the Nautical Assessor, and he is of opinion that taking the courses that the vessels were on, the "Kostrena" must have had the "James Joicey" not on her port bow but upon her starboard bow. Of course the "Kostrena" must have been very much further to the west than we are led to suppose from the evidence, but in the circumstances the "Kostrena" might easily have got inshore of the course of the "James Joicey" owing to her shifting her course to avoid vessels, and owing perhaps to the tidal currents. It is absolutely certain that if she had not been inshore of the course of the "James Joicey" just before the collision, the two courses never could or would have crossed each other. I must hold that somehow or other the "Kostrena" must have got inshore of the course of the "James Joicey," and therefore when she approached the point where the courses were to cross each other she must have had the "James Joicey" on her starboard bow. Now, in that state of matters it was a wrong manœuvre on the part of the "Kostrena" to port her helm and thereby run straight across the bows of the "James Joicey." With regard to her excessive speed, which is the third fault charged against the "Kostrena," that is shewn by the nature and direction of the injuries inflicted on the two ships by the collision, and I am satisfied that although the speed may not have been very great, yet it was a speed greater than she should have been proceeding at through fog. With regard to the "James Joicey," the first point made against her is that she did not stop when she heard the whistle of the "Kostrena," and that is founded upon the entries of the time in the mate's log. I agree with what was said by your Lordship in the chair in the course of the discussion that the mate's log must not be read too literally or strictly in a case of this sort. At that moment when the whistle sounded those in command of the "James Joicey" were all concerned with trying to escape from a collision, and I have no doubt that the log was written afterwards, for the simple reason that it could not be written up at the time when the mate was on the bridge. On the other hand, the engineer's log is in a totally different position. The engineer is in the engine room, and when he gets a signal from the bridge he looks at the clock, and after he has carried out the order he marks down the very moment that the telegraph rang, so that it is a record which, unless it can be clearly shewn that it was written up afterwards, is a record of the highest importance, and is most reliable. I am therefore of opinion on the best evidence we have, and comparing it with the other evidence in the case, that the "James Joicey" did stop when she heard the fog-signal of the other vessel. It is said that she manœuvred improperly by starboarding her helm and reversing her engines. The order to starboard and the order to reverse are two distinct orders given at the same time, one to the man at the wheel by word of mouth, and the other to the engineer by the telegraph. These orders were proper in the circumstances, and did not contribute to the collision; on the contrary, they tended to lessen the risk of collision, and mitigated, so far as was possible, the force with which the vessels collided. The evidence as to

speed shews that the "James Joicey" was not being navigated at too great a speed in the fog. There is a fourth point of blame brought against the "James Joicey," and that is that she failed to comply with Article 15 (e) of the Regulations in not giving one prolonged blast followed by two short blasts. The first thing to be said about that is that it is really irrelevant to the present case, because it cannot be said that those on board the "Kostrena," who did not stop under Article 16 when they heard the ordinary fog-signal, would have stopped if they had heard this other signal. But apart from that altogether I consider that this ship the "James Joicey" could not well be regarded as a ship not under command. It is true that it is a duty to put up or give by sound a signal appropriate to a ship not under command, but whatever may be said about that in ordinary circumstances it is clear that it did not matter here, because the ship was going at a low speed, and that at that low speed she was quite under command. In short, the fact of the matter was that the "James Joicey" was practically reduced from an 8 or a 9-knot vessel to a 4-knot vessel by reason of the fact that it would be dangerous to force her through the water at great speed. At the slower speed she was quite under command, and as that speed was the proper speed in going through fog the master was not required to sound the number of whistle signals prescribed by Article 15 (e). Accordingly, I think that the charges put forward against the "James Joicey" have broken down, and that, for the reasons I have already mentioned, the "Kostrena" was alone to blame.

The "James Joicey" v. The "Kostrena."
Lord Ardwall.

THE COURT adhered.

BOYD, JAMESON, & YOUNG, W.S.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—
Agents.

JAMES MAXTONE GRAHAM (Liquidator of James Donaldson & Company, Limited), Petitioner.—*D.-F. Campbell—Constable.*
THOMAS WHITE & PARK, Respondents.—*Graham Stewart, K.C.—Sandeman.*

No. 44.

Dec. 4, 1907.

Company — Winding-up—Production of Documents—Lien—Companies Act, 1862 (25 and 26 Vict. cap. 89), sec. 115.—On the motion of the official liquidator of a company which was being wound up by the Court, the law-agents of the company were *ordained* to produce all books, title-deeds, papers, and other deeds or documents in their custody relating to the company "without prejudice to the lien claimed by them."

Liquidator of Donaldson & Co., Limited, v. White & Park.

In re South Essex Estuary and Reclamation Co., L. R., 4 Ch. App. 215, followed.

ON 1st June 1907 an order was pronounced by the Second Division of the Court for the compulsory winding-up of James Donaldson & Company, Limited, 157 Great Junction Street, Leith. James Maxtone Graham, C.A., Edinburgh, was appointed liquidator, and all subsequent proceedings in the winding-up were directed to be taken before Lord Dundas.

In September 1907 the liquidator presented a note to the Lord Ordinary under sections 115 and 117 of the Companies Act, 1862,*

* The Companies Act, 1862 (25 and 26 Vict. cap. 89), enacts:—

Sec. 115. "The Court may, after it has made an order for winding-up the

Dec. 4, 1907.

Liquidator of
Donaldson &
Co., Limited,
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Park.

setting forth, *inter alia*, as follows:—"Messrs Thomas White & Park, W.S., Edinburgh, acted as the law-agents of the said . . . James Donaldson & Company, Limited. The said Thomas White & Park are in possession of documents belonging to the Limited Company, or to which the liquidator is entitled to access. The liquidator has made application to the said Thomas White & Park to produce these documents, but (although they have in connection with the liquidator's said application prepared an inventory thereof) they refuse either to produce the documents or to exhibit the inventory, on the ground that they have a lien over the documents."

The liquidator prayed the Lord Ordinary "to ordain Hope Park, Thomas William Saidler, and Alexander White, being the only known partners of the said Thomas White & Park, to appear before your Lordship on a day to be fixed by your Lordship, for the purpose of being examined upon oath concerning the affairs, dealings, estate, and effects of the said James Donaldson & Company, Limited, and to produce all books, title-deeds, papers, writings, or other deeds or documents in their custody or power relating to the said James Donaldson & Company, Limited."

Thomas White & Park lodged answers in which they stated:—"The respondents claim a lien over the said papers in respect of work done and sums paid by them on the instructions of the said Company. The respondents have all along been willing, and have informed the liquidator of their willingness, to hand him over the papers relating to the Limited Company, under reservation of all questions of security and preference, so as to preserve to them their rights of lien. The liquidator has declined to take delivery of the papers on these terms."

On 22d November the Lord Ordinary pronounced an interlocutor reporting the cause to the Second Division.* The case was heard on 4th December 1907.

company, summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company; and the Court may require any such officer or person to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company; and if any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, having no lawful impediment (made known to the Court at the time of its sitting, and allowed by it), the Court may cause such person to be apprehended, and brought before the Court for examination; nevertheless, in cases where any person claims any lien on papers, deeds, or writings, or documents produced by him, such production shall be without prejudice to such lien, and the Court shall have jurisdiction in the winding-up to determine all questions relating to such lien."

Sec. 117. "The Court may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought before them in manner aforesaid concerning the affairs, dealings, estate, or effects of the Company, and may reduce into writing the answers of every such person, and require him to subscribe the same."

* "OPINION.—The liquidator presents this note under sections 115 and 117 of the Companies Act, 1862 (25 and 26 Vict. cap. 89). The prayer of the note, so far as the present question is concerned, craves the Court to ordain certain law-agents to appear before the Court 'for the purpose of being examined upon oath concerning the affairs, dealings, estate, and effects

Argued for the liquidator;—The liquidator was entitled to have the documents produced in order that he might determine whether to make use of them or not, and that without becoming liable for payment in full of the respondents' account.¹ The mere fact that he examined the documents would not make him liable, and a finding to that effect ought to be included in the interlocutor to be pronounced. At all events, he was entitled to an order under section 115 in the terms of the prayer of the note. He had no objection to the insertion of the words "without prejudice to any lien which the respondents might have or claim," provided it was understood that mere inspection of the documents did not constitute prejudice. *Renny & Webster*² was a case under the Bankruptcy Act, and had no application here. If the Court should be of opinion that the mere inspection of the documents constituted prejudice, he desired to confine the prayer of the note to an order under section 117.

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of the said James Donaldson & Company, Limited; and to produce all books, title-deeds, papers, writings, or other deeds or documents in their custody or power relating to the said James Donaldson & Company, Limited.' The first branch of this prayer echoes the language of section 117; while the second is based upon section 115; but omits, oddly enough, any reference to its proviso in regard to lien, which raises the point here at issue. Any order which is made would require to be expressly 'without prejudice to such lien.' The liquidator's counsel proposed to restrict his crave at this stage to the first branch above quoted; with the frankly professed object of endeavouring, if possible, to obtain sufficient information, in the course of the examination, as to the nature and contents of the various documents, without incurring any liability for the law-agents' account, which he apprehended might possibly arise if an order to produce was executed. A precedent for this course was said to exist in the Outer-House case of *Fergusson (Barr & Company's Liquidator)*, 10 S. L. T. 456. But that case is not, in my opinion, in point as a precedent; for I observe from the report that 'counsel having agreed that the examination should not be used to obtain a *précis* of the titles, the respondents did not oppose the motion.' I think the proposal to restrict the crave is inexpedient and unnecessary. It was explained during the discussion that the apprehensions entertained by the liquidator were based upon an analogy derived from the law of bankruptcy. It may, I think, be taken as settled that if a trustee in a sequestration obtains possession, upon his own demand, of documents under reservation of a lien, he will be liable for payment of the amount secured by the lien, even though he should find upon investigation that they are of no value whatever to the estate or the creditors (*Renny & Webster*, 1847, 9 D. 619). I see that in the recognised text-book on bankruptcy (Goudy, 3d ed., p. 600) the learned author, after referring to *Renny & Webster's* case, thinks 'it is doubtful if the same results would arise were the trustee simply to inspect the titles in the agent's office, exercising his right to examine all the bankrupt's deeds and securities so as to judge if it will benefit the estate to take up the property to which they relate. It is thought that the agent would have no claim for a preference in such a case, if the trustee declined to take up the property.' I am disposed, as at present advised, to agree with the opinion embodied in the sentence last quoted. But it is, in my judgment, unnecessary to pursue the topic; for we are here dealing not with a sequestration, but with a statutory liquidation. It has been decided in England, with

¹ *In re South Essex Estuary and Reclamation Co., Limited*, 1869, L. R., 4 Ch. App. 215, per Lord Hatherley, at 217.

² *Renny & Webster v. Myles Murray*, Feb. 8, 1847, 9 D. 619.

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Argued for the respondents ;—They had no objection to an order in the precise terms of section 115, that was to say, an order with the qualification “without prejudice to such lien,” provided it was understood that the mere inspection of the documents constituted prejudice. Otherwise their lien might prove to be worthless, for a mere inspection of the documents might give the liquidator all he wanted. Lord Hatherley’s opinion in the *South Essex Estuary*¹ case was wrong.

The opinion of the Court (The LORD JUSTICE-CLERK, LORD STORMONTH-DARLING, LORD LOW, and LORD ARDWALL) was delivered by—

LORD JUSTICE-CLERK.—The Court will follow the judgment of Lord Hatherley in the case of the *South Essex Estuary Company*,¹ and will direct the Lord Ordinary accordingly.

THE COURT pronounced this interlocutor:—“The Lords having heard counsel for the parties on the report by Lord Dundas to them of date 22d November 1907, direct the said Lord Ordinary to proceed in the liquidation by granting the crave of both branches of the prayer of the note without prejudice to the lien claimed by the respondents, in accordance with the opinion expressed by him in the said report: Find no expenses due by or to either party since the date of the Lord Ordinary’s interlocutor reporting the cause.”

DAVIDSON & SYME, W.S.—THOMAS WHITE & PARK, W.S.—Agents.

reference to section 115 of the Act of 1862, that where the solicitors of the company have a lien for costs on documents relating to the company in their possession, the official liquidator may nevertheless compel their production, without prejudice to the lien, though in many instances this would render the lien valueless—*In re South Essex Estuary Co.*, 1869, 4 Chan. 215. I should be prepared to follow this case, which I think is directly in point, and to grant the crave of both branches of the prayer of the note, already referred to, adding the words ‘without prejudice to any lien which the respondents or any of them may have or claim over the same.’ I may add that I think the examination and production would, in this case, be competently and most conveniently conducted by a commissioner, and not by the Court itself. The liquidator is, in my judgment, entitled to the production craved, in order to see whether the documents or any of them are such as he desires to acquire in the interests of those whom he represents; and, in my opinion, that production and inspection of them by him will not, *per se*, impose any liability upon him for payment of the law-agents’ account. The validity of the lien and the ultimate effect of it in relation to what the liquidator may see fit to do after production has been made, are matters which do not appear to arise at this stage. The question raised is one of general importance, and has not, so far as I know, been decided in Scotland. I have therefore reported it to the Court, to obtain their instruction and guidance, and in doing so I have thought it right to state my own opinion upon the matter.”

¹ *In re South Essex Estuary and Reclamation Co., Limited*, L. R., 4 Ch. App. 215.

JAMES TURNBULL, Pursuer (Appellant).—*Crurie Steuart.*

JOHN BRIEN, Defender (Respondent).—*Morton.*

No. 45.

Dec. 5, 1907.

Aliment—Pupil—Donation or Debt.—In 1906 a labourer raised an action against his wife's brother for decree for payment of £26, as being the amount expended by the pursuer on the defender's aliment. The pursuer averred that in 1897 he took the defender, then a destitute orphan eleven years old, into his own house, and alimanted him for two years, after which the defender was able to earn enough for his own support. Turnbull v. Brien.

Held that the action was irrelevant, the pursuer's averments shewing that the aliment had been given as a donation, and without any intention that it should form a debt against the defender.

In September 1906 James Turnbull, labourer, raised an action in the Sheriff Court at Edinburgh against John Brien, mason, praying for decree for payment of £26. 2D DIVISION.
Sheriff of the
Lothians and
Peebles.

The pursuer averred :—(Cond. 1) "The pursuer is a labourer, and resides at 22 Albert Street, Edinburgh. The defender, who is a brother of the pursuer's wife, being bereft of a home by the death of his father, the pursuer agreed with the defender to take him into his home as a boarder, and accordingly the defender went to reside there on 13th May 1897. . . ." (Cond. 2) "For two years after the said 13th May 1897, the defender, who was then between eleven and twelve years of age, continued to reside with the pursuer, and contributed nothing towards his own maintenance. He attended school during said period, and the pursuer, at his own expense, maintained the defender. The pursuer estimates said maintenance at 5s. per week, which he considers fair and reasonable, and for 104 weeks at said rate amounts to £26, being the amount sued for." (Cond. 3) "The defender thereafter in due course served an apprenticeship as a mason, and continued to reside with defender, and contributed towards his maintenance until 30th June 1906, when he left the pursuer's house and went to reside elsewhere. During his residence with pursuer the defender repeatedly promised to pay the pursuer for said maintenance, but he has failed to implement said promise. He has been repeatedly requested to make payment thereof to the pursuer, but he has refused or delayed to do so, and the present action has therefore been rendered necessary."

The pursuer pleaded ;—The defender being resting owing to the pursuer in the sum sued for, decree should be pronounced as craved.

The defender pleaded, *inter alia* ;—(1) The action is irrelevant.

On 21st February 1907 the Sheriff-substitute (Guy) sustained the first plea in law for the defender, and dismissed the action.

The pursuer appealed, and argued ;—The present action was not laid upon contract. The question was this—Was the amount expended by the pursuer upon the aliment and education of the defender to be presumed to be a donation by the pursuer to the defender, or was it to be presumed to be a debt due by the defender to the pursuer? When the person alimanted was in majority, or was a pupil or minor who had guardians, the presumption was that aliment was given as a donation, if no contract was made, because there being in these cases a person with whom a contract might be made, the reasonable inference was that the person giving the aliment would have contracted for repayment if he intended the expenditure to be a debt, but where the person alimanted was a pupil or minor without guardians, the presumption was that the aliment was given with the intention of

Dec. 5, 1907.

Turnbull v.
Brien.

constituting a debt, there not being a person with whom to contract. The only exceptions to this last rule were cases where the pupil or minor had estate of his own, and cases where the person giving the aliment was under a natural or legal obligation to support the pupil or minor.¹ The present was a case of a pupil, without guardians, who had no estate of his own at the time he was being alimented, and towards whom the pursuer was not under any obligation of support, for it could not be said that a brother-in-law was under any such obligation. The presumption, therefore, was that the amount expended by the pursuer on the defender's aliment constituted a debt against the defender, and there was nothing in the pursuer's averments to rebut that presumption.

The defender founded on the undernoted authorities.²

LORD STORMONTH-DARLING.—The Sheriff-substitute has sustained the first plea in law for the defender, which is that the action is irrelevant, and has dismissed the action. I think that the Sheriff is right. The pursuer is a labourer, and the husband of the defender's sister, and he says that in May 1897 he took the defender, who was then an orphan of eleven, into his house, and continued to support him until he began to serve his apprenticeship as a mason. The pursuer now sues the defender for the amount of the aliment furnished up to May 1899. After that date, as I understand, no claim is made, because the boy contributed enough to cover his maintenance until 1906, when he left the pursuer's house. The claim is thus obviously made in respect of aliment afforded to a pupil. I am of opinion that aliment allowed to a pupil by a person who is not under a natural obligation to support him must be considered to have been afforded *ex pietate*, and that there is no relevant claim against the pupil, even if he succeeds to a small sum of money in after life. If it be said that the defender is under a moral duty under these circumstances to reimburse the pursuer for his expenditure, I am afraid that the answer is that we have nothing to do with moral duties, and that a legal obligation cannot be incurred by a person who is not a legal *persona*. The pursuer further avers that the defender promised to pay for his maintenance, but I think that that averment is irrelevant, because there is no statement as to the terms of the promise or as to the time at which it was made. I propose therefore that the appeal should be dismissed and the judgment of the Sheriff-substitute affirmed.

LORD LOW.—I am of the same opinion. It has always been recognised that cases of this description must be treated each according to its own

¹ Steven v. Simpson, 1791, M. 11,458; Wilson v. Archibald, 1701, M. 11,427; Montgreenan v. Blair, 1624, M. 11,432, and 8918; Gourlay v. Urquhart, 1697, M. 11,438; Stirling v. Ottar, 1663, M. 11,432; Lady Lugton v. Hepburn, 1672, M. 11,435; Forbes v. Forbes, Nov. 4, 1869, 8 Macph. 85, *per* Lord Cowan, at p. 91; Elchies' Notes on Stair, p. 48; Ersk. iii. 3, 92; Bell's Prin. sec. 533; Fraser, Parent and Child, 3d ed. pp. 116-120.

² Cunningham v. MacGathen, Feb. 17, 1831, 9 S. 472; Drummond v. Swayne, Jan. 28, 1834, 12 S. 342; M'Gaws v. Galloway, Nov. 10, 1882, 10 R. 157, *per* Lord Justice-Clerk Moncreiff, at p. 162; Ligertwood v. Brown, June 25, 1872, 10 Macph. 832.

special circumstances. The special circumstances of this case as averred by Dec. 5, 1907. the pursuer, are as follows:—In 1897 the pursuer's brother-in-law, aged Turnbull v. Brien. between eleven and twelve years, was left an orphan and destitute owing Lord Low. to his father's death. The pursuer took him into his own home and maintained him there for two years, until he obtained an apprenticeship and was able to pay for his board and lodging. Now, the plain inference from these facts seems to me to be that the pursuer acted from a very natural and proper sense of duty without any ulterior motive, and without any idea of making a subsequent claim. The circumstances of the case seem to me to preclude the idea that the pursuer thought at the time that the boy was incurring a debt which he might afterwards be called on to pay. I am convinced that the idea of claiming repayment is an afterthought, suggested by the fact that the young man has now come into a little money. I am therefore of opinion that the Sheriff-substitute has rightly decided this case.

LORD ARDWALL.—I concur. The question is whether the aliment afforded by the pursuer to the defender was supplied *animo donandi*, or with the intention that a debt should be created against the defender. We had a careful and interesting citation of old authorities from Mr Steuart in support of the latter alternative, and there are *dicta* which to a certain extent support his contention. But I think that the tendency of the more recent authorities is to consider the question whether in cases such as the present the aliment supplied was intended to be a donation or a debt as one depending on the circumstances of each case, and not on any fixed rules or presumptions of law. And in the present case a consideration of the facts disclosed on the record leads me to the conclusion that the aliment, repetition of which is now sued for, was given *ex pietate* as a donation, and with no intention that it should form a debt against the defender. I therefore agree with the judgment of the Sheriff-substitute.

The LORD JUSTICE-CLERK concurred.

THE COURT dismissed the appeal.

MACKAY & YOUNG, W.S.—R. J. CALVER, S.S.C.—Agents.

DIONITIUS STEWART, Pursuer (Reclaimer).—*Morison, K.C.*—*A. A. Fraser.*

No. 46.

JOHN M'DOUGALL, Defender (Respondent).—*Dickson, K.C.*—*Kemp.* Dec. 13, 1907.

Sheriff—Small-Debt Procedure—Decree ad factum præstandum—Decree for delivery—Diligence—Imprisonment—Small-Debt Amendment (Scotland) Act, 1889 (52 and 53 Vict. cap. 26), secs. 1 and 2, and Sched. B.—The Small-Debt Amendment (Scotland) Act, 1889, enacts, sec. 1, that the Act shall be construed as one with the Small-Debt Act, 1837, and sec. 2, that the Sheriff, in the Small-Debt Court, may grant an order, in the form of Schedule B attached to the Act, for delivery of any corporeal moveables not exceeding £12 in value. The form of order in Schedule B concludes with the words "and grants warrant for all lawful execution hereon."

Held that these words necessarily refer back to Schedule A of the principal Act, which authorises imprisonment without further procedure or application to the Sheriff (in cases where imprisonment is competent), and that, as imprisonment was the only mode of enforcing a decree *ad factum præ-*

Dec. 13, 1907. *standum*, they authorised a pursuer in a Small-Debt action, who held an order in that form for delivery of a moveable, to proceed, on the expiry of the days of charge, to enforce the order by imprisonment without further application to the Sheriff; and action of damages for wrongous imprisonment, at the instance of the defender who had been imprisoned, held to be irrelevant.

Stewart v.
M'Dougall.

1ST DIVISION.
Lord Dundas. ON 1st September 1906 Dionitius Stewart, commercial traveller, Aberdeen, brought an action against John M'Dougall, grain merchant there, concluding for £500 as damages for wrongous imprisonment.

The pursuer averred that he had been in the employment of the defender as a traveller for more than two years prior to 26th April 1906. That at that date he held, as he was entitled, under the terms of his employment, a season ticket in his favour of the Great North of Scotland Railway Company, taken out on 15th March 1906, and current for a year from that date. That on 1st June 1906 the defender raised an action against him in the Small-Debt Court at Aberdeen, concluding for delivery of the said ticket. That on 21st June the defender obtained decree against him in that action, and that an extract of the decree was issued in the following terms:—"At Aberdeen, the 21st day of June 1906 years, the Sheriff of Aberdeen, Kincardine, and Banff decerns and ordains the within designed D. Stewart, defender, to deliver to the pursuer a railway ticket of the Great North of Scotland Railway Company, numbered 5315, and issued," &c. . . . "and finds the within designed defender liable to the pursuer in the sum of 10s. 1d. sterling, and grants warrant for all lawful execution hereon. Robert Fiddes, Sheriff-Clerk Depute." That on 2d July 1906 he was charged under that decree, this charge being in the following terms:—"D. Stewart, before designed, you are hereby charged to implement the decree, of which, and of the complaint whereon the same proceeded, the within is a copy, within ten days from this date, under pain of imprisonment, so far as regards the delivery, and poinding and sale for the expenses, without further notice. . . ."

The pursuer further averred:—"The pursuer, who disregarded the said irregular and incompetent proceedings before mentioned, was, on 17th July 1906, at the instance of and in terms of instructions by the defender, forcibly, illegally, and without lawful warrant, apprehended by D. R. Hendry, sheriff-officer, Aberdeen, and conveyed to the prison of Aberdeen . . . The said apprehension and incarceration of the pursuer by the defender, or on his instructions, were illegal and without any warrant. The Sheriff-substitute had not authorised said illegal proceedings, which were initiated solely by the defender and those employed by him and put into force *brevis manu*. . . . Explained that it is not competent for a warrant of imprisonment or for execution by imprisonment to follow on a decree obtained under the Small-Debt Acts."

The pursuer pleaded, *inter alia*;—(1) The defender, having, without any warrant, caused the pursuer to be apprehended and imprisoned, is liable in reparation to the pursuer.

The defender pleaded, *inter alia*;—(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (2) The action is incompetent, being excluded by the provisions of the Small-Debt Act, 1837 (1 Vict. c. 41).

On 16th March 1907 the Lord Ordinary (Dundas) pronounced this interlocutor:—"Finds that the pursuer has failed relevantly to aver that the defender, without any warrant, caused him to be appre-

hended and imprisoned: Therefore sustains the defender's first plea in Dec. 13, 1907. law, assoilzies him from the conclusions of the summons,"

The pursuer reclaimed and argued;—The action was relevant, for the imprisonment here had been unwarranted. The Small-Debt Act of 1889† did not authorise imprisonment to follow on such a decree as this; at any rate it did not authorise it at the discretion of the holder of the decree without further application to the Sheriff. If imprisonment were competent at all it could only be legally carried out in the usual way, viz., by following the provisions of sec. 11 of

Stewart v.
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* " OPINION.—The pursuer seeks by this action to recover £500 in name of damages, upon the ground that the defender, 'without any warrant, caused the pursuer to be apprehended and imprisoned.' On referring to the condescendence, one finds a somewhat involved history of a Small-Debt action at Aberdeen, in which the defender sued the pursuer for delivery of a railway ticket, and obtained decree, with expenses, on 21st June 1906. The pursuer's counsel admitted that he could not now reopen, or ask review of, the proceedings in the Small-Debt case; but he maintained that the manner in which the decree therein obtained was put into execution was injurious to him and illegal. What actually happened was as follows:—[His Lordship narrated the averments]. The question raised upon these averments seems to be whether or not the defender's actings were 'lawful execution' of the decree of 21st June 1906. It becomes necessary, therefore, to investigate the terms of the Small-Debt Acts, by which the diligence following upon such actions is regulated. The leading Act is 7 Will. IV. and 1 Vict. c. 41 (1837). That Act provides by section 13 that the Sheriff's decree, stating the amount of expenses (if any) found due to any party, and containing warrant for arrestment, and for poinding and imprisonment when competent, shall be annexed to the summons or complaint, and on the same paper with it, agreeably to the form in Schedule (A) annexed to the Act, or to the like effect, 'which decree and warrant, being signed by the clerk, shall be a sufficient authority for instant arrestment, and also for poinding and sale

† The Small-Debt Amendment (Scotland) Act, 1889 (52 and 53 Vict. cap. 26), enacts, sec. 1, that that Act shall be construed as one with the Small-Debt Act, 1837, and the Sheriff Courts Act, 1853, so far as consistent with the tenor of these Acts respectively, and these Acts together may be cited as the Small-Debt (Scotland) Acts, 1837 to 1889.

Sec. 2. "Where a party claims to be owner, or to be entitled to the possession, of any corporeal moveables, the value of which shall be proved to the satisfaction of the Sheriff not to exceed £12, and which are wrongfully withheld from him, he may apply in the Small-Debt Court for an order for delivery thereof, and the Sheriff may grant such order accordingly; and the application therefor and the extract of the decree, if granted, to follow thereon shall be as nearly as may be in the form of Schedules A and B respectively; but in other respects the procedure shall be conform, as nearly as may be, to the provisions of the said first recited Act" (the Act of 1837) "so far as agreeable hereto: Provided always, that if delivery of any of the subjects sued for shall have become impossible, or if their value be alternatively concluded for, the Sheriff may give decree for their value to an amount not exceeding £12."

Schedule B. "At the day of one thousand eight hundred and the Sheriff of the shire of decerns and ordains the within designed, defender, to deliver to the pursuer [the subjects within referred to, or state to what extent the order for delivery is granted]; and finds the said defender liable to the pursuer in [the sum of, any sum decerned for in lieu of others of the subjects that cannot be delivered, with] of expenses; and grants warrant for all lawful execution hereon. G. H., Sheriff-clerk."

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the Personal Diligence Act, 1838,* and making application to the Sheriff for a warrant. It was otherwise in the Small-Debt Act of 1837,† and the alteration in the phraseology of the 1889 Act¹ was deliberate, and the only inference that could be drawn from it was that the practice was intended to be different. Further, the Act of 1837 † could not be appealed to as regulating the practice with regard

and imprisonment, where competent, after the elapse of ten free days from the date of the decree. . . . The form in Schedule A (No. 7) *inter alia*, 'decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale and imprisonment, if the same be competent, after . . . free days.' It appears, therefore, that under the principal Act of 1837 a defender who had failed to pay a civil debt (not less in amount than £8, 6s. 8d.—see 5 and 6 Will. IV. c. 70), might, after the expiry of the prescribed charge, be imprisoned without further procedure. The Debtors (Scotland) Act, 1880 (43 and 44 Vict. c. 34), abolished imprisonment for debt, but section 4 provided, *inter alia*, that nothing contained in the Act should affect or prevent the apprehension or imprisonment of any person under any decree or obligation *ad factum præstandum*. The reason for this provision is, in the words of Lord President Inglis in *Mackenzie*, 1883, 10 R. 1147, at p. 1151, 'very clear, and it is simply this, that if the right to imprison were abolished in such circumstances, no other method of enforcing such decrees would remain.' Then in 1889 the Small-Debt Amendment (Scotland) Act (52 and 53 Vict. c. 26) became law.

* The Personal Diligence (Scotland) Act, 1838 (1 and 2 Vict. cap. 114), enacts, that where a charge has been given on an extract decree in the Sheriff Court, and the days of charge have expired, the execution of the charge may be recorded, and, sec. 11, " . . . if warrant to imprison be desired, the creditor or a procurator of Court shall endorse and subscribe on the said extract a minute in the terms of the Schedule (No. 8) hereunto annexed (or as near to that form as circumstances will permit); and the said clerk shall, if there be no lawful cause to the contrary, write on the extract this deliverance, 'Fiat ut petitur,' and shall date and subscribe the same; and it shall be lawful by virtue of the said extract and deliverance to search for, take, apprehend, imprison, and, if necessary for that purpose, to open shut and lockfast places as aforesaid."

† The Small-Debt (Scotland) Act, 1837 (7 Will. IV. and 1 Vict. cap. 41), enacts,—Sec. 13. " . . . And the decree stating the amount of the expenses (if any) found due to any party (which may include personal charges, if the Sheriff think fit), and containing warrant for arrestment, and for poinding and imprisonment when competent, shall be annexed to the summons or complaint, and on the same paper with it, agreeably to the form in Schedule (A) annexed to this Act, or to the like effect, which decree and warrant, being signed by the clerk, shall be a sufficient authority for instant arrestment, and also for poinding and sale and imprisonment, where competent, after the elapse of ten free days from the date of the decree, if the party against whom it shall have been given was personally present when it was pronounced; but if he was not so present poinding and sale and imprisonment shall only proceed after a charge of ten free days. . . ."

Schedule (A), No. 7. "*Decree for Pursuer in a Civil Cause.*—At the . . . day of . . . one thousand eight hundred and . . . the Sheriff of the shire of . . . finds the within designed . . . defender liable to the pursuer in the sum of . . . with . . . of expenses, and decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale and imprisonment, if the same be competent after . . . free days. . . . J. P., Sheriff-clerk."

¹ 52 and 53 Vict. cap. 26.

to decrees *ad factum præstandum*, for such decrees were only introduced by the 1889 Act,¹ and that Act contained the code, and the only code, for them. The provisions as to imprisonment of the 1837 Act² that were appealed to applied only to imprisonment for civil debt, and as that imprisonment was now abolished, they were clearly inapplicable to the present case.

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Argued for the respondent;—The imprisonment here had been duly warranted, and all the statutory requirements had been followed both in the letter and the spirit. The pursuer in the Small-Debt action held a warrant for “all lawful execution,” and the lawful execution for the enforcement of a decree *ad factum præstandum* was by imprisonment, which had been specially preserved for such decrees in sec. 4 of the Debtors Act, 1880,³ when imprisonment generally for civil debt was abolished. Not only was it a lawful form of execution, but it was the only form of execution for the enforcement of

Section 1 provided that the Act should be construed as one with the recited Acts, viz., the principal Act of 1837, and the Sheriff Courts (Scotland) Act, 1853, so far as consistent with the tenor of these Acts respectively. By section 2 a new jurisdiction was conferred upon the Small-Debt Court. Provision was thereby made for an action for delivery of corporeal moveables up to the value of £12; ‘and the application therefor, and the extract of the decree, if granted, to follow thereon, shall be as nearly as may be in the form of Schedules A and B respectively; but in other respects the procedure shall be conform, as nearly as may be, to the provisions of the said first recited Act, so far as agreeable hereto.’ The form of Schedule B, ordaining delivery, concludes with the words, ‘and grants warrant for all lawful execution hereon.’ The Small-Debt action between the present parties was, as already explained, one for delivery of a railway ticket, in virtue of section 2 of the Act of 1889, and the extract decree admittedly followed the form prescribed by Schedule B. The pursuer’s counsel founded upon the difference of the language as to execution contained in Schedule A (No. 7) of the Act of 1837, and Schedule B of the Act of 1889. They strenuously urged that (as is the case) the earlier schedule was applicable only to decrees for civil debt, and not *ad facta præstanda*; that (as is also the case) imprisonment for civil debt was abolished in 1880, though the Debtors Act of that year made exception in the case, *inter alia*, of decrees *ad facta præstanda*; that the alteration in the language of Schedule B of the Act of 1889 was intentional; and that the intention of the Legislature, in passing that Act, was to prevent imprisonment following upon a decree for delivery under section 2 thereof, at all events without application being made to the Sheriff for a special warrant to imprison. The defender’s counsel, on the other hand, contended that the words in Schedule B of the Act of 1889—‘and grants warrant for all lawful execution hereon’—necessarily refer back to the language of Schedule A of the principal Act of 1837, which authorises imprisonment, without further procedure or application to the Sheriff, ‘where competent’; and that, as imprisonment is the appropriate, and indeed the only, method of execution in the case of failure to implement a decree *ad factum præstandum*, it is competent under the Act of 1889 to proceed to such execution without further procedure than that contained in and authorised by a warrant under Schedule B. I think that the defender’s contention upon this summary of the matter is right, and that the pursuer’s argument is wrong. The pursuer’s case is, in my judgment, in no way assisted—but is indeed weakened—by a reference to the procedure, under analogous circumstances, which is authorised by the Personal Diligence Act,

¹ 52 and 53 Vict. cap. 26.² 7 Will. IV. and 1 Vict. cap. 41.³ 43 and 44 Vict. cap. 34.

Dec. 13, 1907. such decrees, whether Small-Debt or not. Nor was a further application for a warrant to imprison necessary, for by sec. 1 of the Small-Debt Act of 1889¹ it was provided that the Small-Debt Act of 1837² should, so far as consistent, be construed along with it; and on referring back to that Act there was a clear provision that imprisonment on Small-Debt decrees should follow without further application to the Sheriff. The provisions of the Personal Diligence Act³ had no application, for the code provided by the Small-Debt Acts for Small-Debt proceedings was a separate branch of process, and was complete in itself.

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At advising,—

LORD PRESIDENT.—In this case the Lord Ordinary has given a very careful judgment, with which I entirely agree. I have very little to add except this, that it is quite clear that the provisions of the Personal Diligence Act

1838 (1 and 2 Vict. cap. 114), because I do not think that that Act has any application to the Small-Debt Court, the rules and regulations of which are, I apprehend, codified in the legislation specially applicable to it alone. I do not know, and may not conjecture, the reasons which led Parliament to alter the phraseology of Schedule A of the 1837 Act, when Schedule B of the 1889 Act became law. But, as matter of construction and of inference from the language used, I should suppose that the Legislature in 1889 had in view the proviso at the end of section 2 of the Act of that year, to the effect that 'if delivery of any of the subjects sued for shall have become impossible, or if their value be alternatively concluded for, the Sheriff may give decree for their value to an amount not exceeding twelve pounds.' For it seems plain enough that, on the one hand, a decree *ad factum præstandum* for delivery could not be executed by way of poinding; and, on the other hand, that a decree for a sum of money could not be executed by way of imprisonment. The pursuer's counsel further contended that imprisonment was not a valid or legal execution of the warrant 'for all lawful execution hereon,' because neither the decree nor the charge indicate sufficiently or at all the duration of the intended imprisonment. They referred to the case of *Muir*, 1849, 11 D. 487, as an exposition of the common law of the land upon this matter. That case had a good many specialties, and I do not think that, upon the point in question, it really helps the pursuer at all. I accept the words of Lord Jeffrey that it is not 'either a safe or a tolerable practice to give the body of any subject of this realm into the hands of a jailer, without any specification of the terms or conditions of the imprisonment.' But I read his Lordship's words in conjunction with those of the Lord President (Boyle) in the same case, where he says that 'the warrant of incarceration should be clear and explicit, and should contain a distinct statement of the acts on performance of which the prisoner is entitled to liberation.' Now, in the present case, I think that the jailer could have no reasonable room for doubt, upon presentation to him of the decree and charge, that the act on performance of which the prisoner was entitled to liberation was the delivery by him of the railway ticket which the Sheriff had ordained him to give up. I should here point out that the summons in this Small-Debt action contained no alternative crave for the value of the railway ticket, and it is nowhere suggested that delivery of it had, or has, become impossible. In these circumstances the argument for the pursuer appears to me to fail entirely, because he has not, in my judgment, shewn that he was apprehended and imprisoned without warrant, or that the defender's execution of his Small-Debt decree was in

¹ 52 and 53 Vict. cap. 26.

² 7 Will. IV. and 1 Vict. cap. 41.

³ 1 and 2 Vict. cap. 114.

have nothing to do with the Small-Debt Acts. The Small-Debt Acts form Dec. 13, 1907. a code by themselves. When you come to consider what took place in this case it is clear that the pursuer was not left in any doubt as to the diligence to be used against him or put to any hardship, and accordingly, for the reasons which the Lord Ordinary has given, I think it is out of the question that he should be allowed to proceed in an action of damages.

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LORD M'LAREN.—I am of the same opinion. It is clear that the words "all lawful execution" in a case of this kind do include imprisonment, for it has been laid down by an eminent Judge in expounding the Debtors Act that unless imprisonment were retained to enforce a decree *ad factum præstandum* there would be no other method of enforcing such a decree. I am therefore of opinion that the present proceedings have been quite in accordance with the Small-Debt Act and the amending statutes.

LORD KINNEAR and LORD PEARSON concurred.

THE COURT adhered.

ARTHUR F. FRAZER, S.S.C.—GUILD & GUILD, W.S.—Agents.

MRS JEANNIE PETERS OR BURGOYNE, Pursuer (Respondent).—

Kennedy, K.C.—A. M. Mackay.

ANDREW WALKER, Defender (Appellant).—*D.-F. Campbell—*

C. D. Murray.

No. 47.

Dec. 11, 1907.

Burgoyne v.
Walker.

Reparation—Master and Servant—Liability of master for negligence of servant—Whether servant of A, pro hac vice, servant of B.—In pursuance of their scientific investigations, the Fishery Board for Scotland from time to time arranged with the owners of trawl boats to carry on board their boats an employee of the Fishery Board, who was allowed to collect from the catches, and retain for the use of the Board, specimens of different kinds of fish. In return for this service, trawl boats carrying a Fishery Board employee were allowed to fish within restricted waters, and to retain the catches, without rendering themselves liable to a charge of illegal trawling.

any way illegal. I confess I do not consider the pursuer entitled to much sympathy as regards his incarceration. I apprehend that he might, if he considered the defender's actings to be illegal, have suspended the charge. But he preferred to 'disregard' it, hoping, I suppose, to be able to recover a handsome amount of damages if the defender should proceed to execute the decree in the manner which he clearly intimated that he intended to do.

"An alternative argument was submitted on behalf of the pursuer to the effect that, in any event, the statutory procedure had not been followed out. His points were (1) that, in the extract decree, no express mention was made of the 'seven days' noted by the Sheriff-substitute in the book, and (2) that the charge does not expressly say ten 'free' days from its date. It is admitted, as regards both points, that the time allowed was, in fact, ample. There is, I think, no substance in either of these points, and I shall not deal with them except to note that they were put before me.

"Upon the whole matter, therefore, my conclusion is that the pursuer has stated no relevant ground of damage. The defender's first plea in law falls to be sustained, and as the objection to the relevancy does not merely relate to defective pleading but goes to the essence of the case, I shall grant decree of absolvitor, and, of course, with expenses."

Dec. 11, 1907. The Fishery Board employee was entitled to point out the places where he wished the trawling to be conducted, but neither he nor the Board had any control over the navigation or management of any trawl boats so engaged.

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A trawl boat with a Fishery Board representative on board under an arrangement of the above description was stranded through the fault of her master, and the Fishery Board representative in consequence died from exposure. His widow brought an action of damages against the owner of the trawler, who pleaded that he was not responsible for the fault of the master in respect that the master was on the occasion in question *pro hac vice* in the service of the Fishery Board.

Held that the master was not *pro hac vice* the servant of the Fishery Board, and that the defender was liable in damages to the pursuer.

2D DIVISION.
Sheriff of
Aberdeen,
Kincardine,
and Banff.

IN July 1906 Mrs Jeannie Peters or Burgoyne, widow of John Darling Burgoyne, hatchery attendant in the employment of the Fishery Board for Scotland, as an individual, and as tutor for her pupil son, raised an action in the Sheriff Court at Aberdeen against Andrew Walker, registered and managing owner of the steam-trawler "Star of Hope," of Aberdeen, praying for damages on account of the death of her husband.

The pursuer averred, *inter alia*:—(Cond. 2) "In pursuance of their scientific investigations, the officials of the Fishery Board for Scotland in charge of the Board's station at Nigg from time to time arrange with the owners of trawl boats fishing from the port of Aberdeen to carry on board their boats an employee of the Fishery Board, who is allowed to collect from the catches, and retain for the use of the Board's officials, specimens of different kinds of fish. In return for this service, trawl boats carrying a Fishery Board employee are allowed to fish within restricted waters, and are allowed to retain the catches got therein, without rendering themselves liable to a charge of illegal trawling. . . . Neither the Fishery Board nor its representatives on board such trawl boats, nor anyone in its employment, has, as a consequence of the arrangement referred to, any concern with the navigation or management of any trawl boats so engaged. . . ." (Cond. 4) "In or about the beginning of December 1905 the officials of the Fishery Board at Nigg arranged with the defender, or with his servant the skipper of the 'Star of Hope,' to take pursuer's husband to sea for the purpose of collecting specimens of fish, as mentioned in condescendence 2, and on the morning of the 4th of December 1905, the vessel left the port of Aberdeen and proceeded to sea with pursuer's husband on board for the purpose of fishing under the arrangement above condescended on . . ." (Cond. 5) "During the 4th of December the skipper and crew on board the vessel conducted trawling operations, and the pursuer's husband was engaged in collecting specimens for his employers, and at or about 1 A.M. on the following morning the vessel was engaged in trawling at or near a point in the North Sea near Collieston on the Aberdeenshire coast, when, owing to the negligence of the skipper of the vessel, for whom the defender is responsible, the vessel ran ashore on the rocks at that point, and as a consequence the pursuer's husband and two members of the crew were drowned or perished from exposure . . ."

The defender in answer averred, *inter alia*:—(Ans. 2) "Denied; and explained that, in pursuance of their scientific investigations, the Fishery Board for Scotland, through their officials in charge of the Board's station at Nigg, from time to time arrange with the owners

of trawl boats fishing from the port of Aberdeen to get the use of these vessels, their crews, gear, &c., for specified periods, and for the purpose of fishing in the service or under the orders of the Fishery Board in specified areas, so as to obtain specimens of various kinds of fish. These vessels, when so engaged, carry on board a representative of the Fishery Board, under whose directions and orders the skipper acts, and who selects from the catches the fish he wishes, which are retained by him for the Board's use. The balance of the vessels' catches are allowed to be retained by the owners, and are the remuneration given to the latter for the use of their vessels. Trawl boats, when so engaged, are in the service or acting under the orders of the Fishery Board . . . and, in terms of the provisions of the statutes and relative bye-laws, are exempt from the penalties imposed thereunder for fishing in prohibited waters. They are *pro tempore* outwith the possession and control of the owners; and the masters and crews become *pro hac vice* the servants of the Fishery Board."

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The pursuer pleaded, *inter alia*;—(1) The pursuer's husband having lost his life through the negligence of the defender's servant, for whom defender is responsible, she is entitled to reparation therefor from defender.

The defender pleaded, *inter alia*;—(2) The pursuer's husband having lost his life, not through the negligence of the defender or that of anyone for whom he is responsible, he is entitled to be assolvied from the conclusions of this action, with expenses. (3) The vessel in question, with her master and crew, having, on the occasion condescended upon, been outwith the control and possession of the defender, he is not responsible to the pursuer for the acts or defaults of her master or crew at that time, and is entitled to absolvitor, with expenses. (4) *Separatim*, the said John Darling Burgoyne and the skipper of the "Star of Hope" having, on the occasion in question, been engaged in the same work, on the same vessel, the defender is, in the circumstances founded on, under no liability to pursuer in respect of her husband's death, and is therefore entitled to absolvitor, with expenses.

On 11th January 1907 the Sheriff-substitute (Henderson Begg), after a proof, pronounced this interlocutor:—"Finds in fact (1) that on 5th December 1905, about 1.30 A.M., the steam-trawler 'Star of Hope,' belonging to the defender, stranded on the coast near Collieston, owing to the recklessness and negligence of the skipper of the vessel; (2) that, as a consequence, the pursuer's husband, John Darling Burgoyne, a servant of the Fishery Board of Scotland, perished from exposure about six hours later; and (3) that, at and before the time of stranding, the skipper and the said John Darling Burgoyne were engaged in trawling for fish, under an arrangement whereby the skipper remained the servant of the defender, and the said John Darling Burgoyne remained the servant of the Fishery Board of Scotland: Finds in law that the defender is liable in damages to the pursuer as an individual, and also as tutor for the pupil, John Darling Burgoyne, the child of the pursuer, and of her said deceased husband: Assesses the damages," &c.*

* "NOTE.—(After reviewing the evidence and coming to the conclusion that the stranding of the 'Star of Hope' was due to the negligence of her skipper)—The arrangement between the Fishery Board and the defender was a very peculiar one. I think that it is accurately set forth in articles

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The defender appealed, and argued;—The evidence did not establish that the stranding of the "Star of Hope" was occasioned by the fault of her master; but in any view the master, at the time of the stranding, was *pro hac vice* the servant of the Fishery Board, and not of the defender. The servant of A might by working towards a common end, along with the servants of B, and submitting himself to the control and orders of B, become *pro hac vice* B's servant in such a sense as not only to disable him from recovering from B for injuries sustained through the fault of B's proper servants, but also to exclude the liability of A for injury occasioned by the fault of the servant to B's own servants.¹ Each case depended on its own circumstances, the question being—Had the servant of A so submitted himself to the control of B as to become for the time being B's servant? and that question depended on the nature of the

2 and 4 of the pursuer's condescendence. . . . The chief question in the present case is whether that arrangement involved the doctrine of *collaborateur* as between Burgoyne and the skipper; and the answer to the question admittedly depends on whether the two men are to be held to have been in the service of a common master at the time of the accident—*Johnson v. Lindsay & Co., L. R., [1891] A. C. 371*. The defender maintains that while Burgoyne continued throughout to be in the service of the Fishery Board, the skipper had become *pro hac vice* the servant of the Board, the vessel, with skipper and crew, having passed from the possession and control of the defender into the possession and control of the Board. Of course, from the time of leaving port on the voyage in question the vessel was outwith the personal possession and control of the defender, just as she would have been in any ordinary trawling cruise in the North Sea. But what the defender means is that through Burgoyne being on board the vessel the Fishery Board possessed the vessel, and controlled the master and crew. When one looks into the matter, however, the control exercised by Burgoyne turns out to have been of a very limited character. He was entitled to indicate the places in Aberdeen Bay where the trawling operations were to be conducted, and to prescribe the length of the drags, so as to get live fish. But I do not see that he had any further control of the skipper and crew, and, of course, he had no right to interfere with the navigation of the vessel. The skipper was on board not merely to navigate the vessel, but also to look after the defender's interest in the fish caught, the defender's share of the fish being generally about ninety per cent of the catch. Of course, the skipper and crew were engaged and paid by the defender, and Burgoyne could not have dismissed any of them. In these circumstances I do not think that any of the authorities to which I was referred in the course of the extremely able argument to which I had the pleasure of listening, would justify me in holding that the skipper was the servant of the Fishery Board *pro hac vice*. Adapting the words of Lord Watson, in the case above mentioned, to the present case, I hold that the circumstances are not such as to shew conclusively that the skipper submitted himself to the control of the Fishery Board, and either expressly or impliedly consented to accept the Board as his master for the purpose of the common employment—trawling for fish.

"The other authorities to which I refer are *Rourke v. White Moss Col-*

¹ *Johnson v. Lindsay & Co., L. R., [1891] A. C. 371*, per Lord Watson, at p. 382, and Lord Herchell at p. 377; *Rourke v. White Moss Colliery Co., 1877, L. R., 2 C. P. D. 204*; *Donovan v. Laing, Wharton, and Down Construction Syndicate, Limited, L. R., [1893] 1 Q. B. 629*; *Cairns v. Clyde Navigation Trustees, June 17, 1898, 25 R. 1021*; *Connelly v. Eosd., Oct. 16, 1902, 5 F. 8*; *M'Fall v. Adams & Co., 1907, S. C. 367*.

work and the person or persons by whom it was being carried out. Dec. 11, 1907.
 The work here was the work of the Fishery Board, and not the work of the defender, and it was being carried out by the Fishery Board with a hired trawler, plant, and crew. The Board had an official of their own on board, and he had the right to control the operations by pointing out where the vessel was to go. The master of the "Star of Hope," therefore, was at the time of the accident in the service of the Fishery Board, not in that of the defender, and the defender consequently was not liable for the negligence of the master. It made no difference that the defender received a large—probably by far the larger—proportion of the catch, that was merely the mode of paying for the hire of the vessel and crew. By the bye-laws framed by the Fishery Board under the Herring Fishery (Scotland) Act, 1889,¹ trawling within the prohibited areas was legal only when the trawling was being carried on either by persons in the service of the Board or by persons who had the permission in writing of the Board. In the present instance there was not any permission in writing granted to the master, and therefore, unless he was in the service of the Board, he was doing an illegal act in trawling—that was to say, in trawling for the benefit of the defender and in his service. Alternatively, if the control of the trawling was not entirely in the hands of the Fishery Board, then it must either have been in the hands of the defender, in which case the pursuer's husband must be regarded as being for the time a servant of the defender, or it was a joint adventure by the Board and the defender, and in either view the defender was not liable on the principle of *collaborateur*.

The pursuer was not called upon.

LORD JUSTICE-CLERK.—In this case we have had a very able argument from Mr Murray. Having carefully considered the case and the interlocutor and note of the Sheriff-substitute, I have come entirely to concur in everything that the Sheriff-substitute has said. In this particular case the vessel

liery Co., 1877, 2 C. P. Div. 205; *Donovan v. Laing*, [1893] 1 Q. B. 629; *Cairns v. Clyde Navigation Trustees*, 1898, 25 R. 1021; and *Connelly v. Clyde Navigation Trustees*, 1902, 5 F. 8.

"The defender's procurator further founded on the cases mentioned in Abbott on Shipping, 14th ed., p. 65, and MacLachlan on Shipping, 4th ed. (1892), p. 354 *et seq.*, in regard to a contract of *locatio navis et operarum magistri et nauticorum*. But the interest which the defender retained in the proceeds of the cruise now in question seems to me to render these cases inapplicable.

"An alternative argument put forward by the defender's procurator was that Burgoyne occupied the same legal position as a guest or licensee on board the vessel, taking the risk of negligence on the part of his host's servants. But what seems to me fatal to this argument is the fact that under the arrangement between the defender and the Fishery Board, Burgoyne was as much entitled to be on board as the skipper and crew.

"Lastly, the defender's procurator argued that the defender and the Fishery Board should be regarded as joint adventurers or partners in a trawling speculation, to which the Fishery Board contributed Burgoyne, with the right to trawl in closed waters, and the defender contributed all else. I can hardly accept this as a correct description of the arrangement between the parties; and there is nothing in the evidence to suggest that either the skipper or Burgoyne accepted the supposed joint adventurers or partners as his new masters. . . ."

¹ 52 and 53 Vict. cap. 23, sec 6.

Dec. 11, 1907. undertook to fish in certain waters in which the Fishery Board were entitled to prevent anyone from fishing, although they were entitled to sanction fishing in these waters, on certain conditions, for the purposes of scientific research. These conditions were that the trawl owners were to take as their share the entire catch except a certain quantity of plaice, which were required for scientific purposes ; and in order that the fishing might be conducted in such a manner as the Fishery Board considered suitable, an official of the Board was to be on the vessel to see that the fishing took place at such spots as were proper for the scientific ends in view. The Fishery Board officer had no other function whatever. He could not interfere with the navigation in any way, and if the master of the trawler thought that any particular spot pointed out for trawling by the Fishery Board officer was not safe for navigation, the master could refuse, and in the interest of his owners was bound to refuse, to take the vessel to the spot pointed out by the Fishery Board officer. Once the Fishery Board officer had pointed out where he wished the vessel to go, the manœuvres for taking her there were entirely in the hands of the master and crew. The master in doing his work was no doubt doing it in part to fulfil the objects of the Fishery Board, but he was also doing it for the profit of his owner, who would appropriate the balance of the catch. It was plainly a speculation for profit on the part of this trawl owner—a speculation for profit in exactly the same sense as in any ordinary case of trawling. He might bring up a large catch or a small catch or nothing at all. That is just what would happen in any ordinary trawling adventure. To say in these circumstances that the vessel had been so handed over to the Fishery Board that the Board became the employers of the master and crew appears to me to be out of the question. I am very well satisfied with the excellent note of the Sheriff-substitute, and I move your Lordships to adhere.

LORD LOW.—I am of the same opinion. There are two questions in the case—(1) whether the stranding was due to the negligence of the skipper of the trawler, and (2) whether the skipper was for the purpose of the adventure in question truly the servant of the Fishery Board. On the first question I entirely agree with the Sheriff-substitute. (His Lordship considered the evidence.) With regard to the second question, I have really very little to add to what your Lordship has said. No doubt Mr Burgoyne, as representing the Fishery Board, had right to indicate in what part of Aberdeen Bay he desired trawling operations to be carried on. But the conduct of these operations and the navigation of the vessel were entirely under the control of the skipper as the servant of the owner and in the owner's interest. I am therefore of opinion that the judgment of the Sheriff-substitute was right.

LORD ARDWALL.—I also agree. The main contention put forward by Mr Murray was that the defender was not liable, because at the time of the wreck the master of the trawler "Star of Hope" was not his servant but the servant of the Fishery Board, and that accordingly (1) the defender is not answerable for him, and (2) the deceased John D. Burgoyne having lost his life through the fault of a fellow-servant, the pursuer's claim in respect of his death is excluded. Now, I think that the facts of this case do not

bring it up to any of the cases in which it was held that a servant hired out to another person was so entirely under the control of that other person that the person whose general servant the servant so hired out was, was not liable for any accident which might occur through the negligence of the servant so hired out. In such cases two test questions arise—(1) For whom was the work being done at the time when the accident happened? and (2) What was the nature of the control retained over the hired-out servant by the person whose servant he generally was?

Dec. 11, 1907.
Burgoyne v.
Walker.
Lord Ardwall.

Now, in regard to the work, the work in the present case was the ordinary work of a trawler, neither more nor less. Neither the defender nor anyone else got pecuniary remuneration from the Fishery Board. The owner, master, and crew of the trawler were paid just like those of any other trawler, out of the proceeds of the adventure. The only difference was that on this particular fishing voyage the vessel had on board an official of the Fishery Board, with tubs into which he put his live fish, and that the trawl owner instead of keeping the whole catch was bound to hand over to the Fishery Board a certain quantity of fish of a certain kind, and in return for this he received the benefit of being allowed to fish in waters where it was in the ordinary case illegal to fish and where the chances of success would certainly be much increased. That was quite an intelligible arrangement, but it did not convert the trawler and its crew into a trawler and crew of the Fishery Board engaged solely or principally in their work. The leading object was trawling on behalf of the owner and others interested, and it was a mere incident of the particular voyage that the Fishery Board had a right to get a small portion of the fish.

If we compare the present case with the case of *Rourke v. The White Moss Colliery Company*,¹ it is easy to see the broad distinction between the two cases. In *Rourke*¹ the injured man was in the service of a pit-sinker. While the pit-sinking was going on no other work in the colliery was going on. The only work which was being carried on at the time and place when the accident happened was pit-sinking, and not working coal. The pit-sinker was a contractor entirely independent of the colliery owners, and although they provided the plant and an engine and engineer, they gave over the whole control thereof to the pit-sinker, or in other words lent both engine and engineer to the pit-sinker. It was accordingly held that the colliery owners were not liable for the injuries caused to the plaintiff by the fault of the engineer.

With regard to the question as to whether at the time of the wreck the vessel was under the control of the Fishery Board or their servant the deceased John Burgoyne, the evidence is I think clear to the effect that the control exercised by the deceased or the Fishery Board was of a very limited description. It is proved that the deceased was entitled to direct, and did direct, the master as to the parts of Aberdeen Bay he should trawl over, but he had truly no control, in the real sense of that term, over the master. For instance, if the master had thought that from any cause there was risk to the vessel in going where the deceased wished him to go, he had an absolute right to refuse to go, and the whole navigation and control

¹ L. R., 2 C. P. D. 205.

Dec. 11, 1907. of the ship as to steering, speed, engines, and everything else was in the master's hands as representing the defender and responsible to him. I am therefore unable to hold that it can be said in this case, as was said in others, that the defender had parted with the control of the vessel and its master and crew to the Fishery Board or its official.

Burgoyne v.
Walker.

Lord Ardwall.

(His Lordship then considered the question of fault, coming to the same conclusion as the Sheriff.)

LORD STORMONTH-DARLING was absent.

THE COURT dismissed the appeal, affirmed the interlocutor appealed against, and found in fact and in law in terms of the findings in fact and in law in said interlocutor.

D. HILL MURRAY, S.S.C.—ALEX. MORISON & Co., W.S.—Agents.

No. 48.

WILLIAM HENRY GILL, Claimant (Respondent).—

Kennedy, K.C.—Gillon.

Dec. 14, 1907.

THE ABERDEEN STEAM TRAWLING AND FISHING COMPANY, LIMITED,
Appellants.—*Dickson, K.C.—Lippe.*

Gill v. Aber-
deen Steam
Trawling and
Fishing Co.,
Limited.

Master and Servant—Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 7 (2)—Ship—Seaman—Fishing Vessel—Remuneration by share in profits or gross earnings.—The Workmen's Compensation Act, 1906, enacts :—Sec. 7 (2). "This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel."

The sole remuneration of the mate or first fisherman of a steam-trawler while at sea was one and one-eighth share (each share being one-fourteenth) of the net balance of the gross price of the fish caught on a trip after deducting certain specified expenses, which did not include the wages of other members of the crew, who were paid by fixed wages.

Held that such remuneration was a share in the profits or the gross earnings of the vessel, and that the fisherman so paid fell under the exception contained in sec. 7 (2) of the Workmen's Compensation Act, 1906, and was consequently precluded from claiming compensation under that Act.

2D DIVISION.
Sheriff of
Aberdeen,
Kincardine,
and Banff.

WILLIAM HENRY GILL, trawl fisherman, Aberdeen, claimed compensation under the Workmen's Compensation Act, 1906, from the Aberdeen Steam Trawling and Fishing Company, Limited, Aberdeen, in whose employment he had sustained injuries, and instituted arbitration proceedings under that Act against them in the Sheriff Court at Aberdeen. The Sheriff-substitute (Young) awarded compensation. The employers appealed.

The facts as set forth in the stated case were as follows :—

The respondent was a trawl fisherman in Aberdeen. The appellants were owners of the steam-trawler "Strathmartin," A 899, belonging to the port of Aberdeen, in which the respondent served as mate or first fisherman from 7th August 1907 to the date of the accident after mentioned.

The "Strathmartin" had, from 4th July to 7th August 1907, been undergoing her No. 1 Board of Trade Survey, which was completed on or about the latter date. The crew of the vessel, of which the respondent was mate, were for two days thereafter engaged preparing the fishing gear for going to sea, and were paid two days' harbour wages on the 9th of August. The said vessel then went to sea, and

completed a ten days' trip on the 19th of August. She went to sea again on the 19th of August, and completed a seven days' trip on the 26th of August. The vessel again went to sea, and completed an eight days' trip on the 3d of September. The next trip was uncompleted at the date of the accident to the respondent on 9th September. These trips were the only trips on which the respondent had served as mate on the "Strathmartin."

Dec. 14, 1907.
Gill v. Aberdeen Steam Trawling and Fishing Co., Limited.

On 9th September 1907 the steam-trawler "Strathmartin" was fishing in the North Sea, about 15 miles north-east of Fair Isle. Respondent served as mate or first fisherman on board the "Strathmartin," and it was part of his duty to make the necessary preparations to ice and put away the fish. About 10.30 P.M. on said date, while the respondent was so engaged removing some ice in the fish room the vessel rolled in the sea, with the result that a large lump of ice accidentally fell upon and fractured the respondent's right leg.

The respondent was taken to the Aberdeen Royal Infirmary, where he remained under treatment from 10th September 1907, and so was unable to earn any wages.

The remuneration of the mate or first fisherman in one of the appellants' trawlers was determined (pursuant to a scale fixed by an award of the Aberdeen Conciliation Board for the Aberdeen trawlers for two years from 25th October 1905) in the manner set forth in the following notice issued by the appellants:—

"All fish (excluding livers and roes, which shall be a perquisite of the deck crews) shall be sold. From the gross price realised there shall be deducted—Salesmen's commission, at the rate of five per cent; discount to the fish buyers at the rate of 2d. per £ on said gross price; one penny for every box used for the fish landed; the cost of all labour handling the fish till they are taken over by the buyers; all ice and coals required for the trip on which the fish were caught; all harbour, market, and water dues; the cost of watching, dan outfit, baskets, and stores. The net balance shall be divided into fourteen shares, whereof:—

"The master shall be paid one and three-eighths of such shares.

"The mate or first fisherman shall be paid one and one-eighth of such shares."

Under this notice a second fisherman got 5s. per day and 4d. or 3d. per £ on the net balance above mentioned. The two engineers got a fixed wage of 8s. 4d. and 6s. 6d. per day respectively. The other members of the crew, except the cook, received a fixed wage of 5s. per day and a bonus depending on the amount of the gross proceeds of the fishing. The cook received 3s. 9d. per day fixed wage and a bonus.

With regard to wages in port the notice provided:—"When any vessel is in port cleaning boilers or under repair, and the attendance of the crew, or any of them, is required, the scale of wages shall be as follows:— . . . First fisherman, 5s. per day. . . ."

No wages to any member of the crew were included among the deductions made from the gross earnings of the vessel before ascertaining the net balance which was divided into fourteen shares, whereof the respondent received one and one-eighth share.

On the foregoing facts the Sheriff-substitute held "that the respondent, while in the appellants' employment as mate or first fisherman on board their trawler 'Strathmartin,' sustained on 9th September 1907 personal injuries by accident arising out of and in

Dec. 14, 1907.

Gill v. Aberdeen Steam Trawling and Fishing Co., Limited.

connection with his employment; that in consequence of the personal injuries so sustained he was incapacitated for work, and unable to earn wages from 9th September 1907; that the amount of compensation payable under the Workmen's Compensation Act, 1906, had not been ascertained by agreement between parties; that under his contract of service the respondent was not remunerated by a share or shares in the profits or the gross earnings of the working of the said trawler, but received harbour wages at five shillings a day, and for time at sea wages on a scale of which the said net balance formed the standard; that his weekly earnings during the period when he was mate or first fisherman in the appellants' employment exceeded £2 per week; that the respondent was a workman in the sense of the Workmen's Compensation Act, 1906, and entitled to compensation under the Act, and that the appellants are liable to pay him compensation at the rate of £1 weekly as from 9th September 1907," and awarded him that weekly allowance accordingly.

The question of law for the opinion of the Court was:—"Whether on a sound construction of the agreement between the appellants and the respondent, as above set forth, the respondent was at the time of the accident a member of the crew of a fishing vessel, and remunerated by a share or shares in the profits or the gross earnings of the working of such vessel, and is thereby excluded by section 7 (2) of the Workmen's Compensation Act, 1906,* from claiming compensation under said Act?"

The appeal was heard before the Second Division on 14th December 1907.

Argued for the appellants;—The claimant and respondent was remunerated by a share in the profits or in the gross earnings of the vessel, and was therefore not entitled to compensation under the Workmen's Compensation Act, 1906.¹

Argued for the claimant and respondent;—He was a servant, not a profit sharer. He was not remunerated either by a share in the profits or in the gross earnings. He got a share of the proceeds of the catch, after making certain specified deductions. The exception in section 7 (2) of the Workmen's Compensation Act, 1906, was not intended to apply to such a case as this, but solely to the case of true joint adventurers in the working of a fishing vessel. A share of earnings might be wages,² and a person remunerated by a share of earnings might be a "workman" in the sense of the Workmen's Compensation Act.³

LORD JUSTICE-CLERK.—I am clearly of opinion that the Sheriff-substitute's decision is wrong. The respondent was first fisherman or mate on board a fishing vessel. The mode in which his remuneration was fixed was as follows:—From the gross price of the fish sold after any trip the owners were entitled to deduct commission, discount, one penny for every box used for the fish, cost of ice and coals, harbour, market, and water dues, and cost of watching, dan outfit, baskets, and stores, but not the wages of any of the

* Quoted in rubric.

¹ Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 7 (2).

² Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), sec. 383.

³ *Ellis v. Joseph Ellis & Co., L. R., [1905] 1 K. B. 324, per Collins, M. R., at pp. 328-9, and Cozens Hardy, L. J., at p. 330.*

crew. As regards the master and first fisherman they were to receive a share of the earnings of the trip after making the deductions mentioned, the master $1\frac{3}{8}$, and the mate $1\frac{1}{8}$. The result of that is plainly this, that these two men might get nothing for a trip, although they did the work. That does not look like receiving wages for their work. It was really a speculation on their part under which they were each to get a share of a fund out of which their shares were to come if there was any such fund. It is plain that the gross earnings of the trip might not be sufficient to pay the charges which the owners were entitled to deduct before calculating the shares. In that case the master and mate would get nothing. On the other hand, if it was a splendid season, and the profits earned were large, they might get a very large sum indeed. How could that be said to be wages? When stated in that simple way the case is clear. The statute provides that it "shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel." How could the master and mate here be said not to be "remunerated by shares in the profits or the gross earnings"? It is said that under the award the wages of the crew are not deducted before calculating the amount payable to the master and mate. The only effect of that is that if the gross earnings are not more than sufficient to pay the deductions the owners have to pay the crew out of their own pocket, and are not entitled to set the amount so paid against any future voyage.

Gill v. Aberdeen Steam Trawling and Fishing Co., Limited.

Lord Justice-Clerk.

On the whole matter I am of opinion that the Sheriff-substitute was wrong in holding that the respondent was not remunerated by a share in the profits or the gross earnings of the trawler, and that the question should be answered in the affirmative.

LORD LOW and LORD ARDWALL concurred.

LORD STORMONTH-DARLING was absent.

THE COURT pronounced this interlocutor :—"Sustain the appeal :
Answer the question of law . . . in the affirmative :
Therefore recall the award of the Sheriff, and remit to him to dismiss the claim, and decern."

HENDERSON & MACKENZIE, S.S.C.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—
Agents.

THE TUDOR ACCUMULATOR COMPANY, LIMITED, Applicants.—

No. 49.

Dickson, K.C.—Macmillan.

SCOTT STIRLING & COMPANY, LIMITED, Respondents.—*Sandeman.*

Dec. 18, 1907.

Company—Winding-up—Petition by creditors for compulsory winding-up—Withdrawal of petitioning creditors—Sist of other creditors in their place—Competency.—Creditors, who had presented a petition for the compulsory winding-up of a limited company, after intimation and service had been effected, but before the prayer of the petition had been granted, compromised their claim against the company, and did not insist in the petition.

The Tudor Accumulator Co., Limited, v. Scott Stirling & Co., Limited.

Certain other creditors of the company thereupon presented a note stating that they desired to insist in the petition, and craving the Court to sist

Dec. 18, 1907. them as petitioners in place of the original petitioners. The company lodged answers, in which they challenged the competency of the application. The Court *sisted* the applicants as craved.

The Tudor
Accumulator
Co., Limited,
v. Scott
Stirling & Co.,
Limited.

1ST DIVISION.

ON 1st November 1907 Hudson & Kearns, Limited, presented a petition to the Court craving that Scott Stirling & Company, Limited, should be wound up by the Court under the provisions of the Companies Acts, 1862 to 1900. They averred that they were creditors of the company for certain sums. The Court ordered intimation, service, and advertisement of the petition.

On 20th November 1907 the company presented a petition setting forth that an extraordinary resolution for the voluntary winding-up of the company had been passed on 18th November 1907, and craving the Court to continue the voluntary winding-up under the supervision of the Court. The Court ordered intimation and advertisement of the petition.

On 26th November 1907, after the days of *induciae* of the service of the first-mentioned petition had expired, but before any further steps had been taken, a note was presented by the Tudor Accumulator Company, Limited, who averred that the petitioning creditors, Hudson & Kearns, had come to an arrangement with Scott Stirling & Company, whereby, for certain considerations, they had discharged the debts due to them by the company, and did not intend to proceed with the petition. They further averred that they themselves, the Tudor Accumulator Company, were also creditors of Scott Stirling & Company; that the affairs of the latter were in such an involved condition that they should be wound up by the Court and an official liquidator appointed. They therefore craved the Court "to sist the said The Tudor Accumulator Company, Limited, as petitioners along with, or in room and place of, the said Hudson & Kearns, Limited," and to order that Scott Stirling & Company be wound up by the Court.

Answers were lodged for Scott Stirling & Company in which they submitted, *inter alia*, that the note was not competent.

Counsel for the applicants, in moving that they should be sisted, admitted that the application was a novel one in Scotland, but pointed out the analogy from bankruptcy procedure, and also stated that such applications were frequently granted in England, and were provided for in the Rules of Court.¹

The Court sisted the Tudor Accumulator Company, Limited, as petitioners in room and place of Hudson & Kearns, Limited, to the effect of enabling them to insist in the petition.

MACKENZIE, INNES, & LOGAN, W.S.—DEAS & Co., W.S.—Agents.

No. 50.

Dec. 19, 1907.

Morrisson v.
Robertson.

ROBERT MORRISSON, Pursuer (Appellant).—*Morton*.
PETER ROBERTSON, Defender (Respondent).—*Wark*.

Sale—Consent—Identity of Purchaser—Essential Error—Consensus in idem—Fraud—Question with innocent third party.—Telford falsely represented to Morrisson that he was the son of Wilson, Bonnyrigg, and had authority from him to purchase two cows. Morrisson, who knew Wilson to

¹ General Rules, March 1893 (made pursuant to sec. 26 of the Companies (Winding-up) Act, 1890 (53 and 54 Vict. cap. 63)); Buckley on the Companies Acts, 8th ed. p. 972.

be a dairyman and in good credit, was deceived by the representation, agreed to sell the cows on the usual credit, and delivered them to Telford, who never paid the price. Thereafter Robertson purchased the cows from Telford in good faith and without knowing that they had been improperly obtained, and paid the price demanded by Telford.

In an action by Morrisson against Robertson for delivery of the cows, *held* (1) that the cows were never sold to Telford, and (2) that the purchaser from him had no title to retain them.

ROBERT MORRISON, dairyman, Kirkcaldy, raised an action in the Sheriff Court at Stirling, against Peter Robertson, dairyman, Cambusbarron, concluding for delivery of two cows, or, alternatively, for payment of their value.

The pursuer's averments were to the following effect:—On 31st January 1906, at the Auction Mart of Messrs Oliver & Sons, where the pursuer had brought certain cows for sale, a man who afterwards turned out to be Alexander Telford, came up to him and falsely represented that he was the son of Mr Wilson, Westrigg, Bonnyrigg, and that he wanted to purchase two cows on behalf of his father. The pursuer had on previous occasions had business dealings with a James Wilson, dairyman, Bonnyrigg, who was a person of good credit, and he believed that the Mr Wilson, Westrigg, Bonnyrigg, whom Telford falsely represented as his father, was the said James Wilson. In this belief, and thinking that he was dealing with a person who was the son of James Wilson, and authorised to treat on his behalf, the pursuer agreed to sell two cows, and delivered them to Telford on the usual trade credit. Thereafter the cows were sold and delivered by Telford to the defender.

The pursuer pleaded;—(1) The two cows in question having been obtained by the said Alexander Telford from the pursuer either by theft or under essential error, or both, he is entitled to delivery thereof as craved. (4) The defender having wrongously refused to deliver up said cows specified in the prayer of the petition, the pursuer is entitled to decree as craved, with expenses.

The defender averred that he had purchased the cows from Telford in good faith, and without any knowledge or suspicion of the way in which they had been obtained and that he had paid the price to Telford. This was not disputed by the pursuer.

The defender pleaded;—(1) The averments of the pursuer are insufficient to support the conclusions of his action. (2) The two cows in question having been obtained by the man Wilson or Telford by a voidable title, and his title not having been voided at the time of the sale, and the defender having bought the cows in good faith, and without notice of the seller's defective title, the pursuer has no claim for delivery thereof. (6) The pursuer having by his own negligence brought about the loss to himself, is barred from insisting in the present action.

On 16th November 1906 the Sheriff-substitute (Mitchell) repelled the first plea in law for the defender so far as bearing upon the pursuer's case of essential error, and allowed a proof before answer,* which was taken and which established the truth of the pursuer's averments.

* "NOTE.— . . . It seems clear that error with regard to the identity of a supposed purchaser is error in substantials, prevents consent, and negatives a supposed contract (Bell's Prin., sec. 11; 1 Com., 313; *Stewart v. Kennedy*, 17 R. (H. L.), 25); and the precise question here appears to be

Dec. 19, 1907.

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1st Division.
Sheriff of
Stirling, Dum-
barton, and
Clackmannan.

Dec, 19, 1907. On 8th January 1907 the Sheriff-substitute granted decree in terms of the first alternative prayer of the petition.*

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Robertson.

The defender appealed to the Sheriff (Lees), who recalled the interlocutor complained of, and assoilzied the defender.†

whether fraud inducing such error makes it cease to be such error and to have such effects. Recent cases in Scotland are, apparently, wanting; and no very distinct authority from the institutional writers was referred to. Prof. G. J. Bell, who was quoted on both sides, distinguishes essential error and fraud, and he does not consistently make it clear that the presence of fraud takes such error out of the category of essential error, with the results of such error as to third parties. In England there appears to be a succession of cases where essential error made void a supposed sale, induced by fraudulent misrepresentations, to the effect of declaring that there was no sale, and of giving recovery to the original seller out of the hands of an innocent purchaser (*Benjamin on Sales*, (5th ed.), p. 462, also p. 459), and I do not see that there is a difference in principle in this point, which makes these cases inapplicable. Most of these cases are founded on in a note in Lord M'Laren's edition of Bell's Commentaries (vol. i., p. 261); *Kinsford v. Murray*, 26 L. J. Ex. 83; *Higsons v. Burton*, 26 L. J. Ex. 342; *Hardman v. Booth*, 32 L. J. Ex. 105; see also *Cundy v. Lindsay*, 3 App. Cas. 459; and the doctrine of that note sets forth the view that in the absence of *consensus in idem placitum* produced by fraud, there is essential error, with no contract, no transfer, and no title to retransfer, and, specifically, there is no such title in the person of a fraudulent buyer who has induced the belief in a seller, as the inductive cause for sale, that he is selling to someone else. . . ."

* "NOTE.— . . . Essential error is a doctrine of Scots Law, applicable I think to the facts of this case, and on similar facts the English decisions seem to arrive at the same conclusion on the ground of no contract of sale, the cases cited coming apparently under the corresponding rule or principle of mutual assent.—(*Benjamin on Sales* (5th ed.), pp. 92, 93, and 98). The recent Scots case *Bryce v. Ehrmann*, 7 F. 5, referred to and distinguished in *Weiner v. Gill and Smith*, 1906, L. R., K. B. Div. 575, does not seem to go at all on different lines from those above referred to. I find then that pursuer has proved this part of the case which I found relevant on 16th November.

"It was argued on the proof for defender that there could be no case of essential error here with regard to identity of the purchaser, as there was a person actually present to whom the cows were actually delivered; and it was even urged that it did not matter to the pursuer to whom he sold. But identity and credit are inseparable in reality, and are in effect so treated in the cases cited; and it is admitted that Alexander Telford had no credit or means. The postponement of payment arranged for and the method of it seems to me specially to connect the identity and the credit of this purchaser. Opinions in one or two of the English cases raise other subtleties, which, however, I think, do not affect the application of the decisions to the present case.

"Defender's other argument is that pursuer is barred through his negligence in the matter. But, assuming that defender was not negligent himself, I think, on a fair estimate of the circumstances of a sale of cattle, the pursuer was not wanting in ordinary prudence in believing and acting on Telford's story. . . ."

† "NOTE.— . . . It is plain the pursuer has no case against the defender merely in respect of Telford's fraud. The pursuer was willing to sell, and possession of the cows was got by Telford with his consent. This put Telford in a position to sell over again; and the defender acquired in good faith and for a full price before the pursuer took any steps to interpel a sale. It is not doubtful on the authorities that in such circum-

The pursuer appealed.¹

At advising,—

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LORD M'LAREN.—In this action the pursuer, Robert Morrisson, who is a dairyman, sues for the delivery of two cows which he says are his property, but which, having been obtained from him by fraud, have actually passed into the possession of the defender by what is not disputed to be a *bona fide* purchase. The case which the pursuer makes on record is of this nature. He says that he had taken the cows to market for sale, but there were no offerers at his price; and then he says that shortly after the cows had been withdrawn from the sale ring, a man, who afterwards turned out to be Alexander Telford of no fixed residence, came up to the pursuer and falsely represented that he wanted to purchase two cows on behalf of his

stances no right arises to the pursuer against the defender in respect solely of Telford's fraud.

"But then it is said the pursuer was under essential error in selling to Telford. What was that error? Not as to Westrigg. The alleged error was in supposing that the Wilson mentioned by Telford was a dairyman with whom the pursuer occasionally dealt. But this error was not induced by Telford. It was the pursuer's own hastiness that caused the error. According to the pursuer's contention, his remedy would have been equally good even if his purchaser had been a son of a Mr Wilson of Westrigg, provided he was not a son of the dairyman.

"I have looked at the cases mentioned by the learned Sheriff-substitute, but I am not satisfied that they rule the point. Telford's misrepresentation was not the cause of the sale. The pursuer was willing to sell, and if he had got his money he could not have claimed restoration of the cows on the ground that he would sell only to the dairyman. He was in the market to sell, and it was not the sale that was induced by his rash assumption, but the willingness to give credit.

"But more than that, the case is not against Telford. If the pursuer's claim is good against the defender it is good against any subpurchaser, however remote, and all because of his causeless assumption that he was selling to the dairyman's son. The same rule would require to apply to any other sale. Take the case of the Stock Exchange. If a holder of stocks seeking a purchaser sold to a man Smith who he causelessly assumed was a partner in a certain firm, it would surely be extravagant to hold that after the stocks had changed hands, it may be a dozen times, and the value had risen, the original seller could claim return of the stocks from a remote subpurchaser merely on the ground of the mistake he had made in regard to the identity of the person who gave the name of Smith. The business of life could not be carried on subject to such a rule. And who is to know whether the mistake might not be a mere afterthought? This would leave far too much to the seller.

"Then, too, credit might have to be given for the price paid by the subpurchaser. But if the price was always a full one at the time of each sale, where would there be a difference for which to decern? The injured but credulous seller could only get decree, failing return, for the difference between the present value of the thing sold and the price paid by the subpurchaser. Here, seemingly, there would be none. It would be *damnum absque injuria*. . . ."

¹ The following Authorities were referred to:—Higsons v. Burton, 1857, 26 L. J. Ex. 342; Hardman v. Booth, 1863, 32 L. J. Ex. 105; Cundy v. Lindsay, 1878, L. R. 3 App. Cas. 459; Kings Norton Metal Co., Limited, v. Edridge, Merrett, & Co., Limited, 1897, 14 T. L. R. 98; Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), secs. 23, 25 (2).

Dec. 19, 1907. father, Mr Wilson, Westrigg, Bonnyrigg. The pursuer says that
 Morrison v. already sold cows to James Wilson, a dairyman at Bonnyrigg, and
 Robertson. was not very well acquainted with him. But he knew that he was
 Lord M'Laren. man at Bonnyrigg, as when he purchased cows through the sale at
 Edinburgh auction marts his name was always given as "Wilson
 Bonnyrigg"; and the pursuer believed that the Mr Wilson,
 Bonnyrigg, whom the said Alexander Telford falsely represented
 father, was the said James Wilson, who is a person of good credit.
 he says that he did not know Alexander Telford at all, but he was
 by the said false representations to believe, and did believe, that
 Telford was the son of the said James Wilson, and that he had the
 authority of the said James Wilson to purchase cows on his behalf.
 are the pursuer's averments. I do not think it necessary to go into
 evidence, but it may suffice to say that the pursuer's averments are
 completely proved. He was induced by the fraudulent representations
 of Telford, which I have just read, to part with two of his cows and
 I think that these facts were not seriously disputed, and on the whole
 it was not disputed that the defender had purchased the cows from
 which he paid without suspicion that they had been improperly

Now, in these circumstances the question arises whether the pursuer
 can recover the cows as his property, or whether they have by their trans-
 mission to a purchaser for value been irrevocably taken out of the
 pursuer's possession. This appears to me to be just one of those questions
 which a lawyer who is willing to think for himself could have no difficulty
 in solving, even if he had not precedents to guide him. If there was
 a contract of sale, then, although the pursuer might have had an action
 for damages against the person who obtained the goods by fraud, or
 had an action for reducing the sale, yet if in the meantime the cows
 had passed by lawful sub-sale to a third person, then to recover from
 that third person, the analogue of the defender in the present case, would
 be indefeasible. Having acquired the property by purchase from a person
 who had a lawful title, he would have had a good defence to an action
 of this nature. But then the case of the pursuer is that there was no
 contract of sale. If Telford, the man who committed the fraud, made
 false representations as to his own character and credit obtained credit
 from the pursuer on credit, then I think that would have been the nature
 of a sale which, although liable to reduction, would stand good until
 reduced. But then that was not at all the nature of the transaction.
 The pursuer never sold his cows to Telford. He believed that he was
 selling the cows to a man Wilson at Bonnyrigg, whom he knew to be a
 person of reasonably good credit, and to whom he was content to give
 credit for the payment of the price. This belief that he was selling
 cows to Wilson was induced by the fraudulent statement of Telford
 that he was Wilson's son. It is perfectly plain that in such circumstances
 there was no contract between Telford and the pursuer, because Telford
 proposed to buy the cows for himself, and because the pursuer never
 sold them on credit to a man of whom he had no knowledge. There
 was there any sale of the cows by the pursuer to Mr Wilson, or
 did Wilson know nothing about them, and never authorised the pur-

whole story was an invention. There being no sale either to Wilson or to Dec. 19, 1907. Telford, and there being no other party concerned in the business in hand, it follows that there was no contract of sale at all, and there being no contract of sale the pursuer remained the undivested owner of his cows, although he had parted with their custody to Telford in consequence of these false representations. Morrison v. Robertson.
Lord M'Laren.

So much being premised, then I think it follows that as Telford had no right to the cows he could not give a good title to the defender even under a contract for an onerous consideration. He had no better title to sell the cows to any third person than he would have had if he had gone into the pursuer's byre and stolen the cows. This seems to me to be perfectly clear upon a consideration of known principles, but it is satisfactory that in the judgment which we are to give according to the law of Scotland, we are confirmed by a decision of the English Court of Exchequer, in circumstances which are in all respects parallel to those in the present case—I mean the case of *Higgins v. Burton*.¹ There never were at any time, as I think, such differences in the law of sale in the two parts of Great Britain as would have affected the present question, but under the Sale of Goods Act these differences have been reduced to the vanishing point, and I can have no difficulty in holding that a decision given by an English Court in a case of this kind is an authority which is entitled to the greatest weight, and which, if sound, would be directly applicable to the same state of circumstances arising in Scotland. Therefore, both on principle and on authority, I think that the pursuer has established his case, and is entitled to a decree for the vindication of his property.

LORD KINNEAR.—I agree with your Lordship. I think the principle upon which the case must be decided is so well established that it requires little explanation, but since we are differing from the learned Sheriff-depute it may be well to refer shortly to the authorities which appear to me to be conclusive. Probably the most apposite is the judgment of the House of Lords in *Cundy v. Lindsay*,² and the first observation with which Lord Chancellor Cairns begins his opinion is certainly directly applicable, viz., that it is always a disagreeable duty “to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall,” and that discharging that duty we can “do no more than apply, rigorously, the settled and well-known rules of law.” Then his Lordship proceeds to lay down the rules which according to his judgment must determine the question whether a purchaser in good faith and for value has or has not acquired a title to property which he has purchased from a seller to whom the property did not belong. He states, in the first place, a distinction with reference to a purchase in market overt, which has never been recognised by the law of Scotland, and which we may therefore dismiss. But the other rules which he lays down are all common to the law of both countries. His Lordship says:—“By the law of our country the purchaser of a chattel”—or, as we should say, corporeal moveable—“takes the chattel as a general

¹ 1857, 26 L. J. Ex. 342.

² 1878, L. R. 3 App. Cas. 459.

Dec. 19, 1907. rule subject to what may turn out to be certain infirmities in
 Morrison v. . . . If it turns out that the chattel has been found by the
 Robertson. . . . professed to sell it, the purchaser will not obtain a title good as
 Lord Kinnear. . . . real owner. If it turns out that the chattel has been stolen by
 who has professed to sell it, the purchaser will not obtain a
 turns out that the chattel has come into the hands of the person
 fessed to sell it by a *de facto* contract, that is to say, a contract
 purported to pass the property to him from the owner of the property,
 the purchaser will obtain a good title, even although afterward
 appear that there were circumstances connected with that contract
 would enable the original owner of the goods to reduce it, and to
 because these circumstances so enabling the original owner of the
 of the chattel to reduce the contract and to set it aside will not
 to interfere with a title for valuable consideration obtained by
 party during the interval while the contract remained unredressed.
 last rule is one example of a general principle which has governed
 sion of many cases of a different kind, of which *Oakes v. Turquand*
 liquidation of Overend and Gurney is a familiar instance. The
 that a contract obtained by fraud is not void but voidable; and
 follows that it is valid until it is rescinded, the rescission may come
 if in the meantime third persons have acquired rights in good faith
 value. But then on the other hand if such third persons have
 their title through a person who himself did not acquire the goods
 of any contract with the true owner, or to whom they were not
 transferred by the true owner upon any title, then the purchaser gets
 no better title than the person from whom he acquired, who either
 had no title at all. The doctrine is established by a great mass of
 and I agree with your Lordship in thinking that the case of
Burton,² and other cases which were referred to in the course of
 ment, such as the case of *Hardman v. Booth*,³ decided in England,
 valuable authorities which we may well follow. But the truth is
 require to go beyond our own books for authority for a doctrine
 stated distinctly by our institutional writers, and which has been
 in the decisions of this Court from a very early date. It is
 great precision by Lord Stair,⁴ who takes exactly the distinction
 Cairns takes in *Cundy v. Lindsay*,⁵ between a title obtained by
 contract which may be set aside as fraudulent, and possession
 supported by no contract at all. Thus, he says,—“In moveables,
 are not quarrellable upon the fraud of their authors, if they do
 for an onerous equivalent cause. The reason is because moveables
 have a current course of traffic, and the buyer is not to consider
 seller purchased, unless it were by theft or violence, which the law
 as *labes reales*, following the subject to all successors.” There
 tinction quite clearly put, and it is stated with equal precision by
 who gives in his illustrations a series of decisions beginning so

¹ *Oakes v. Turquand and Harding*, 1867, L. R., 2 H. L. 325.

² 1857, 26 L. J. Ex. 342.

³ 1863, 32 L. J. Ex.

⁴ Stair, Inst. iv. 40, 21.

⁵ 3 A. C. 459.

⁶ Bell's Prin

1629 with the case of the *Bishop of Caithness*,¹ in which the doctrine has been applied by this Court. Dec. 19, 1907.

Therefore I think that Mr Morton in his able argument put his case on exactly the right ground when he said that there was no contract between his client and Telford, the fraudulent person. He said if Telford had obtained the cattle by fraudulent contract he should have had nothing to say, but that there was no contract at all with Telford; and upon the facts I agree with your Lordship that that is an exactly accurate statement. If a man obtains goods by pretending to be somebody else, or by pretending that he is an agent for somebody, who has in fact given him no authority, there is no contract between the owner of the goods and him; there is no consensus which can support a contract. The owner, in this case the pursuer, does not contract with the fraudulent person who obtains the goods, because he never meant to contract with him. He thinks he is contracting with an agent for a different person altogether. He does not contract with the person with whom he in fact supposes that he is making a contract, because that person knows nothing about it and never intended to make an agreement; therefore there is no agreement at all. I think the fallacy of the reasoning of the learned Sheriff-depute becomes quite apparent when one considers that in order to make a contract of sale you must have a certain seller and a certain buyer. The learned Sheriff says that the pursuer was willing to sell, and was in the market to sell; but then a general desire to sell to someone is not a contract to sell to any particular person, and it is as clear as evidence can make it that the pursuer never intended to sell to Telford. He knew nothing about him, he never thought of him, and never intended to deal with him. Therefore, there was no consensus which could lead to any agreement. For these reasons I entirely agree with your Lordship that the pursuer is entitled to recover his cattle if they are still extant. If the defender is not in a position to deliver either or both of the cattle the question will arise as to the pursuer's remedy for the value, which has not been disposed of by the Sheriff-substitute. In the meantime I agree with the decision which your Lordship proposes.

Morrison v.

Robertson.

Lord Kinnear.

LORD PEARSON.—I agree so far with the learned Sheriff that the pursuer has no case merely in respect of Telford's fraud, or merely in respect that he sold the cattle to Telford under essential error. But I think the real question here arises at a prior stage. The Sheriff's view is that there was here a contract, and if there was, then he is probably right in his view of the law. I am unable to find that the proof establishes any contract to which the pursuer was a party. Telford did not represent himself as being principal, but as an agent. The pursuer was entirely deceived, both as to the identity and also as to the intention of the person with whom he supposed he was contracting and intended to contract, and in that essential part of a contract there was no consensus *in idem*, and therefore no sale. I think that the case falls within the principle of the English cases of *Higgons*² and *Cundy*³; and that the delivery to Telford gave him no such

¹ *Bishop of Caithness v. Fleshers of Edinburgh*, 1629, M. 9112, 4145.

² 1857, 26 L. J. Ex. 342.

³ 1878, L. R., 3 A. C. 459.

Dec. 19, 1907. title of possession as would enable him in law to transfer the
 the cattle to another.
 Morrison v.
 Robertson.

The LORD PRESIDENT was absent.

THE COURT pronounced this interlocutor :—" Find in fact on January 31, 1906, Alexander Telford falsely and fraudulently represented to the pursuer and appellant that he was the agent of Mr Wilson, Bonnyrigg, and that he had authority from Mr Wilson to purchase two cows; (2) that the appellant knew Mr Wilson of Bonnyrigg to be a farmer and a man of credit, was deceived by said representation, and agreed to purchase two cows to Mr Wilson on the usual credit, and delivered the two cows to Telford; (3) that the respondent, on February 1, following, purchased the said cows from Telford in good faith and without notice of the appellant's right, and paid the price demanded by Telford: Find in law (1) that the appellant is not bound to sell the two cows to Telford or to Wilson of Bonnyrigg; (2) that the cows were not delivered to Telford upon a bona fide sale, but, notwithstanding such delivery, continued to be the appellant's property; (3) that the appellant was impleached and is not chargeable with negligence in delivering the cows to Telford as the supposed agent of Wilson; and (4) that the respondent having obtained the two cows from a person who had no title either of property or possession thereto, is under an obligation to restore the cows to their true owner, the appellant, or to account to the appellant for their value at the date when he acquired them, and remit the cause to the Sheriff-substitute to dispose thereof in conformity with the above finding, and decern."

WILLIAM BROTHERSTON, W.S.—MACPHERSON & MACKAY, S.S.C.—A

No. 51. ALEXANDER FLEMING AND OTHERS, Pursuers (Respondents).—*Wilson, K.C.—Moncrieff.*
 Dec. 20, 1907. JAMES GEMMILL, Defender (Appellant).—*Hunter, K.C.—Carr.*
 Fleming v. WILLIAM BARR & SONS, Defenders (Appellants).—*Hunter, K.C.—Macmillan.*
 Gemmill. CHARLES SURGEONER, Defender (Appellant).—*Hunter, K.C.—Hon. W. Watson.*

Landlord and Tenant—River—Pollution—Interdict—Title to
 an action for interdict at the instance of the tenant of a farm to prevent the pollution of a stream which flowed through his lands, and at which his cattle were watered, against the proprietors of houses (let to tenants) on the upper part of the stream, *held* that, as the pursuer was the tenant under the landlord's title, in so far as it was necessary for his own purposes the subjects let, he had the same right as the landlord to maintain the purity of the stream, and accordingly that he had a good title to pursue the action.

Landlord and Tenant—River—Pollution—Responsibility of Landlord—Pollution by Tenant.—The proprietors of a block of workmen's houses erected for the use of their tenants earth closets, and made drains which were only intended to receive water from wash-houses and sinks, but which were used by the occupants of the houses as a receptacle for sewage, with the result that a stream which flowed through an adjoining farm, into which the drains discharged, was polluted, and injury was caused to the cattle which watered at the stream.

In defence to an action of interdict and damages directed against the proprietors of the houses, the defenders pleaded that they had provided an effective drainage system, and were not responsible for pollution due to an improper use thereof by their tenants. Dec. 20, 1907.
Fleming v.
Gemmill.

The Court *held* that the improper use of the drains might have been anticipated, and that as the proprietors had made the drains in such a way that pollution was a probable result, they were responsible therefor,—but continued the cause that the defenders might submit a scheme to avoid pollution.

Reparation—Damages—River—Pollution—Plurality of Defenders—Joint and Several Liability.—In an action of damages against several defenders for loss caused by the pollution of a stream, *held* that, as each of the defenders had contributed materially to the pollution, they were liable jointly and severally for the whole amount of the damage which ensued.

Process—Summons—Decree—Joint and Several Liability.—In an action of payment against six defenders “jointly and severally,” three of the defenders were assoilzied. *Held* that a decree against the remaining defenders conjunctly and severally was competent.

ALEXANDER FLEMING and others, tenants of the farm of South Netherburn, in the parish of Dalsersf and county of Lanark, raised this Sheriff of action in the Sheriff Court at Hamilton, against six defenders, viz., James Gemmill, James Nimmo & Company, Limited, William Barr & Sons, The United Collieries, Limited, William Cooper, and Charles Surgeoner. 1ST DIVISION.
Lanarkshire.

The pursuers prayed (first) for decree against each of the defenders, interdicting them from permitting polluting liquids to flow from houses belonging to them into the Netherburn Burn at any point in the course of said burn on the pursuers’ farm of South Netherburn, or at any portion of its course prior to entering on the lands of said farm; and (second) for decree against the defenders “jointly and severally” for payment of certain sums amounting *in cumulo* to £314.

The pursuers averred:—(Cond. 3) “Through said farm of South Netherburn, which extends to 130 acres or thereby, there flows a burn or watercourse known as Netherburn Burn or Dalsersf Burn, which is the only natural source for obtaining water for the supply of the cattle on said farm. The dairy stock on said farm amounts to 30 cows or thereby and 13 heifers.” (Cond. 4) “The defenders, the said James Gemmill and James Nimmo & Company, Limited, William Barr & Sons, and The United Collieries, Limited, are coalmasters occupying certain collieries in the vicinity of said burn and owners of houses in the same locality, and the said William Cooper and Charles Surgeoner are the owners of a number of houses there. For some time past defenders have permitted . . . sewage from said houses to flow into said burn, whereby the water in the burn has been rendered unfit for drinking purposes and for the watering of said cattle.” They also averred that two heifers and a cow belonging to them died, that their cattle fell off in condition, and that the milk supply of their cows was diminished, as the result of using the water so contaminated.

The pursuers pleaded;—(1) The defenders, having through their operations contaminated and rendered unsuitable for the purpose of watering cattle the burn referred to, should be interdicted from continuing said pollution. (2) The pursuers having sustained loss and damage through the defenders’ illegal actings, as aforesaid, to the extent sued for, decree should be granted therefor, with interest and expenses.

All the defenders lodged defences.

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The defender James Gemmill pleaded;—(3) The defender Gemmill not having contaminated and rendered unsuitable for the purpose of watering cattle the burn referred to, he is entitled to absolvitor, with expenses. (4) The pursuers not having suffered any loss or damage through the fault of the defender James Gemmill, he is entitled to absolvitor, with expenses.

Similar pleas were stated on behalf of the other defender.

A proof was taken before the Sheriff-substitute (A. S. D.) which established the following facts:—The Netherburn Burn flowed through the pursuers' land, and from which their cattle were watered, was polluted with sewage coming from houses in the town belonging to the defenders James Gemmill, William Barr & Son, and Charles Surgeoner, and occupied by their tenants, with the result that the milk supply of the pursuers' cows was diminished, and the condition of the cattle fell off.

The houses belonging to the defender Gemmill were tenanted by workmen, and were furnished with earth closets, and also with drains by which the water from sculleries and washhouses along the burn tended to be carried off, and to which access could be got by syvers and jawboxes in front of the cottages. The drains ran through a cesspool into a pipe which discharged into the Netherburn, and out of which the sewage which polluted the burn proved to flow. There was no fault in the construction of the drains, and it appeared that the pollution was caused by the impurity of it by the occupants of the cottages, who poured their liquors down these drains.

The drainage system in connection with the houses owned by the defenders William Barr & Son and Charles Surgeoner (which were of the same class) was substantially the same, and there was a contribution to the pollution from these houses as well as from the houses owned by Mr Gemmill.

No sewage was proved to flow into the burn from the houses owned by the other defenders.

On 26th March 1907 the Sheriff-substitute interdicted the defenders James Gemmill, William Barr & Sons, and Charles Surgeoner in terms of the first crave of the action, and ordained that they should "conjunctly and severally," to pay to the pursuers the sum of £1000, at which sum he assessed the damage suffered by the pursuers, and their expenses.

The defenders James Gemmill, William Barr & Sons, and Charles Surgeoner, appealed.

A preliminary objection taken to the competency of the Sheriff-substitute was separately argued.

The defenders argued;—The action being directed against the defenders "jointly and severally," the only decree which could competently be pronounced was one finding them all liable. If they were all assoilzied, all were free. In an action against several defenders, if some were assoilzied, decree could only be pronounced against the others when to the words "jointly and severally" the words were added as "or severally." The decree pronounced by the Sheriff-substitute was accordingly incompetent.

The pursuers argued;—There was no authority for the proposition that a joint and several conclusion meant anything different from what it said, or that, under such a conclusion, it was incompetent to pronounce decree in any form of which joint and several

admitted. The addition of such words as "or severally," might be customary, but was quite unnecessary. The Sheriff was accordingly justified in pronouncing decree against those of the defenders whom he found liable, while at the same time he assolized the others.¹

At advising,—

LORD PRESIDENT.—In this case a farmer, the land in whose occupation bounds a certain stream, raised an action in the Sheriff Court against six persons who he alleged polluted the stream, and the prayer of the petition was to ordain each of the defenders to abstain from causing a flow from their collieries or works or offices of noxious matters of various sorts, and "(second) to grant a decree against the above-named defenders, ordaining them, jointly and severally, to pay to the pursuers" certain sums of money which the pursuer alleges were the value of cattle which he lost through their being poisoned by the deleterious ingredients of the stream which they had drunk. There was a long proof on the matter, and the Sheriff-substitute eventually found that the pollution had been caused by three of the defenders, and not by the other three, and accordingly he pronounced an interlocutor in terms of the prayer against each of the three defenders, ordaining them to abstain, and granting decree jointly and severally against them for certain sums of money, being the sums at which he assessed the damage. An appeal was taken against that by the three persons found liable, but before going into the question of the merits, the point was raised by their counsel that the decree given by the Sheriff was wrong because it was impossible for the Sheriff to grant such a decree upon the prayer of the petition, in respect that the petition having asked for a decree for payment against six defenders jointly and severally, it was impossible to grant decree jointly and severally against only three of the defenders.

Perhaps at this time of day it is curious that the point is not perfectly settled, but counsel were unable to bring to our notice any authority deciding the matter, though there are many *obiter dicta* on one side and on the other. In that state of matters one must take up the matter on principle, and on principle I confess I do not think there is really much in the argument for the appellants. I can quite understand that for precaution's sake the common form of prayer has been more ample than the form in this case—that is to say, I think the common form of prayer or conclusion in a summons has been to find the defenders liable "jointly and severally, or severally," or in some cases where special caution is taken such words may be added as these—"or as their several liability may be determined in the course of the process to follow hereon." But while that is so, I do not doubt that under a

¹ The following Authorities were referred to:—Leslie's Representatives v. Lumsden, Dec. 17, 1851, 14 D. 213; Liquidators of Western Bank v. Douglas, March 20, 1860, 22 D. 447; Braidwoods v. Bonnington Co., June 23, 1866, 2 S. L. R. 152; Mackersy v. Davis & Sons, Limited, Feb. 16, 1895, 22 R. 368, *per* Lord McLaren, at p. 370; Caughie v. Robertson & Co., Oct. 15, 1897, 25 R. 1; Wallace v. Braid and Others, July 19, 1898, 6 S. L. T. 118; Robinson v. Reid's Trustees, May 31, 1900, 2 F. 928, *per* Lord Moncreiff, at p. 931; Cook v. Barnton Hotel Co., Limited, June 12, 1900, 2 F. 1011; Douglas v. Hogarth, Nov. 19, 1901, 4 F. 148, *per* Lord Trayner, at p. 150; Baird's Trustees v. Leechman, Dec. 20, 1902, 10 S. L. T. 515; Ball's Prin. sec. 56.

Dec. 20, 1907. prayer or a conclusion asking for a joint and several decree, it is possible to give decree in any form that joint and several liability means. As to what joint and several liability really means there can be no doubt. Mr Bell in his Principles, for instance, in section 56 says quite clearly that joint and several obligation means that "each is liable for the whole or a share," and there is a passage to the same effect in the Commercial Code. It would seem to me an absurd result that if in a prayer or conclusion using the words of obligation, you could not get all that the law says the conclusion truly means, and upon that very short ground I put my objection. But I have also discovered an old case which, without settling the point, seems to me to shew that that is the same view as was held in the present case. The case is that of *Hay*.¹ What happened, as narrated in the case, is this:—"James Hay brought an action against Charles Elphinstone, John Gray, and also against James Hamilton of Hutchison, for damages and expenses on account of their having wrongfully adjured him not to serve as a soldier during the subsistence of the Press Acts in 1757 and 1758.

"The Court, by interlocutor of the 6th of August 1762, found the whole defenders conjunctly and severally liable in £200 of damages and expenses.

"The defenders having reclaimed by joint petition, which was presented upon the last day of the session, it was refused as to Mr Elphinstone and Mr Gray, but as some of the Judges seemed to be of opinion that Mr Hamilton was not equally guilty, the pursuer, in order to be enabled to carry on further litigation, agreed at the bar to pass from that gentleman, and he was assoilzied.

"The pursuer having extracted the decret, and charged Mr Elphinstone and Mr Gray with horning, a bill of suspension was offered in that behalf, in which besides repeating the argument pleaded for them in the first instance, they further insisted that, in respect of the pursuer's passion against the other defender Mr Hamilton, they could only be liable in two-thirds of the sum charged for."

In that they were found to be wrong, and the inference to be drawn from the procedure in the action seems to me to be this: At that time reclamation petitions were dealt with upon their own merits, and it was not until 1840, as it is now according to our practice, to recall the interlocutor pronounced against—at least in part—before proceeding to vary it. An order was used to be pronounced which gave effect to the alteration desired by the Court without disturbing the original judgment, and that was what happened here; the reclaiming petition was refused as to Mr Elphinstone and Mr Gray, and upon counsel at the bar passing from Mr Hamilton, the other man was assoilzied. But the old decree was left alone, and I think it is quite clear that the decree which the pursuer extracted was the old decree in which the three defenders were found jointly and severally liable—that is to say, he went upon the old decree, and he charged Mr Elphinstone and Gray alone. That does not settle the point in the present case, but it shews, I think, that if the doctrine urged on the other side had

¹ *Hay v. Elphinstone*, Jan. 11, 1763; M. 14,658.

there would have been open a defence which obviously was not considered Dec. 20, 1907. open—namely, that a decree against three defenders, jointly and severally, could never be a good basis for a charge against two defenders jointly and severally, where the third defender had in the meantime been assoilzied. Accordingly I have no doubt that the Sheriff here is right in so far as regards the question of the competency of the decree.

Fleming v. Gemmill.

Ld. President.

LORD M'LAREN.—When an action is brought against several persons without the addition of words descriptive of the nature of their liability, then I take it that even if one of them should be assoilzied, or if the pursuer should pass from his action against him, the instance would still be good against the defenders who remained, the only question being whether they were liable jointly or severally. In the case I am putting I think the better opinion is that they would only be liable jointly unless words denoting several liability were added. But then in order to avoid such a result, under which the pursuer would lose a part of his claim, the law authorises the use of the words "jointly and severally." These seem to me to cover the whole ground. The word "severally" implies that against whatever number of defenders a man proceeds, each is liable for the whole sum sued for, and the word "jointly" or "conjunctly" secures to those against whom the decree is made operative the right of rateable relief against the persons who have not paid. This, as I have said, seems to me to cover the whole ground. I am unable to see that the addition of the words "and severally," or the words "or severally," to the description in which "severally" is already contained, can have any meaning at all, and it seems to me that the suggested addition is mere surplusage. I think that the conclusion as it stands is rightly framed, and that under such a conclusion it is perfectly competent to pronounce a decree in the terms pronounced by the Sheriff.

LORD PEARSON.—The defenders here, six in number, were sued for payment of three separate sums of money, which they were to be ordained jointly and severally to pay to the pursuers to make good certain damages sustained by them. Three of the defenders have been assoilzied, and the remaining defenders now take the objection that no decree can pass against them for want of the words "or severally, or one or more of them," or some similar words, in the conclusion of the summons. The expression "jointly and severally" was originally part of the language of obligations, and imported a reserved right on the part of the creditor of two or more persons in a divisible obligation, to hold them bound either each for his own share or each for the whole. The question as to the effect of using the expression in the pecuniary conclusion of a summons, seems not to have been definitely settled in practice. Perhaps it would be more apt to use the expression "jointly or severally" in a summons. But I see no reason why the expression here used should not be regarded as sufficient to warrant the Court in pronouncing decree against all, or against each, or against one or more even in different shares, according to the view which the Court takes of the liabilities of the various defenders on the merits; and this, even although one or more of the defenders may be assoilzied.

Dec. 20, 1907.

Fleming v.
Gemmell.

The Lord President intimated that LORD KINNEAR, who was the hearing, but absent at the advising, concurred in the judgment.

The case was then heard upon the merits.

The defenders argued ;—(1) The pursuers being merely tenants of the lands through which the stream flowed had no title unless they could shew that the defenders were committing a nuisance. The right of a tenant to insist on the purity of a stream through his lands was less extensive than that of a proprietor. The pursuers could not give him a title to sue on the ground of pollution merely. The pollution complained of was caused by sewage coming from the houses of which the defenders were the landlords, and was attributable to the act, not of the defenders, but of their tenants. A landlord is not responsible *ex dominio* for the act of his tenant, but only if the lease authorised the act complained of,² or where it was incumbent on the landlord to provide against the act, and he negligently failed to do so.³ In the present case the defenders had provided a means of disposing of the sewage, viz., earth closets, and having done this their responsibility was at an end. The pollution was a nuisance, the result of improper use of the open drain on the part of the tenants, which the defenders could not be expected to anticipate for which they could not be held liable. [The LORD PRESIDENT referred to the cases of *Rich v. Basterfield*,⁴ and *Harris v. Jarvis*,⁵ and the case of the *Caledonian Railway Co. v. Baird & Co.*,⁶ relating to the pursuers, the question of the landlord's liability for the nuisance of a tenant was not raised on the pleadings. Further, it was an action for interdict only, whereas in the present case there was a claim for damages as well. A landlord might be liable to interdict, but it did not follow that he would be liable in a claim of damages.⁷ The pursuers were not entitled to a decree against the defenders jointly and severally for the whole amount of the damage suffered, as there were other persons who had contributed to the pollution, and their names had not been made parties to the action. Although in an action for interdict it might be competent to select certain of the wrongdoers and sue them separately, damages could not be obtained unless the whole of the persons responsible therefor were convened in the action. Further, the pursuers were not entitled to recover from each defendant more than the share of the damage caused by the pollution for which he was responsible.⁸ The case of *Smith v. O'Reilly*⁹ cited by the pursuers was distinguishable in respect that it was an action for damages for a delict committed by a number of persons acting in concert, and each of the delinquents was properly held liable for the whole.

¹ *Armitstead v. Bowerman*, July 3, 1888, 15 R. 814.

² *Duke of Buccleuch v. Cowan*, Dec. 21, 1866, 5 Macph. 214, 15 S. 853, at p. 871, aff. July 3, 1867, 15 S. 853, at p. 871, aff. July 3, 1867, 15 S. 853, at p. 871, aff. July 3, 1867, 15 S. 853, at p. 871.

³ *Weston v. Incorporation of Tailors of Potterrow*, July 10, 1876, 1218; *Devlin v. Jeffray's Trustees*, Nov. 19, 1902, 5 F. 180.

⁴ 1847, 16 L. J., C. P. 273, 4 C. B. 783.

⁵ 1876, 45 L. J., Q. B. 545.

⁶ June 14, 1876, 3 R. 839.

⁷ *Hamilton v. Dunn*, 15 S. at p. 872.

⁸ *Duke of Atholl v. Dalgleish*, June 20, 1822, 1 S. 511; *Bell v. Bell*, 550; *Stair*, i. 9, 5.

⁹ Feb. 13, 1800, Hume's Dec. 605.

damage done.¹ (4) In any event, interdict should not be pronounced *de plano*. The defenders should have an opportunity of submitting a scheme.

Dec. 20, 1907.
Fleming v.
Gemmill.

The pursuers argued;—(1) The rights of a tenant were determined by the terms of his lease, and included an assignation in his favour of all the rights of the proprietor in so far as these were necessary for the proper enjoyment of the subjects. In a case, such as the present, of a lease of lands for agricultural purposes, the tenant had every interest to maintain the purity of the stream where his cattle were watered, and had the same title as the proprietor to raise an action on the ground of pollution. The actings of the defenders were directly prejudicial to the object for which the pursuers had entered into the lease, and they were entitled, as in right of the proprietor, to take every measure which would have been competent to him for the protection of their interests. The position of a tenant was explained in the case of *Collins v. Hamilton*.² (2) The present case was not distinguishable from *Caledonian Railway Co. v. Baird & Co.*,³ where in almost identical circumstances the landlord had been held responsible for acts of pollution committed by his tenants. It was to be expected that tenants of the class which occupied these cottages would make an improper use of the open drain, and the defenders were to blame for not anticipating this and providing against it. It was not suggested that the defenders were liable *ex dominio*, but, on the other hand, it was not seriously disputed that a landlord was liable for the act of his tenant, if it was his duty to prevent it, and he negligently failed to do so. It was the duty of a landlord to provide an efficient system of drainage, and it was not enough for him to provide a system which would be efficient if properly used, where improper use might reasonably be expected. (3) The pursuers were within their rights in selecting such of the persons causing the pollution as they desired to sue, and, in any event, the plea of "All parties not called" had not been stated. It was impossible for the pursuers to prove the amount of damage done by each individual defender. Each of the defenders was responsible for a material contribution to the pollution, and the pursuers were accordingly entitled to a joint and several decree against all the defenders for the whole amount of the damage.⁴

At advising,—

LORD PRESIDENT.—In this case questions have been raised both of fact and law. The case is a long one, and there is a great deal of evidence which I do not propose to analyse, because upon the result of it I come to the same conclusion as the Judge of first instance. I think it is proved that this stream is polluted, and that there is a material contribution from each of the three defenders Gemmill, Barr, and Surgeoner. But I propose to say a word or two upon the questions of law that were raised in a very anxious and good argument at the bar. First, the defenders raised the question of the title of the pursuers. They said that even admitting that there was pollution which rendered the stream less pure than it was before,

¹ *Palmer v. Wick and Pulteneytown Steam Shipping Co., Limited*, June 5, 1894, 21 R. (H. L.) 39, *per* Lord Watson, at p. 44.

² April 19, 1837, 15 S. 895.

³ 3 R. 839.

⁴ *Smith v. O'Reilly*, Hume's Dec. 605.

Dec. 20, 1907. and of which a proprietor could have complained, the right of a
 Fleming v. somewhat less; that a tenant could not complain of the mere
 Gemmill. of the quality of the water, but must raise the question to
 Ld. President. equivalent to nuisance; and that the pursuers' case has fallen
 proof which was necessary for that. I do not think there is any
 in the quality of the title, if I may use such an expression, of the
 and of the tenant in this matter. It seems to me that the tenant
 assignee of the landlord's title, by the mere force of the lease
 extent that it is necessary to give it to him for his protection in
 and inasmuch as the subjects let include a stream, one of the
 of which is to water cattle at it, it seems to me that the tenant
 right which the landlord had to maintain the purity of the
 other words, he is the assignee of the landlord's title in so far as
 sary for his own protection in the subjects let.

The second point is this: Those persons who are attacked—the
 the defenders—are landlords but not occupiers. They are pro-
 different blocks of houses from which the pollution comes; and
 strenuously argued that they were not liable because the wrong
 there was, had been done by the action of their tenants and not by
 action. In other words, that the filth which found its way into
 was not anything for which they were directly responsible. In
 it was pointed out that they had taken proper precautions in
 out of their houses to arrange that filthy matter should not
 stream, by the establishment of dry closets which, of course, have
 communicating with the stream. The state of facts, however, is
 there were these dry closets, there was also a liquid system
 which access was got by open syvers and jawboxes in front of
 cottages. This liquid system was run through a sort of cesspool
 was irrigated upon the land which was upon the banks of
 Now, upon this matter also there is a good deal of authority, a
 culty in each case, I think, is to settle into which of the two cases
 case is to fall. I take cases as representing the extremity, so
 one side and on the other. As the one extreme I take the position
 Melville in the case of the *Duke of Buccleuch v. Cowan*.¹ At
 extreme I take the case of the *Caledonian Railway Co. v. Baird &*
 in Lord Melville's case the *species facti* was this: Lord Melville,
 of Melville Castle, joined along with the Duke of Buccleuch, was
 proprietor of Dalkeith Palace, and Sir James Drummond, the p
 Hawthornden, in order to object to the pollution of the Esk by
 manufacturers. Lord Melville himself had a property which
 mill. Against Lord Melville it was urged that he could not ob
 he himself—if there was pollution from the mill—was the author
 respect that he was the proprietor. Lord Justice-Clerk Inglis
 that that depended on the terms of the lease, and that if Lord
 not by the terms of his lease in any way shewn that he gave
 right to pollute, then the pollution was their act, and not his
 case, on the other hand, of the *Caledonian Railway Co. v. B*

¹ Feb. 23, 1866, 4 Macph. 475.

was a case where the Caledonian Railway Company, who had private rights in a canal, objected to the pollution of the water by the inhabitants of a mining village which belonged to Messrs Baird. The Messrs Baird had, as here, made provision for a system of dry closets, but none the less the pollution found its way into the canal, and the Court held that the Messrs Baird could be interdicted because they were responsible for what was happening. It is true that in that case the Messrs Baird seemed to have assumed responsibility for what their tenants were doing, and further, that these miners were tenants at will—that is to say, their tenancy depended upon their being employed, and they were all on terms of contract which permitted of their being turned out on the shortest notice. But none the less in that case the law was pretty clearly laid down that if a landlord erects his premises in such a way that what may be called the natural result will be pollution, he will be liable, although in one sense he is not the person who personally contributes to the pollution. The truth is, it would be a very unfortunate result if it were otherwise, because if you had, in one sense, to catch the actual offenders, you would have to proceed to interdict every man, woman, and child living in the place. On the other hand, it is quite clear that where the pollution is due to the ultraneous act of the tenant and is not a thing which the landlord could foresee, then the landlord cannot be liable. In the case of *Baird*¹ that very point was put by Lord Gifford, who observed that the landlord could not have been held answerable if the miner had run out of his cottage at night with refuse and thrown it into the stream.

When I come to apply the law to the facts in this case, the view I take of it is this: Although no doubt there was this provision of earth closets, there still was an *opus manufactum*, namely, the drain, by which impurities put in at the syvers and jawboxes would sooner or later find their way to the stream; and it would be childish not to suppose, from the known habits of such persons as the tenants of these cottages, that pollution would ensue. It is clear that, apart from the grosser form of sewage, there are many forms of sewage which certainly cause pollution, and which may find their way into the stream by means of a drain which is open as a receptacle for any slops that may be put into it. Therefore, as this *opus manufactum* exists, I think the landlord must be responsible for what happens in consequence of it.

Then there comes the question of what is to be done. The tenant, I think, is entitled to interdict, but, on the other hand, it has been your Lordships' invariable custom in cases of this sort never to grant interdict *de plano* as has been done in this case. Therefore, I think the defenders here ought to have an opportunity themselves of submitting some scheme which may remedy the pollution complained of.

But there is another question in this case—the question of damage. The tenants here sue for damage to their cows, which ensued in respect of the effect on their health of the pollution, and that damage is divided into three heads. Three cows, that is, two heifers and a cow, died; there was a deficiency in milk in the whole herd; and there was a deterioration in the

¹ 3 R. 839.

Dec. 20, 1907. value of the herd of cattle themselves. The learned Sheriff-sub-
 Fleming v. granted for these three matters sums of £35, £30, and £50.
 Gemmill. also a legal question was raised—namely, as to whether there was
 Ld. President, and several liability in respect of the pollution for such damage
 to me that there is. As soon as you find that there is a materi-
 tion, then, I think, each person is, so to speak, *versans in illi*
 acts at the risk of being found jointly and severally liable along
 persons for the damage that may ensue.

But there remains the question of damage. (After review-
 evidence)—Upon the whole matter, I am for disallowing the
 decerning for the other two sums, and recalling the Sheriff's inter-
 far as it interdicts, in order that the defenders may have an
 of submitting a scheme to somebody to be named by the Court
 usual in these cases, before interdict should be pronounced against

LORD M'LAREN and LORD PEARSON concurred.

LORD KINNEAR was absent.

THE COURT pronounced this interlocutor:—"Find in fact
 the pursuers, who are tenants of the farm of South Netherburn,
 keep a stock of cattle on said farm and water their cattle from
 the Netherburn and from the Broomfield Burn, which flows into the
 Netherburn; (2) that all the defenders except James Gemmill,
 & Company, The United Collieries, Limited, and James Cooper,
 contributed to the pollution of the Netherburn with sewage;
 sewage; (3) that as the result of the pollution of the Netherburn,
 burn, which was the natural water supply of the pursuers' cattle,
 cattle, the milk supply of the pursuers' cows from May to August
 May was diminished and eight or ten of pursuers' cows were
 off in condition: Find in law in these circumstances that the
 defenders (other than the three above excepted) are liable for
 damages to the pursuers for the loss thus resulting from the pol-
 lution of the said burn: Assess the damages at £80: Decern and
 decern and ordain these defenders James Gemmill, James Barr
 Barr & Sons, and Charles Surgeoner, all conjunctively and
 severally to make payment to the pursuers of £80: Decern and
 and decern: Further, continue the cause that the defenders last
 ders last above mentioned may submit to the Court for the
 for the avoidance of pollution of said Netherburn: Decern the
 pursuers entitled to additional expenses since the pronouncing of
 said interlocutor of the Sheriff-substitute, modified in the
 quarters of the amount thereof as taxed: Remit," &c.

SIMPSON & MARWICK, W.S.—MILLAR, ROBSON, & M'LEAN, W.S.—

No. 52. ALEXANDER DAVIDSON AND ANOTHER, Pursuers (Respondents).
 M'Lennan, K.C.—Murray—Hamilton.
 Nov. 29, 1907. ABRAHAM LOGAN, Defender (Reclaimant).—Sol.-Gen. Usher.
 Davidson v. Lord Kinross.
 Logan.

Lease—Construction—"Tenantable condition and repair"—
Submission—Construction—Decree Arbitral—Reduction.—An
 on the part of a landlord to put buildings, fences, drains, &c., in
 mendment of a lease "in tenantable condition and repair"

onerous than the obligation which lies upon a tenant at the end of a lease Nov. 29, 1907.
to leave these subjects in tenantable condition and repair.

The proprietor of a farm in his own occupation let the farm for a period of nineteen years, the tenant binding himself in the lease "to accept of the whole houses, buildings, drains, ditches, dykes, fences," &c., on the farm "when the same shall have been put into good order . . . as being in tenantable order and condition." The parties thereafter entered into a submission, which, on the narrative that the tenant had in the lease become "bound to accept the buildings and others . . . as in good tenantable condition and repair when the same had been put into good order," referred to arbitration, *inter alia*, the sum payable by the landlord to the tenant in respect of any of the drains, ditches, dykes, and fences not being "in tenantable condition and repair" as at the entry of the tenant. The arbiters awarded a sum which they reached on the principle of giving the amount which an outgoing tenant would have had to expend in putting the subjects into tenantable condition and repair.

Davidson v.
Logan.

In an action of reduction at the instance of the tenant against the landlord, *held* (aff. judgment of Lord Ardwall) (1) that the question referred to arbitration was the amount of the defender's obligation *qua* landlord, and not the amount for which an outgoing tenant would have been liable, and therefore (2) that the arbiters not having determined the question submitted to them, their award fell to be reduced.

Arbitration—Decree-Arbitral—Reduction—Award by arbiters and oversman conjointly.—The landlord of a farm and the incoming tenant entered into a submission by which they referred certain questions "to A and B, arbiters mutually chosen, and in the case of their differing in opinion, to an oversman to be named by the said arbiters before entering on the business of the submission."

An award was issued which bore to be the award of, and was signed by, the two arbiters and the oversman.

In an action of reduction by the tenant against the landlord, *held* (aff. judgment of Lord Ardwall, *diss.* Lord Stormonth-Darling) (1) that *ex facie* the award was invalid in respect that it bore to be the award of a tribunal to which the parties had not agreed to submit their disputes; and (2) that it was incompetent by parole evidence to prove that the oversman had never acted, and that the award was the award of the arbiters only.

Hope v. Crookston Brothers, 17 R. 868, *distinguished*.

Process—Record—Ground of action not averred on record and disclosed to pursuer by the evidence for the defender at the proof.—The proprietor of a farm in his own occupation having let it on lease, the landlord and the tenant entered into a submission as to the amount payable by the landlord under an obligation to put the buildings in "tenantable condition and repair." The arbiters having issued an award, the tenant, being dissatisfied with the amount awarded, brought a reduction, setting forth various grounds of reduction. At the proof it appeared from the evidence of the arbiters that they had fixed the sum awarded on the principle of taking the landlord's obligation as the obligation of an outgoing tenant, and not as the obligation of a landlord. This was not averred either by the pursuer or by the defender, and was not, until the proof, known to the pursuer.

Held (aff. judgment of Lord Ardwall) that the absence of any averment by the pursuer did not bar him from taking the objection that the arbiters had not determined the question submitted to them.

By lease, dated 1st and 5th February 1904, Abraham Logan, of Whitton, Roxburghshire, first party, let the lands and farm of Whitton to Alexander Davidson senior and Alexander Davidson junior, second parties, for nineteen years from Whitsunday 1904, with breaks in favour of either party at Whitsunday 1914 and Whitsunday 1919.

2D DIVISION.
Lord Ardwall.

Prior to the entry of Messrs Davidson Mr Logan had farmed

Nov. 29, 1907. Whitton himself. He consequently was in the position of going tenant as well as landlord.

Davidson v.
Logan.

The lease contained, *inter alia*, the following clauses:—“The second parties hereby bind and oblige themselves and their heirs and assigns to take over at a valuation to be made by two neutral persons, an oversman chosen and appointed as aftermentioned, the whole of the lands upon the said lands at their entry thereto, as also the waygoes, and the waygoes of the year 1904; the second parties also bind and oblige themselves and their foresaids to take over at a valuation” a number of acres specified. “The second parties hereby agree to accept of the buildings, houses and buildings, with the water supply thereto, and the water connections thereof, roads, drains, ditches, dykes, and fences, and the said farm when the same have been put into good order, and the alterations and additions upon the steading made as arranged, and being in tenantable order and condition, and they bind and oblige themselves and their foresaids to keep and maintain the same in the same tenantable order and condition during the currency of this lease, and at its expiry to leave them in the like order and condition.”

The clause of arbitration was in the following terms:—“The parties further provided that when any question shall arise under this lease, whether hereinbefore referred to arbitration or not, they shall submit the same into a submission to two neutral men of skill, mutually chosen by the parties, after having named an oversman, shall proceed to act upon the submission, and the award of the said arbiters upon any question embraced in such submission shall, if they agree, be final and binding on the parties; and in the event of said arbiters not agreeing, the matter, they shall have power to devolve such question upon the oversman for his award, and power is hereby conferred upon the said arbiters or oversman to pronounce interim or final award, as they or he shall see fit.”

In April 1904 the parties entered into a submission, which was, *inter alia*, as follows:—“Considering that by lease of the lands of Whitton entered into between us, dated 1st and 5th April 1904, we, the said second parties, become bound to take over the buildings, subjects and others therein mentioned at a valuation to be made by two neutral men of skill mutually chosen, who, before acting upon the submission to them, are thereby directed to appoint an oversman, to whom to devolve any such submission in the event of the said arbiters disagreeing in regard thereto, all as the said lease more fully bears: Further, considering that by said lease we, the said second parties, also became bound to accept the buildings and the water connections as therein mentioned on the farm as in good tenantable order, and repair when the same had been put into good order, and the alterations and additions upon the steading made by me, Abraham Logan as arranged, and that I am in course of making these alterations and additions, and that I have agreed to pay a sum (if any) as shall be fixed by said arbiters or oversman upon the said in respect of any buildings and others not being in good order, which sum we, the said second parties, have agreed to accept, and be full of all that we could ask in that respect. . . . Then the whole parties hereto, have submitted and referred, and do hereby submit and refer, to the amicable decision, final sentence, and award, as arbitral to be pronounced by John Watson, residing at Grangehall, in the county of Roxburgh, and John Brown, residing at Hundalee, in the county of Roxburgh, arbiters mutually chosen by the parties.”

in the case of their differing in opinion to an oversman to be named ^{Nov. 29, 1907.} by the said arbiters before entering on the business of this submission, to ascertain, fix, and determine, in the first place, the sums payable by us, the said Alexander Davidson senior and Alexander Davidson junior, to me, the said Abraham Logan for (First) the value of " a number of subjects, including the waygoing corn crop. " And, in the second place, the sums payable by me the said Abraham Logan to us the said Alexander Davidson senior and Alexander Davidson junior in respect of any of the houses and buildings with the water supply thereto, pipes, and connections thereof, roads, drains, ditches, dykes, and fences on the said farm not being in tenantable condition and repair all as at the entry thereto (Whitsunday 1904), of us the said second parties. With power to the said arbiters and oversman to take all manner of probation, and to make such remits to men of skill as they and he may find necessary in duly preparing themselves and himself for the performance of their and his duty as arbiters and oversman. . . . "

John Elliot, farmer, Meigle, was appointed oversman.

On 24th August 1904 there were issued two documents in the following terms :—

" *Whitton Reference*, 1904.—(No. 16 of process.)

" INTERIM AWARD.

" The arbiters and oversman in the reference between A. Logan, Esq., of Whitton, and Messrs Davidson, hereby request Messrs Davidson to pay to Mr Logan on or before the 31st day of August curt. the sum of £682, 17s. stg.

" This payment is intended to cover all claims between the parties, the one against the other, in respect of the matters stated below ; but the arbiters reserve power to rectify any error or omission which may be brought to their notice before the issuing of their final award.

" JOHN WATSON.

" *Kelso*, 24th August 1904.

" JOHN BROWN.

" All matters mentioned in the deed of submission except the corn crop."

" *Amended Award*.

" *Whitton Reference*, 1904.—(No. 17 of process.)

" INTERIM AWARD.

" The arbiters and oversman in the reference between A. Logan, Esq., of Whitton, and Messrs Davidson, hereby request Messrs Davidson to pay to Mr Logan on or before the 31st day of August curt. the sum of £674, 2s. 8d. stg.

" This payment is intended to cover all claims between the parties, the one against the other, in respect of the matters stated below ; but the arbiters reserve power to rectify any error or omission which may be brought to their notice before the issuing of their final award.

" JOHN WATSON.

" JOHN BROWN.

" *Kelso*, 24th August 1904.

" JOHN ELLIOT.

" All matters mentioned in the deed of submission except the corn crop."

On 10th February 1905 a further document in the following terms was issued :—

" *Whitton Waygoing*, 1904.—(No. 18 of process.)

" The arbiters and oversman in the reference relative to the above hereby direct Messrs Davidson to pay to Mr Logan on or before the

Nov. 29, 1907. 17th day of February curt. the sum of £450 stg. to account
 of corn crop of JOHN BROWN, Arb
 Davidson v. " Kelso, 10th February 1905. JOHN ELLIOT, Over
 Logan.

On 24th February 1905 Messrs Davidson raised an action
 ing for reduction of the three documents above quoted as
 Logan, the two arbiters, the oversman, and Robert Dodds
 merchant, Kelso, to whom (according to the pursuer's averment)
 arbiters had illegally delegated their duties.

The pursuers pleaded, *inter alia* (certain of the pleas being
 by amendment on 25th October 1906);—1. The whole proceedings
 in the said arbitration, and *separatim*, the said pretended
 awards, are null and void, and the pursuers are entitled to
 reduction as craved, with expenses, in respect that—(1) The
 in issuing said awards, acted *ultra vires* and in an improper
 manner; (2) the said arbiters incompetently delegated their
 to the defender Robert Dodds; (3) the said arbiters and
 Robert Dodds, for whom they are responsible, have been guilty of
 corruption in the sense of the Act of Regulations, 1695; (4) the
 awards complained of are not the awards of the tribunal constituted
 by the parties submitters (i.e., the two arbiters, and, in addition,
 only of their devolving the reference, the oversman), but are
 awards of the arbiters, or one of them, incompetently acting
 with the alleged oversman; (5) the arbiters did not accept the
 writing; (6) the alleged oversman was not appointed in writing
separatim, was not appointed before the arbiters entered on the
 business of the reference; (7) the alleged oversman did not accept
 in writing; (8) there was no devolution to the alleged oversman;
 (9) the awards complained of are neither holograph nor testamentary.
 The acceptance of office by the defenders nominated as arbiters,
 appointment of the alleged oversman, the acceptance of office by him,
 and the devolution of the reference on him, can be constituted
 by probative writs, or, in any view, only by writings subscribed by
 the said parties respectively.

The defender Logan lodged defences, in which he pleaded, *inter alia*
alia (certain of his pleas being also added by way of amendment);—
 2. The action should be dismissed in respect that—(1) The proceedings
 having been conducted informally in accordance with a recognised
 practice in the district, of which the pursuers were well aware, it was
 unnecessary to observe the formalities founded on by the pursuers
 the grounds of reduction; (2) the arbiters have not acted improperly
 or incompetently, nor have they been guilty of corruption; (3) the
 arbiters did not delegate their functions to the said Robert Dodds,
 and, in any event, the said Robert Dodds did not act improperly;
 (4) the said awards are not invalidated by being signed by John
 Elliot along with the arbiters, or one of them; (5) the said
 awards are not invalid, although neither holograph nor testamentary.
 The pursuers are barred by their actings from challenging the validity
 of the appointment and acceptance of the arbiters and oversman.
 The acceptance of office of the arbiters, and the appointment of
 acceptance of the oversman, can be constituted otherwise than by
 probative writ, or by writings of the parties themselves.

On 11th May 1905 the following further document was introduced:

" *Whitton Reference*, 1904.—(No. 21 of process.)

" AWARD No. 3.

" The arbiters and oversman in the reference between Mr

and Messrs Davidson hereby find that the value of the corn crop Nov. 29, 1907. (exclusive of the straw), after deducting allowance for manufacturing, &c., is £736, 18s. 3d. stg., said sum, less £450 paid to account in Davidson v. Logan. February last under an interim award, being due and payable on 15th May current.

"The arbiters and oversman further find that the expenses of the reference to this date, including tradesmen's and measurers' fees, &c., amount to the sum of £65 stg., whereof one-half, £32, 10s., to be paid by each party, to Mr C. Dodds, Kelso, for distribution.

"JOHN WATSON.

"JOHN BROWN.

"JOHN ELLIOT."

"*St Boswells*, 11th May 1905.

The pursuers did not seek for reduction of this document.

On 5th September 1905 the Lord Ordinary (Ardwall) granted decree of reduction.*

* "OPINION.—There are various grounds of reduction set forth in this action. One is that the oversman interposed in the reference, consulted with the arbiters, and in some cases signed the awards without there ever having been a difference of opinion between the arbiters and a devolution following thereon, and it is admitted that this was the case. I am of opinion that this is fatal to the awards under reduction. Undoubtedly, in mere cases of ordinary agricultural valuations such procedure is common, and might not invalidate an ordinary valuation under a lease. I may refer to a case of *Nivison v. Howat*, 11 R. 191, and I was also referred to a case decided upon similar principles, *Hope v. Crookston Brothers*, 17 R. 868. There, however, the matter turned upon the terms of the contract between the parties which stated that 'any dispute under this contract was to be settled by arbitration here in the usual way,' and it was held that this entitled the arbiters and oversman to follow the custom of Liverpool in valuing the goods in question. But I cannot regard the present as a mere valuation. It is a submission constituted by a formal deed outwith the lease altogether, although arising out of it, and therefore the terms of that submission must be looked to. Now, that submission bears that the reference is to John Watson and John Brown, 'arbiters mutually chosen, and in the case of their differing in opinion to an oversman to be named by the said arbiters before entering on the business of this submission,' and the subjects of the submission involve a very wide range, including the sums necessary to put the houses, fences, drains, and everything else on the farm in tenantable condition and repair. It was accordingly a very different affair from a valuation concerned only with a corn crop and dung, and I think it must be presumed to have been the intention of the parties that matters should be gone about regularly and solemnly; that the arbiters should endeavour to come to an agreement, and that only in the event of their differing should there be a devolution on the oversman. I accordingly think that the law laid down in *Lang v. Brown*, 2 Macq. 93, applies, and that the procedure in this submission and the issuing of the awards thereunder is inept, because the procedure was not in accordance with the contract of the parties, in respect that the arbiters did not apply their minds to the matter in the first place, and that the oversman interfered without any difference of opinion between the arbiters, or any proper devolution. I consider this case is practically on all-fours with the case of *Frederick v. Mailland & Cunningham*, 3 Macph. 1069. I notice Mr Elliot, the oversman, signs the interim amended award, dated 24th August 1904, No. 17 of process, and also the award entitled No. 3, No. 21 of process. It is, in my opinion, clear that these awards are bad, and as it is apparently admitted by the defenders that Mr Elliot intervened all through the reference, I think the other awards must be reduced also. . . ."

Nov. 29, 1907. The defender reclaimed.

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On 25th May 1906 the Court recalled the Lord Ordinary locutor, and remitted to the Lord Ordinary to allow a pro answer.

A proof was thereafter allowed and led. The import of the proof sufficiently appears from the opinion of the Lord Ordinary pronounced on 27th January 1907, when his Lordship pronounced an interlocutor granting decree of reduction.*

* "OPINION.—The following facts are, in my opinion, established by the proof which has been taken :—

"The pursuers are the incoming tenants of the farm of Whitton under the lease No. 7 of process. The defender Logan is landlord of the farm, but for several years back it has been in his own occupation. He is accordingly the outgoing tenant as well as the landlord at the pursuers' entry.

"The arbiters, after they had received the deed of submission in April 1904, to inspect and value the dung and fallow ground of Whitton. In this inspection they were accompanied by the oversman. They also made a very general inspection of the fences and drains, which apparently convinced them that both fences and drains were in need of repairs. At or before this inspection both the arbiters and the oversman had made up their minds that what they had to value was the houses and buildings, drains, ditches, dykes, and fences, and the amount which would be required to put them in such tenantable order and repair as an outgoing tenant would have been required to do in connection with the landlord or incoming tenant. Having taken this into consideration, they remitted to a Mr Dodds as a man of skill, and who, it is accustomed to act in such matters between outgoing and incoming tenants, to estimate what sum would be required to put the fences, drains, ditches, and dykes in order. I shall not further allude to the other subjects which were put in order, as the present dispute really arises as to fences, drains, ditches. The arbiters and oversman paid a second visit to the farm in April 1904, and again for the purpose of valuing the corn crop in August. By this time Mr Dodds had made his report, bringing out a sum of £100 for fences and drains which, in my opinion, is proved to be totally insufficient to put these subjects in tenantable order and repair in the sense in which a landlord is bound to put farm subjects at the commencement of a lease, which possibly was sufficient to put them in such tenantable order and repair as would have satisfied the obligations of an outgoing tenant at the end of a lease, and would, as Mr Dodds himself said, have kept the farm in order for a year.

"The senior pursuer on the occasion of the visit of the arbiters and oversman in the autumn of 1904 made a complaint about the sum, and on that occasion said, as he subsequently said in his evidence, to Mr Dodds, that he would give £100 in addition to the sum found by Mr Dodds if they or Mr Dodds would put the subjects in tenantable order and repair for that, and he asked them to look over the fences and drains again. Mr Brown, who was the arbiter nominated by the pursuers, put the matter up at a meeting that he and the other arbiter and the oversman had subsequently to this date, and suggested that the matter might be put into again. It appears, however, that he did not press the matter strongly, and did not support it by very sufficient reasons, and the other arbiter, declining to reopen the matter, he did not press the proposal to the extent of asking a devolution on the oversman, and no further was done. This was not surprising, on the footing that the pursuers all agreed, as they frankly admit, that all that was to be awarded was such as would have satisfied the obligation of an outgoing tenant.

The defender Logan reclaimed, and argued;—(1) The first question was Nov. 29, 1907.
 —Had the arbiters considered and determined the matter submitted to them in relation to the repair of the fences, drains, and ditches. The defender did not dispute that the authorities cited by the Lord Ordinary¹ bore out the proposition that that question was a question for the Court to determine. The question depended on the construction of the second operative clause in the submission—that was to say, on the meaning of the words “tenantable condition and repair.” These words had a well-recognised meaning, namely, the condition of repair in which an outgoing tenant was bound to leave such subjects. Probably the words in the narrative of the submission, and in the lease, “good order” imported a higher obligation of repair—namely, the obligation of a landlord to an incoming tenant, but it was incompetent to construe the operative clause of a deed by reference to the narrative or to another deed, unless the operative clause was ambiguous,²

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Dodds himself says that he made the valuation upon that footing. The only notice that I can find given on record to the effect that the defender Logan and the arbiters and oversman and Mr Dodds treated this matter as a question between an outgoing and an incoming tenant occurs in Answer 8 to the defender's statement, where it is said that it is a recognised practice in a submission between ‘outgoing and incoming tenants’ to dispense with acceptances. Now, the submission under consideration was undoubtedly, so far as regards dung, fallow, and corn crop, one between outgoing and incoming tenants, but, in my opinion, it was also one between landlord and incoming tenant. With regard to the actings of the oversman in the submission, it is proved by Mr Elliot's own evidence that while, in accordance with the custom in such matters, he accompanied the arbiters on their various inspections, there was never any devolution of any kind whatever upon him, and he never applied his mind to the amount awarded, because the arbiters had agreed upon that amount, and he states that he signed the interim awards, Nos. 17 and 21 of process, in accordance with the general practice that an oversman signs such interim awards, to shew that he had taken part in the inspections, had acted in the reference, and was thus entitled to the ordinary remuneration. He only justifies his signing the award No. 18 of process along with one of the arbiters by saying that it was the unusual case of one of the arbiters being absent in South Africa, and that he signed it just as he would have done if both arbiters had signed it.

“With regard to the alleged custom in the counties of Roxburgh and Berwick set forth for the defenders, it is not, in my opinion, proved that it is a recognised practice to dispense with written acceptances by the arbiters and oversman, though it has been proved that in frequent instances that has been done without objection being taken afterwards; nor is it proved that there is a practice of dispensing with a written appointment of the oversman. This, however, is not, in my opinion, of much importance, as I think that the parties, by acquiescing in the arbiters acting without written acceptances, are barred from reducing the submission on the ground that such acceptances did not exist, while with regard to the oversman, as it now appears that he never gave any decision as oversman or applied his mind to the subject, the manner of his appointment does not necessarily enter into the decision of the case. It ought, however, to be

¹ Mackay & Son v. Leven Police Commissioners, July 20, 1893, 20 R. 1093; Adams v. Great North of Scotland Railway Co., Nov. 27, 1890, 18 R. (H. L.) 1; Alexander v. Bridge of Allan Water Co., Feb. 5, 1869, 7 Macph. 492.

² Orr v. Mitchell, March 20, 1893, 20 R. (H. L.) 27.

Nov. 29, 1907. which here it was not. That being the meaning of the operative
 Davidson v. Logan. the arbiters had determined the matter submitted to them, and not a good objection to their determination that it was wrong awarding too little.¹ Even if the submission meant that the

were to be such as a landlord would be obliged to make at law as in a question with an incoming tenant, that did not the Lord Ordinary appeared to think, such repairs as would subjects last to the end of the lease, but merely such repairs put them in a reasonable condition of repair,² and the arbiters the final judges on a question as to what was reasonable. The pursuers' case really came to this, that the arbiters had awarded too little. Further, this whole question was not properly before the Court, because the pursuers did not raise it upon record. The circumstance that the awards bore to be the awards of the court as well as of the arbiters did not make them invalid. This was

observed at this stage that it is amply proved by the witnesses on both sides that the arbiters and oversman acted perfectly rightly in proceeding together to make the inspections. This practice is universal. The valuation of such things as dung, fallow land, and corn crop must be made when these subjects are in existence, and therefore the oversman's valuation of them cannot be put off till the close of the reference. When fallow land would have been broken up, the dung used up, and the crop ingathered, thrashed, and possibly sold, and it seems to be that there should be two inspections, one by the oversman and one by the arbiters; further, the system of inspecting the subjects provides for a convenient devolution on any point to the oversman that become necessary. This practice is similar to the familiar practice of arbiters under the Lands Clauses Act, under which practice the arbiters agree, before there has been any devolution, to the oversman to value the subjects to be valued, and being present at the proof along with the arbiters, thus saving the parties the needless expense of a double inspection and proof.

"The first ground on which at the close of the proof counsel for the pursuers maintained that they were entitled to reduction, was that the arbiters had acted *ultra vires* and in an incompetent manner, in that they never applied their minds to the valuation of the subjects, the valuation of which was submitted to them. He maintained that in their submission the sum that they were to fix and determine was the sum which would be sufficient to put the houses, buildings, drains, fences, and others on the farm 'in good tenantable condition and repair,' as required by the condition between a landlord and an incoming tenant on a nineteen years' lease, whereas the sum which the arbiters had fixed was only the sum which would have satisfied the obligation of an outgoing tenant at the close of the nineteen years' lease to leave the subjects in 'tenantable condition and repair.' I have felt some difficulty in entering on a consideration of this ground of reduction, because while there is on record a plea which is sufficient to cover it, yet the averments in the condescendence exactly meet the case now made upon the proof. But I do not think

¹ Holmes Oil Co., Limited, v. Pumpherston Oil Co., Limited, 1891, 18 R. (H. L.) 52; Caledonian Railway Co. v. Turcan, Feb. 25 R. (H. L.) 7; Lanarkshire and Dumbartonshire Railway Co. v. Glasgow City and District Railway Co., July 16, 1895, 22 R. 912; Glasgow City and District Railway Co. v. George, Cowan, & Galloway, Jan. 25, 1886, 13 R. 609.

² Haining & Douglas v. Grierson, Feb. 18, 1807, Hume's Dec. 850; Moesman v. Brocket, May 19, 1810, Hume's Dec. 850; Ersk. Inst. 39; Bankt. ii., 9, 21.

formal arbitration, but a mere valuation, to which the rules of formal arbitration did not apply.¹ The parties had got the decision of the tribunal they stipulated for, namely, that of the two arbiters, for it was clear on the proof that the awards were the awards of the arbiters only, as it was immaterial that the oversman, in accordance with the custom of the locality, adhibited his signature to shew that he was present.

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Argued for the pursuers;—1. An obligation to put subjects into "tenantable condition and repair" meant one or other of two quite different things, namely, either (1) such an obligation as in a question between a landlord and an incoming tenant, or (2) such an obligation as in a question between an outgoing tenant and a landlord. The former was very much the more onerous. That was settled law;² and besides it was proved to be in accordance with the custom of the locality, which it was legitimate to take into account.³ The operative clause

this objection should be stringently enforced against the pursuers, for they had no proper notice on record or otherwise that the arbiters and the reporter, Mr Dodds, in arriving at the sum they did were proceeding on the footing that the defender Logan was, as regards the whole submission, merely to be treated as an outgoing tenant. The pursuers all along thought, as, in my opinion, they were entitled to think, that what the arbiters endeavoured to do, and ought to have done, was to ascertain the sum that would have been payable by a landlord to an incoming tenant, and in this belief their record is framed on the footing that the inspections and valuations made were insufficient and inadequate to enable the reporter or arbiters to arrive at a proper conclusion on the subject, and this, I think, they have succeeded in establishing. But when they were met at the proof, for the first time as far as I can see, with the answer to their complaint that this was merely a valuation of repairs as between an outgoing and incoming tenant, I think they are entitled to take up the ground in law which they might have taken up without a proof at all had they known of it, that the arbiters had not valued the subject submitted to them. I shall therefore proceed to consider the question.

"It is, I think, established by the proof that the words 'tenantable condition and repair,' according to the custom of the country and the understanding both of landlords and tenants, represent two totally different things, according as they are used with reference to the obligations of a landlord to an incoming tenant at the commencement of a nineteen years' lease, and the obligations of an outgoing tenant to the landlord or an incoming tenant at the close of a lease. It is, I think, obvious in point of fact that this must be so. An outgoing tenant is not liable for tear and wear. The houses and fences may have been old when he entered the farm, and with the effects of tear and wear during the years of his tenancy may have got into such a state as to need renewal in whole or in part instead of mere repair in order to render them in tenantable order and condition as at the commencement of a new lease, but it would be manifestly unfair to an outgoing tenant to require him either to rebuild houses in whole or in part, or, for instance, to put new sarking on offices where the wood had become so old that slates could not be securely nailed on to it, or that he should be bound to renew stob and wire fences where

¹ Nivison v. Howat, Nov. 22, 1883, 11 R. 182; Hope v. Crookston Brothers, June 6, 1890, 17 R. 868.

² Johnston v. Hughan, May 22, 1894, 21 R. 777; Bell's Prin. secs. 1253, 1254; Bell on Leases, vol. i. p. 238; Rankine on Leases, p. 232.

³ Wigglesworth v. Dallison, Smith's Leading Cases, p. 545; Hunter on Landlord and Tenant, vol. ii. p. 239.

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of the submission, therefore, in using the expression "condition and repair" was ambiguous, and consequently was construed by reference to the narrative clause and to the submission. So construed the expression "tenantable condition and repair" plainly meant tenantable condition and repair as in a question between landlord and incoming tenant. The arbiters, however, had construed it as meaning tenantable condition and repair as in a question between outgoing tenant and landlord. That was proved by the evidence before the arbiters, which was competent evidence.¹ The arbiters' award, not having decided the question submitted to them, their award was invalid. The pursuers had not any means of knowing of the existence of this ground of objection to the awards until it was brought out at the proof; they were entitled therefore to take the awards notwithstanding although it was not set forth on record.² 2. The awards were valid on the further ground that they were not merely signed by

these were in such a state that no amount of patching would make good tenantable fences; and accordingly all that an outgoing tenant is bound to do is to put the houses and fences in such order as to last as long as time they can serve their purposes, as Mr Dodds, the valuator, said, for, say, a year. The obligation on a landlord at the beginning of a nineteen years' lease is in fact and according to custom of a very different character. He must put the farm into such a condition as to be serviceable without serious repairs till the end of the lease, and in some descriptions of fences cannot be expected to last nineteen years; the fences must be such as to last well into the lease, and not require a new tenant making extensive repairs on them from the day he enters the farm. All this, I think, is established by the evidence, but it is a matter of fact, but by reason of inveterate custom has become law. Mr Bell in his Principles (paragraph 1253) says:—"From the nature of the contract, warrandice is implied on the landlord's part to put the subject effectual to the tenant or fit for its purpose, and so to put the houses and fences in due repair," and this is supported by a number of decisions, whereas, with regard to the tenant's obligations (see Principles, 1254), it does not extend to natural decay which results from the lapse of time and is known under the common expression 'tear and wear,' nor yet essential defect of structure necessitating such thorough renewal as to amount to extraordinary expenditure. The distinction is in fact and in law between these two obligations is increased in the case of old buildings or old fences, because when either buildings or fences are very old, nothing but extraordinary expenditure, often amounting to the cost of replacement, would put them in the proper order and condition, and applying this to the present case, it is clear that the fences other than the stone dykes were for the most part dilapidated, so as in some cases practically to require renewal. The distinction, accordingly, between the sum which would have enabled a tenant to fulfil his obligation and the sum that would be required for renewal, is an express or implied condition on the landlord to put the fences in proper order and condition is proved in the present case to be very different. According to Mr Dodds' valuation, No. 42 of process, which has been adopted by the arbiters, the amount allowed for putting the fences and dykes in tenantable order is £37, 0s. 7d., and for drains is £21, 16s. 2d., whereas according to the report of the witnesses

¹ *In re Dare Valley Railway Co.*, 1868, L. R., 6 Eq. 429; *Buccleuch v. Metropolitan Board of Works*, 1872, L. R., 5 App. 418.

² *Bile Beans Manufacturing Co.*, July 20, 1906, 8 F. 1181.

man—*per se* perhaps that might not have been fatal—but were *in terminis* the awards of the oversman as well as of the arbiters. Such an award was entirely incompetent. What the parties agreed to was an award either by the arbiters or, if they differed, by the oversman, but they did not agree to an award by the arbiters and the oversman combined. It was said that the oversman had never acted, and that the award was the award of the arbiters only. *De facto* that might be so, but it was incompetent by parole evidence to contradict the terms of the award.¹

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At advising.—

LORD LOW.—The Lord Ordinary has reduced the awards of the arbiters which are challenged in this case upon two grounds—first, that they did not determine the question which was submitted to them, but dealt with

Johnston and John Rutherford, No. 50 of process, the amount that would be necessary to fulfil the landlord's obligation to put the fences and drains in tenantable order and repair is, for fences and dykes, £311, 12s., and for drains and ditches, £123, 9s. 1d. This report and estimate was carefully prepared by these witnesses, and it is approved of as moderate by so skilled and reliable a witness as Mr James Inglis Davidson of Saughton Mains, and by other witnesses. It was strongly argued for the defenders that all that the arbiters were directed to do was 'to ascertain, fix, and determine the sums payable by the defender Logan to the pursuers in respect of the houses, buildings, with the water supply thereto, pipes and connections thereof, roads, drains, ditches, dykes, and fences on the said farm not being in tenantable condition and repair,' and that they were entitled to follow what method they pleased in ascertaining and determining that amount. If they made a mistake and took a wrong method, that would not, it was argued, invalidate the award, provided they did not act corruptly. I am unable to accede to this argument, because, for the reasons above stated, I think that what the arbiters were bound to do was to ascertain the sum sufficient to fulfil the landlord's obligation to put the subjects in 'good tenantable condition and repair' as at the commencement of a nineteen years' lease, whereas, it is admitted that what the arbiters did fix and determine was the sum which would have been sufficient for an outgoing tenant to pay at the end of his lease in order to put the subjects into such condition as that they would stand for a year or less. The arbiters and oversman admitted that they did not consider they were concerned with any part of the submission except the passage I have just quoted, but in my opinion they were bound to read the whole submission in a case where there were words in the operative clause which were capable of two different meanings, and if they had done so and applied the narrative to the construction of the operative clause in the same deed, they would not have fallen into the mistake which I consider they have. The narrative clause is in these terms :—'Further, considering that by said lease we, the said second parties, also became bound to accept the buildings and others as therein mentioned on the farm as in good tenantable condition and repair when the same had been put into good order, and the alterations and additions upon the steading made by me the said Abraham Logan as arranged, and that I am in course of executing these alterations and additions, and that I have agreed to pay such sum (if any) as shall be fixed by said arbiters or oversman as aforesaid in respect of any buildings and others not being in good order, which sum we, the said second parties, have agreed to accept as in full of all that we could ask in that respect.' It is noticeable from this

¹ Duke of Buccleuch v. Metropolitan Board of Works, L. R., 5 Eng. & Ir. App. 418; Millar & Son v. Oliver & Boyd, Nov. 10, 1903, 6 F. 77.

Nov. 29, 1907. another question ; and secondly, that the awards bear to be the
 Davidson v. the arbiters and oversman, and are signed by the oversman as
 Logan. arbiters, although the arbiters were agreed upon their award and
 Lord Low. was never devolved upon the oversman.

In regard to the first of these grounds of reduction I am of
 opinion as the Lord Ordinary. The submission arose in this
 lease executed in February 1904 the defender, Mr Logan, let
 Whitton in Roxburghshire, of which he is proprietor, to the pursuers
 period of nineteen years from Whitsunday 1904, with breaks in
 either party at Whitsunday 1914 and Whitsunday 1919. Mr Logan
 prior to the pursuers' entry, farmed Whitton himself, and he was
 both outgoing tenant and landlord. By the lease the pursuers bound
 selves to take over the dung upon the farm, the waygoing crop and
 certain plant, machinery, and house fittings, at a valuation, and

narrative in the first place, that the phrase 'good tenantable condition
 repair' appears as being used in the new lease of nineteen years.
 said that the tenants were only to accept the buildings and contents in
 good tenantable condition and repair when the same had been put in
 order,' and it further proceeds to say that the defender Logan had to
 pay such sum as should be fixed by the arbiters or oversman in respect of
 any buildings or others not being in 'good order,' and it is that sum
 which the pursuers, it is stated, have agreed to accept in full, inasmuch
 they could ask in that respect. I think it plainly follows from this
 the pursuers did not agree to accept a sum such as would have been
 obligation on an outgoing tenant to put the drains and fences in
 condition and repair,' and that the arbiters, in awarding such sum,
 have fixed and determined the value of a totally different thing from
 which it was referred to them to value. They have valued the obligation
 on an outgoing tenant to a landlord, and not the obligation of a
 an incoming tenant on a nineteen years' lease in reference to the
 subjects in question in tenantable condition and repair. It is plain
 plain from the narrative clause that the tenantable condition mentioned
 mentioned in the operative clause was the same state of repair as was
 to and called by the name of 'good order' in the narrative clause.
 subject of a tenant's obligation to keep houses tenantable, I would refer
 the case of *Mossman*, 1810, Hume's Decisions, 850, where some of the
 remarks by the Lord President are reported. I am accordingly of opinion
 that the arbiters acted *ultra vires* and incompetently in respect to the
 not apply their minds to value the obligation which they were to
 value, but an obligation totally different not only in extent but in
 I accordingly think on these grounds that the award falls to be set aside.

"The case of *Mackay*, 20 R. 1093, was referred to as an authority for
 the proposition that it was for the Court, and not the arbiters, to
 the construction of a contract of submission unless that was
 reserved to the arbiters. The case of *Alexander v. Bridge of Forth
 Company*, 7 Macph. 492, was also referred to, and is, in my opinion,
 authority for the pursuers' contention in the present case, and that
 that decision was approved of by Lord Watson in the case of
Great North of Scotland Railway, 18 R. (H. L.) 1, although the
 which the decision had been arrived at was disapproved of in
 the case was held not to be one of constructive corruption under the
 tions, although the judgment of the arbiters was bad, because it was
 the category laid down by Lord Watson to the effect that it was
 ground of reduction at the instance of either party to a submission
 able to shew independently of the regulations either that the

agreed "to accept of the whole houses and buildings, with the water supply thereto, and pipes and connections thereof, roads, drains, ditches, dykes, and fences on the said farm, when the same have been put into good order and the alterations and additions upon the steading made as arranged, as being in tenantable order and condition."

In April 1904 a submission was prepared, apparently upon Mr Logan's instructions, whereby he and the pursuers submitted to the determination of two arbiters mutually chosen, and in case of their differing in opinion, to an oversman to be chosen by them, in the first place, the amount to be paid by the pursuers for the dung and other things which by the lease they were bound to take over at valuation, and in the second place, "the sums payable by me the said Abraham Logan to us the said Alexander Davidson senior and Alexander Davidson junior, in respect of any houses and buildings, with the water supply thereto, pipes and connections thereof, roads,

exceeded what are called in Scotland the *finis compromissi*, or that in the course of the arbitration he has disregarded any one of the express conditions contained in the contract of submission, or any one of those important conditions which the law implies in every submission. I am of opinion in the present case that the arbiters went beyond their jurisdiction in considering what an outgoing tenant should pay as the value of repairs, and that they disregarded altogether the matter submitted to them, and thus failed to perform their proper duty under the submission, or to comply with the conditions thereof.

"The objections to the defects in the proceedings must now be considered. The first of these is that there was no written acceptance of office by the arbiters. I am of opinion that that objection cannot be sustained as a ground of reduction. The arbiters being duly named in the submission, their acting under the same implied acceptance, and the pursuers were unable to cite any authority for the proposition that it was necessary to the validity of a submission that the arbiters should accept in writing. The authorities, indeed, seem to be the other way. (*Gardner v. Ewing*, M. 659, and *Brysson v. Mitchell*, 2 Shaw, 382.) Even had an acceptance in writing been required by law, I should have been prepared to hold that the title of the arbiters to deal with the matter being contained in the submission, and they having acted thereunder, without objection by either party, both parties are barred by acquiescence in their so acting from calling their decision in question. I ought to add, however, that in my opinion it is in accordance with the proper practice in arbitrations that arbiters should accept the submission in writing, and I am glad to notice that that is the practice followed in the Border counties in regard to such submissions.

"The next objection is that there was neither a written nomination nor acceptance by the oversman. In view of the fact which has been established at the proof, namely, that none of the awards in question are judgments of the oversman, and that he never applied his mind to the matter as a judge, it is unnecessary for the purposes of the decision of this case to enter on the subject, but I think it right to say that in my opinion where there is a formal written submission, as here, the nomination of the oversman ought to be in writing, and that such nomination should be made before the work of the submission is entered upon. Without such written nomination the oversman has no title nor authority to act at all, and any actings of his without such nomination would be inept. I am also of opinion, following on the decision in the case of *Frederick v. Maitland & Cunningham*, 3 Macph. 1069, that to entitle an oversman to act there must be a written devolution of the reference upon him.

"Coming now to the documents under reduction, these documents, or

have cost Mr Logan as outgoing tenant to put the subjects into tenantable condition and repair as at the termination of a lease, and it was argued for Mr Logan that they were right upon a sound construction of the submission in making their estimate upon that footing.

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Now, it seems to me not to be open to question that the obligation undertaken by Mr Logan in the lease to put the buildings and fences into good order was undertaken by him as landlord, and not as outgoing tenant, and I think that it is equally plain that the intention of the parties to the submission was that the arbiter should determine the amount of money required to fulfil that obligation.

The difference in phraseology between the narrative of the submission and the operative clause which formulated the question which the arbiters were to determine, was founded on by Mr Logan's counsel, who argued that the words in the latter clause—"tenantable condition and repair"—were invariably used to designate, and were recognised as meaning, the condition and state of repair in which an outgoing tenant was bound to leave buildings and fences at the termination of his lease, and were therefore not open to construction, and could not be modified or controlled in any way by reference to the narrative.

I am of opinion that that argument is not well founded. It is beyond dispute that the obligation which lies upon a landlord at common law to put buildings and fences at the commencement of a lease in tenantable condition and repair involves more and is more onerous than the obligation which lies upon the tenant to leave these subjects in like condition and repair at the end of the lease. To take one example out of many which might be given—If a fence were, at the beginning of a lease, worn out, so that it was no longer capable of being repaired, the landlord would be bound to renew it, but no such obligation would rest upon a tenant at the end of a lease, because he is not responsible for the effects of inevitable wear and tear, and is not bound to renew what, from that cause, has become worn out. It was therefore essential, in the present case, that the arbiters should know whether the obligation upon which they were to put a money value was the obligation of a landlord at the beginning of a lease or of an outgoing tenant at the end of a lease. I should have thought that no one could have read the submission without seeing that it was the landlord's

which on the face of it professes to be a judgment of the arbiters and oversman as the persons who issued the judgment, and I think it is incompetent by parole proof to qualify or explain away the document in question by proving that *de facto* the oversman never acted, and that it is a judgment of the arbiters alone. To allow such proof would be to allow a proof by parole to set aside and qualify a written document. In my opinion the document must be taken as it is, and so taken, it seems to me to embody an absolutely incompetent judgment.

"Coming next to the document No. 18 of process, the same objection applies to it, and it has this additional defect, that one of the arbiters does not sign and the oversman does. This is precisely the kind of document that was considered in the case of *Frederick*, already alluded to, and there the award was held to be void. On these grounds, accordingly, apart altogether from the ground of *ultra vires*, I should have been prepared to hold that the pursuers were entitled to reduction of the documents Nos. 16, 17, and 18 of process."

Nov. 29, 1907. obligation which was in question, because the submission itself
 Davidson v. clause in the lease in regard to the condition of the buildings
 Logan. and the landlord states that he has agreed to pay such sum as
 Lord Low. shall fix in respect of any buildings and fences not being in the
 condition.

It was said that the use of the words "good order" in the narrative of the words "tenantable condition and repair" in the opening of the submission indicated that what was actually submitted to the arbiters was different from what was referred to in the narrative, or at all events the question submitted was more accurately expressed in the opening of the submission in either of which cases the latter clause must rule. I do not think there is any real inconsistency between the narrative and the opening of the clauses. In the first place, I am inclined to think that a landlord's obligation to put buildings and fences into "tenantable condition and repair" at the beginning of a lease is substantially equivalent to an obligation to put them into good order, because I cannot imagine such subjects being submitted to arbiters "tenantable condition and repair" when intended to serve the purpose of a lease for (say) nineteen years, unless they were in good order at the beginning of the lease. Even if that may be, the clause in the lease, which is recited in the submission, shews that in the present case the expression "tenantable condition and repair" was equivalent to "good order," because the tenants undertook themselves to accept the buildings and fences "when the same were put in good order," as being in tenantable condition and repair.

It therefore seems to me to be clear that what was referred to in the submission was to estimate the amount which would be required to implement the obligation undertaken by the landlord to put the buildings and fences in the condition stipulated by the lease at the beginning of the lease. Therefore, as the arbiters have frankly admitted that what they estimated was the amount which an outgoing tenant would require to expend in order to comply with his obligation to leave the subjects in tenantable condition and repair at the end of his lease, I am of opinion that the award cannot stand, because the arbiters have not determined the question submitted to them, but have decided the question altogether.

It was, however, argued for Mr Logan that the pursuers were not entitled to a decree of reduction upon that ground, because they have not pleaded it. I agree with the Lord Ordinary that that contention cannot be sustained. I can very well understand that it never occurred to the pursuers that the arbiters had entirely misapprehended the question submitted to them, and the defences do not disclose that what the arbiters dealt with was the obligation of the outgoing tenant. But the pleadings cannot prevent justice being done between the parties. Whenever the arbiters admitted that they had not dealt with the question referred to them, there was, in my judgment, an end of the case. The alleged defect in the pleadings could even now be put right by amendment of the record, but I do not think that in the circumstances amendment is necessary.

In regard to the second ground upon which the Lord Ordinary has set aside the awards to be liable to reduction, I have felt some difficulty in assent to the view that in agricultural arbitrations, where the question

value of such things as a waygoing crop or the dung upon a farm, and where Nov. 29, 1907. the arbiters are chosen because their experience in such matters enables Davidson v. them, by inspecting the subjects, to fix the value, it is desirable that there Logan. . should be as few formalities as possible. Further, I think that in such Lord Low. arbitrations mere irregularities will not vitiate an award even if they are of a kind which would be fatal in other classes of submissions where the duties of the arbiters are more of a judicial character.

In this case the submission was not one purely for valuation, because the arbiters had to fix the amount which would be required to enable the landlord to implement his obligation to put the buildings and fences into good order. No doubt the arbiters might be expected to be able to determine by their own inspection what required to be done, but I think that the probability is that they would further require to call in the aid of tradesmen to advise them as to the cost of such repairs and renewals as they might deem to be necessary.

Still the submission was substantially one for valuation, and in such a case, if it appeared that the parties had obtained the honest opinion of the gentlemen selected upon the questions submitted to them, I should not regard mere irregularities of procedure as being sufficient to nullify the award.

In the present case there is only one matter which has occasioned me difficulty, and that is the fact that the awards under reduction bear to be the awards of "the arbiters and oversman." I have great difficulty in regarding that as a mere irregularity or informality. In the case of *Lang v. Brown*¹ Lord Chancellor Cranworth laid it down very emphatically that when an award is challenged the question always is whether it is one which the parties agreed should be binding on them. Now, in this case the parties agreed to abide by the award of the two arbiters mutually chosen, or in the case of their differing in opinion, of an oversman, but they never agreed to accept a joint award of the arbiters and the oversman. It therefore seems to me that the matter is one of substance, and not merely of form.

It is true that in this case the arbiters were agreed; and apparently the oversman (who quite properly had accompanied the arbiters when they inspected the subjects) was made a party to the award and signed it, simply to indicate that he approved of the conclusion at which the arbiters had arrived. But that that was the position of matters could not be discovered from the award itself. For anything that appears to the contrary in the award the arbiters might not have agreed, but might have called in the oversman to settle their differences and then issued an award jointly with him. If that had been what actually occurred, I think that there could be no doubt that the award would have been bad, and, in any view, I have difficulty in reconciling myself to the idea that a written award which bears to be a joint award can be proved by general evidence to be an award by the arbiters only, with in addition an irregular, ineffective, and unnecessary concurrence by the oversman.

The case of *Hope v. Crookston Brothers*² was founded on. In that case a joint award by the arbiters and the oversman was sustained. The parties,

¹ 2 Macq. 93.

² 17 R. 868.

Nov. 29, 1907. however, had agreed that any disputes in regard to a contract for sale and purchase of hay should be settled by arbitration in Liverpool in the usual way," and it was proved that the course which had been followed was according to the custom in Liverpool.

Davidson v.
Logan.

Lord Low.

If in the present case it had been proved to be the recognised custom in Roxburghshire, in agricultural arbitrations, where the oversman accompanied the arbiters when inspecting the subjects, for a joint award to be issued by the arbiters and oversman, the question would have been different, but although there is evidence that that course is sometimes followed, no such general custom is established.

I therefore agree with the Lord Ordinary that the awards, bearing to be joint awards of arbiters and oversman, cannot be sustained.

LORD STORMONTH-DARLING.—I concur with Lord Low in the merits of judgment which he proposes. I think that not only is the obligation of a landlord at the commencement of a lease to put the buildings and fences on the farm into "tenantable condition and repair" (this course could be altered by express contract) equivalent to an obligation to put these into good order, but I think the lease itself in the present case makes it clear that this was the thing submitted to arbitration, the tenants bound themselves to accept the buildings and fences as in tenantable condition and repair only "when the same had been put into good order." And as this was (confessedly) not what the arbiters decided, that their awards, so far as challenged, cannot stand.

But I do not think that we can avoid, if only as affecting the expenses, the duty of forming and expressing some opinion on the grounds of reduction to which also the Lord Ordinary has given weight. It would have been enough, no doubt, for the pursuers to rely solely on the ground that the arbiters had mistaken the nature of the thing submitted. But they did not choose to do so. On the contrary, they chose to rely on every ground, good and bad, on which the awards could be attacked. On some of these points (I think on most of them) the Lord Ordinary has rejected them. In particular, he holds that the parties, by acquiescing in the awards, acting without written acceptances, are barred from reducing the awards on the ground that there were no written acceptances. He also expresses the opinion that the arbiters and oversman acted quite rightly in coming together to make the inspection, and he gives very good reasons why any other mode of procedure would be quite unworkable. Further, in view of the fact established at the proof that there never was any devolution on the oversman, nor any necessity for such devolution, for the simple reason that the arbiters were agreed, his Lordship really comes to the conclusion that the objection founded on there being no devolution in writing to the oversman signed the awards, had no substance in it. The Lord Ordinary no doubt states his opinion that wherever there is a formal submission the nomination of both arbiters and oversman ought to be insisted on. But that seems to me to be attaching far too much weight to matters of formality and procedure, at all events in rural arbitrations. In truly partake much more of the nature of valuations, between which and regular arbitrations our Courts have always drawn broad distinctions.

the case of *M'Gregor v. Stevenson*¹). Indeed, I claim the first part of the Nov. 29, 1907. Lord Ordinary's opinion as really negating the idea that these awards ought to be reduced on any ground except the substantial one on which *Davidson v. Logan*.

Lord Low has proceeded. Be that as it may, my own opinion is that there is no ground for reducing these awards on any of what may be called the *IdStormonth-Darling*.

technical grounds. It was because the Second Division, as constituted on 25th May 1906, thought that the Lord Ordinary had erred in accepting these technical objections as sufficient to justify reduction *de plano* that we recalled his Lordship's interlocutor and remitted to him to allow a proof before answer. The proof thus taken has, of course, been considerably lengthened by the pursuers insisting upon these formal objections and even adding to their number. In the result it seems to me to have been shewn that there was no substance in the technical grounds, although it has also been disclosed that there was a very real and sufficient ground for reducing some of the awards, because the arbiters had not applied their minds to the sum which was necessary to put the fences, &c., into good order.

I should therefore have been in favour of limiting our judgment to what I consider the true ground, and if your Lordships had agreed with me, of marking our sense of the pursuers' failure to establish their technical objections by modifying the expenses to which they are to be found entitled.

LORD JUSTICE-CLERK.—I concur with both your Lordships that the so-called award in this case cannot stand. But upon the technical questions as to the procedure of the arbiters and oversman, which can only affect the question of expenses, I agree with the views expressed by Lord Low. I entirely assent to the general view that submissions such as this which relate to farming matters are not to be too strictly dealt with as regards procedure. But relaxation of rules of sound procedure must not be carried too far. Where only matters of detail are concerned mere technicalities may be held not sufficient ground for setting aside an award evidently fairly arrived at. But the difficulty in this case is that the irregularities which took place make it plain that the party complaining of the procedure did not get the benefit in the arbitration of what was stipulated for, viz., that in the event of the arbiters differing he was entitled to the decision of the oversman. He was entitled to know the fact whether the arbiters differed, and whether they referred the matter on that ground, and to consider whether he should ask the oversman to hear him or bring matters before him for consideration. Now, the case as it presents itself to us, indicates, if anything, that the award was an award made both by the arbiters and the oversman in conjunction, or in the form of one of the deliverances, an award by one arbiter and the oversman. Such awards presented to a party could give him no certainty as to what had been done—whether the arbiters had considered the case and had differed, and therefore had devolved the matter upon the oversman, or whether the oversman had never had any devolution made to him, but had proceeded without any such devolution to take part in disposing of the matters in dispute. It seems to me that the objection to such procedure is substantial. I cannot hold that the party to the arbitration

¹ May 20, 1847, 9 D. 1056.

Nov. 29, 1907. who felt aggrieved by the so-called award can without injustice
 Davidson v. the position of having to accept an award as to which it does
 Logan. that the procedure was truly the procedure contemplated by him
 Lord Justice- ing into the arbitration as shewn by the terms of the submission
 Clerk. only to say further that I do not think that the case of *Hop*
 bearing on the case. It proceeded on customs of a port. There is no
 any ordinary law applicable to such a case. Here there is no ground
 for dealing with the matter on any other footing than that the law
 applied, there being nothing to shew any district custom which could
 a decision not in accordance with the legal principles applicable to the
 circumstances of the case.

LORD ARDWALL was not present.

THE COURT adhered.

MURRAY LAWSON & DARLING, S.S.C.—RUSSELL & DUNLOP, W.S.—

No. 53. DAVID GREIG, Pursuer (Appellant).—*M'Lennan, K.C.*—
 Dec. 20, 1907. ALEXANDER CHRISTIE, Defender (Respondent).—*C. D. Munro.*

Greig v.
 Christie.

Passive Title—Vicious Intromission—Onus.—A farmer, after his
 his uncle who lodged with him and assisted him on the farm, gave
 his uncle's repositories a cheque in his uncle's favour for £1000
 exchange for it got from the granter a cheque in his own favour.

In an action by a creditor of the uncle against the nephew as
 intromitter with the uncle's estate, after a proof, the Court held (1)
 uncle had no interest in the stock of the farm, and that the cheque
 represented the price of three bulls, part of the stock sold by the
 management of the farm, (2) that the pursuer had failed to prove
 uncle had any claim against the farm which would have entitled him
 retain the cheque, and (3) that the defender was not liable as
 intromitter even to the extent of the sum in the cheque;
 Stormonth-Darling, who was of opinion (1) that the cheque was in
 favour of the uncle, even though he might have been liable for the
 proceeds, formed part of his estate at the time of his death, and
 (2) that the nephew in dealing with it had rendered himself a
 vicious intromitter.

Opinion (per Lord Low) that, even if the uncle had been joint
 the bulls along with the nephew, the nephew, by acting as he did
 regard to the cheque, would not have made himself liable as a
 intromitter.

2D DIVISION. DAVID GREIG, retired farmer, residing in Glasgow, brought
 Sheriff of Stir- action in the Sheriff Court at Stirling against Alexander
 ling, Dum- farmer, Bankend, near Stirling, "as vicious intromitter with
 barton, and gear, and effects of" his uncle, the deceased James Christie,
 Clackmannan. representing him under one or other of the passive titles
 the law." The action was originally also directed against the
 defender as executor-dative *qua* one of the next of kin of the deceased
 James Christie, but it appeared that although the defender was
 decerned executor-dative along with his sisters neither he

ever took out confirmation. The action consequently came to proceed Dec. 20, 1907. against him as a vitious intromitter solely.

The pursuer craved decree for payment of three sums of £20, £12, and £25, with interest thereon from 5th February 1902, 6th January 1904, and 5th February 1904 respectively. The pursuer averred that he had lent these sums on the dates mentioned to James Christie, and that they, with interest, were due and resting owing to the pursuer at the time of James Christie's death, and were still unpaid. Greig v.
Christie.

The pursuer further averred that James Christie had for some time been joint tenant of the farm of Bankend along with his brother, Alexander Christie, the father of the defender, and that after his brother's death on 12th December 1902 he became, and was at the time of his death, on 7th March 1905, sole tenant of the said farm; that at the time of his death he had property, including cash in house, stock, crop, and implements, and household furniture, to a value much exceeding the sums sued for; and that the defender had taken possession of and intromitted with the whole of the said estate.

The defender denied these averments, and stated that the stock and furnishings of the farm of Bankend belonged entirely to the defender's mother and sisters, and that the only property belonging to the deceased was some bedroom furniture of small value, with which the defender had not intermeddled.

The pursuer pleaded, *inter alia*;—(3) *Separatim*, the pursuer is in the circumstances narrated entitled to decree against the defender as vitious intromitter with said estate.

The defender pleaded, *inter alia*;—(3) The deceased James Christie not having left any moveable property, there is no room for vitious intromissions, and defender ought to be assoilzied with expenses. (4) The defender not having intromitted with any property whatever which belonged to the late James Christie, he ought to be assoilzied, with expenses. (5) In the event of its being found that any funds or property with which the defender has intromitted truly belonged to the deceased James Christie, said intromissions being *bona fide*, and in the belief that said funds and property did not belong to said deceased, defender should only be found liable to the extent of his actual intromissions.

Proof was allowed and led. The facts, as ultimately held by the majority of the Court to be proved, were as follows:—

James Christie and his brother Alexander Christie, the defender's father, down to 1879 were joint tenants of the farm of Bankend, and the stock on that farm then belonged to them jointly. In 1879 James Christie took another farm called Bandedath on the same estate, and took to that farm the whole of his share of the stock on Bankend. He was not successful at Bandedath, and the landlord ultimately in 1885 took the farm off his hands. He then returned to Bankend, and resided there till his death. In 1890 James Christie's name was entered in the estate-books as joint tenant of Bankend with his brother Alexander, and his name continued to be so entered until Alexander's death in 1902, after which he was entered as sole tenant till his own death in 1905. It was explained by the defender that James' name was inserted in the estate-books for voting purposes. There was no written lease of Bankend, and no farm books or accounts were kept. The majority of the Court held it to be proved upon the evidence as a whole, notwithstanding the entry in the estate-books, that James was not in fact at any time after 1879 either joint or sole tenant of

Dec. 20, 1907.

Greig v.
Christie.

Bankend; that Alexander was sole tenant until his death, after his death the farm was carried on for behoof of his daughters, and his son, the defender, who were now the tenants; no part of the stock of the farm belonged to James, who was in the position of a lodger with his brother Alexander, and after Alexander's death with Alexander's family; that James carried on the management of the farm in return for board and lodging, and that he carried on business as a cow-dealer on his own account. After Alexander's death James transacted the financial business of the farm. He paid the rent, wages, seed bill, and other charges. He sold and received the money for the produce and stock of the farm. Receipts in his favour for the rents payable in 1904 and at Candlemas 1905 were produced. In the opinion of the majority of the Court he acted in these transactions as the agent of his brother Alexander's family.

It was proved that the pursuer, who was James' brother, lent him the sums sued for on the dates above mentioned. The sums were borrowed by James ostensibly to enable him to pay rent and taxes due for the farm of Bankend, and the receipt for £25 borrowed on 5th February 1904 bore that the sum was "to enable" him "to pay rent and taxes, &c." The rent of Candlemas 1904 was in fact paid by him on 8th February of 1905. There was no other evidence to shew that the sums received for the stock and produce of the farm were not sufficient to meet its liabilities, or that, upon a true accounting between James, as agent for Alexander's family, and Alexander's family as tenants of the farm, there was any sum due by them to him at the date of his death. It appeared that before Alexander's death and after James' death the farm always paid its way.

After James' death there was found in his repositories two hundred pound notes and a cheque granted in his favour by Messrs. Brothers, auctioneers, for £46, 5s. 7d. The two notes and the cheque were placed by the pursuer in a cash-box, which he locked up at Bankend, taking away the key. The defender thereafter opened the cash-box with a key which he found in the house, and took out the two notes and the cheque. The two notes he applied towards payment of James' funeral expenses, amounting to £11, 13s. 6d. The cheque he took to Messrs Speedie and got from them in exchange for it another cheque in his own favour for the same sum. The sum was for the price of three shorthorn bulls which had formed part of the stock of Bankend, and which had been sold on the instructions of James. In the view of the majority of the Court it was held that it was proved that these bulls were to no extent the property of James, but were wholly the property of Alexander's family, and were lent to James as their agent.

By interlocutor dated 9th October 1906 the Sheriff (Mitchell) assoilzied the defender from the conclusions of the pursuer's action.

The pursuer appealed to the Sheriff (Lees), who, on 3d November 1906, pronounced this interlocutor:—"Finds that the pursuer is a creditor of his brother-in-law, the late James Christie: Finds that the pursuer has failed to prove that the defender has confirmed as agent of the said James Christie or has vitiously intromitted with his property. Finds in these circumstances, as matter of law, that the defender is liable in payment to the pursuer under the conclusions of the

Therefore refuses the appeal; of new assolizies the defender from the Dec. 20, 1907. conclusions of the action; and decerns."

The pursuer appealed. The case was heard before the Second Division on 12th and 13th November 1907. Greig v.
Christie.

Argued for the pursuer and appellant;—Any person who intromitted without title with the effects of a person deceased was a vitious intromitter even although he had acted *bona fide*. *Bona fides* might absolve from the penal consequences of universal liability, but the intromission was none the less vitious, and the intromitter was liable at least to the extent of his intromission.¹ The case of *Adam v. Campbell*² was special, and it merely decided that the persons there sued were not liable for the deceased's debts universally. They admitted liability to the extent of the estate left by the deceased. The deceased here left, and the defender vitiously intromitted with, either (a) half of the stock at Bankend, or at least (b) the cheque. Even assuming that James had no interest in the farm stock, that the bulls for the price of which the cheque was granted were the property of the defender's family, and that James was only an agent for them, the cheque was none the less the property of James. A principal was not entitled to the price of goods sold by his agent, but merely to the balance which might be found due by the agent on an accounting, and it lay upon the defender to explain the true position of affairs by accounting as James' executor. It could not be assumed that the balance was against James. The *onus* of proof was on the defender. The cheque in any view was liable *primo loco* to meet debts incurred by James on farm account, and on the defender's behalf and for his benefit. That was the position of the debts here sued for. It was proved that the money lent to James was borrowed for the purpose of paying the rent of the farm, and was, in fact, used for that purpose. If the defender's family were the tenants, they got the whole benefit of the money borrowed from the pursuer.

Argued for the defender and respondent;—The absence of dishonest purpose and concealment, and of any intention to take up the *universitas* of the deceased's estate, was a good defence to a charge of vitious intromission.³ At least any *bona fide* title of intromission relieved the intromitter from the penal consequence of universal liability.⁴ But really here there was no intromission with the estate of the deceased. He had no interest in the farm stock, and even the cheque was not his property, for it was proved that it was the price of bulls belonging to the defender's family. It was said that he would have been entitled to retain this cheque to meet debt incurred on farm account by him. But his right so to retain or to apply it in payment of the pursuer's loans would have depended upon the state of accounts between him and the defender's family. The Court had no information as to this, and could not obtain it in an action based solely on vitious intromission. But at most what the defender did was to affect prejudicially a right of retention, and all the pursuer was entitled

¹ Ball's Prin. sec. 1921; Ersk. Inst. iii. 9, 49-53; Wilson v. Taylor, 1865, 3 Macph. 1060.

² 1854, 16 D. 964.

³ Adam v. Campbell, 1854, 16 D. 964, per Lord Justice-Clerk Hope, at pp. 972-3.

⁴ Ball's Prin., sec. 1921; Wilson v. Taylor, 1865, 3 Macph. 1060, per Lord Cowan, at p. 1061.

Dec. 20, 1907.

Greig v.
Christie.

to was the proved value of that right of retention. That on its being shewn that on an accounting the balance was of James. The *onus* of proving this was on the pursuer, and not discharged it. There was no proof that James as does to borrow money to pay the rent. On the other hand, it was that the farm, at least before Alexander senior's death, James' death, always paid its way, and that there was money coming in to meet all its liabilities.

At advising on 20th December 1907,—

LORD JUSTICE-CLERK.—(After stating the facts)—In these circumstances the question arises whether the defender in this case has fallen into the character of a vitious intromitter by his having taken a cheque in favour of the deceased and got another cheque in his own favour from the granter, and so got from the bank the amount in question. I am satisfied that the cheque, which was from stock auctioned for the price of three young bulls which did not belong to the deceased, being bulls reared on the farm, and not the deceased's property, was granted to him as managing the business of the farm.

In these circumstances the question which arises is one of some difficulty, and it is only after repeated consideration that I have come to the conclusion that the pursuer's plea in favour of vitious intromission must fail. I do not go further into the matter, as I have considered and compared the opinions prepared by Lords Low and Ardiwall. The deceased, I think, had no right or title to the money represented by the cheque, the burden of proof being on the party maintaining vitious intromission, and that the pursuer has failed to discharge the *onus*.

LORD LOW.—I am of opinion, in the first place, that it is established that no part of the stock, crop, or implements upon the farm of Bankend belonged to the deceased James Christie. It was impossible to get exact and precise evidence upon the question, because no farm accounts of any description appear to have been kept, and according to the evidence, if taken in detail, is somewhat vague and indefinite. As a whole, however, it leaves no doubt in my mind that after the death of Bankend in 1885 James Christie was merely in the position of a tenant with his brother, who assisted in the management of the farm in board and lodgings, and who carried on business as a cow-dealer on his own account.

There is indeed one fact which *prima facie* suggests that James must have had an interest in the farm, and that is that in 1896 an entry was entered in the estate-books as joint tenant with his brother. There is nothing, however, in the estate office to shew how or why this came to be made. Mr M'Laren, the present factor, only came to the farm in 1896, and his only source of information is the entry in the books. He says, however, that he always regarded Alexander as being a joint tenant, while the defender says that he understood that James was put in as joint tenant "to give him a vote for the laird." In the circumstances, I cannot regard the entry in the rental as counterbalancing

great weight of evidence to the effect that James' position in regard to the Dec. 20, 1907. farm was what I have stated.

The pursuer, therefore, has no claim against the defender in respect of Christie. Greig v. the intromissions which the latter had with the stock and crop upon the farm. Lord Low.

So far the case appears to me to present no difficulty, but a delicate question arises as to whether the defender by his intromissions with the cheque for £46, 5s. 7d. granted by Speedie Brothers in favour of the deceased, has not incurred liability for the debts of the latter, as a vitious intromitter, at all events to the amount of the cheque.

The answer to that question depends upon whether the money represented by the cheque was the property of the deceased, because if it was not his property the defender cannot have incurred a passive title, however irregular and unwarranted his intromission with the cheque may have been. Mr Erskine in his Institutes (iii. 9, 51) states the law thus:—"Intromission cannot be vitious, nor consequently infer a passive title, when the subject intermeddled with was truly not *in bonis defuncti*, no part of the estate of the deceased, or ceased to be such before the intromission."

Now, a cheque is not a document of title, nor, in the general case, does it give any indication of the purpose for which, or the capacity in which, it is granted to the payee. Still, when a cheque is found in a dead man's repositories, drawn in his favour in ordinary form, I think that there is a certain presumption that the money represented by the cheque belonged to him. It seems to me, therefore, that the *onus* in the first instance lay upon the defender to shew that the money did not belong to the deceased. That *onus* he has, in my opinion, discharged, because it is proved that the cheque represented the price of certain cattle which formed part of the stock of Bankend, which were sold by Speedie Brothers upon James Christie's instructions, the sale of stock being a matter which was intrusted to him. If, therefore, I am right in thinking that it is established that no part of the stock of the farm belonged to James Christie, he held the cheque not in his own right but for the defender and his mother and sisters, to whom the stock upon the farm belonged. That being so, then unless circumstances existed which would have entitled James Christie to retain the money although it was the price of cattle which did not belong to him, the defender has not, by his intromission with the cheque, incurred liability for his uncle's debts.

It is argued, however, that upon the assumption that James Christie had no interest in the farm, he was entitled to retain the cheque in a question with the defender and his mother and sisters, because he had borrowed the sums now sued for from the pursuer for the purpose of paying the rent of the farm. I think that it may be taken to be proved that James Christie did in fact borrow the sums sued for for the ostensible purpose of paying rent and taxes, but it does not follow that that gave him right to retain the amount in the cheque. Whether he would have been entitled to do so or not would have depended upon the result of an accounting for his intromissions with the produce of the farm. He appears to have conducted all the sales, both of crops (such as hay, beans, and barley) and of cattle, and out of the proceeds he paid the rent and other

Dec. 20, 1907. necessary expenses. The farm seems always to have paid its way to have afforded a livelihood for Alexander Christie and his family. The reason is disclosed why James Christie should have required money to pay the rent. Perhaps the fact that he engaged in cattle apparently with little success, may have had something to do with it, however that may be, it is certainly not proved, nor do I think it can be inferred from the evidence, that James was a creditor of the farm. It is possible that he may have been so, but as no books or accounts were kept, it cannot now be ascertained how matters truly stood. It is fortunate for the pursuer, but upon this branch of the case the burden of proof is on him.

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Christie.

Lord Low.

I am therefore of opinion (1) that it is proved that James Christie had no right to or interest in the stock, crop, or implements upon the farm; (2) that it is proved that the cheque represented the price of certain cattle or in which James Christie had no right or interest; and (3) that it is proved that there was a balance due to James Christie by the farm, in which he would have been entitled to retain the proceeds of the sale.

The result is that, in my judgment, the appeal should be dismissed, and the interlocutor of the Sheriff affirmed.

I should like, however, to add that even if I took a different view of the result of the evidence I should still think that the defender could not be held to have incurred liability as a vitious intromitter. The most reasonable view of the evidence which could be taken for the pursuer is that it shewed that James Christie had some interest in the farm, but no right to the stock thereon. It is plain, however, that even if it was established by the evidence, no data are supplied by which any conclusion whatever can be made of the extent of James Christie's right or interest. I suppose that if he had any right at all it must have been a partial right along with his brother in the stock,—a right which may have been to the extent of one-half, but which may have been to some less extent. Assuming that to have been the position of matters, I am unable to see how, by carrying on the farm, and thereby necessarily intromitting with the stock, the defender could be regarded as a vitious intromitter in dealing with stock which *ex hypothesi* belonged to a greater or lesser extent to him or those for whom he acted, and which it was necessary for one to intromit with if the farm was to be carried on in ordinary course.

I think that very much the same view applies to the cheque. Assuming that the cattle for the price of which the cheque was issued belonged to some unknown extent to James Christie, they also belonged to the defender and his mother and sisters, whom he represented. In the course which the defender adopted was irregular, but I do not think that it can be described by a more serious epithet. To whom the cattle belonged they were part of the stock of the farm, and the proceeds of their sale naturally fell to be applied to farm expenses, and I can understand that it would have been very inconvenient, perhaps impossible, for the conduct of the farm, if the money had been tied up in a cheque. I am indeed inclined to think that the defender had a probable excuse for his intromission with the cheque, which the institutional writers would find sufficient to exclude the consequences of vitious intromission.

Accordingly, even upon the most favourable view for the pursuer I think Dec. 20, 1907. that he has mistaken his remedy. It seems to me that the appropriate course would have been for him to confirm as executor creditor and bring an action of accounting. Greig v. Christie.

Lord Low.

I need hardly say that the fact that the contrary view is held by my brother, Lord Stormonth-Darling, whose opinion I had an opportunity of reading, has led me to consider the case with much anxiety, but after repeated consideration of the evidence and the authorities, I have been unable to come to any other conclusion than that which I have stated.

LORD ARDWALL.—The pursuer in this case seeks to recover from the defender sums of £20, £12, and £25, which he alleges were lent by him to the deceased James Christie, an uncle of the defender. The loans are proved by valid writs produced in process, and the receipt for £25 bears that that sum was received to enable the deceased James Christie to pay "rent and taxes."

The action is brought, in the first place, against the defender as executor-dative of the deceased James Christie, but although he was decerned executor he never took out confirmation, for the reason, he says, that there was no estate to confirm to; but, in the second place, he is sued as a vitious intromitter with the moveable estate of the deceased James Christie. The moveable estate with which it is said vitious intromission took place was, in the first place, the half of the stock on the farm of Bankend, and, second, in any view, a cheque drawn by Speedie Brothers, auctioneers, Stirling, in favour of the said James Christie.

With regard to the stock on Bankend, I think it is proved that no portion of it belonged to James Christie. The facts of the case shortly are these:—(His Lordship stated the facts with regard to the stock on Bankend).

There remains, however, the question as to the cheque for £46, 5s. 7d.

(His Lordship stated the facts as to the cheque and the defender's action with regard to it.)

The question comes to be, was this treatment of the cheque vitious intromission on the part of the defender with his deceased uncle's estate?

The *onus* is on the pursuer to shew that this cheque, or, as it may be taken to be, the money contained therein, formed part of the deceased James Christie's estate. I do not think any importance can be attached to the fact that the cheque was taken in the name of the deceased. It has been held that payment by a cheque is really payment in cash, and it perhaps simplifies matters to regard the cheque as in the same position as if instead of the cheque the deceased had received the money in bank-notes and coin, and had left it lying in a parcel in his repositories. It is proved by the sale-note No. 6/5 of process and the evidence of Andrew M'Dermont, cashier for Speedie Brothers, the granters of the cheque, that the sum of £46, 5s. 7d. was paid for three shorthorn bulls which it is clearly proved belonged not to the deceased at all but to the defender and his mother and sisters, who seem to have been interested with him in the farm stock at Bankend, and I may observe that M'Dermont's evidence also shews that the deceased's transactions in cow-dealing, on his own account were kept perfectly separate from the sale of bulls bred upon Bankend.

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This being so, it seems necessarily to follow that the cheque of money which it represented was not part of the deceased's estate inasmuch as it was the price of and a surrogatum for bulls belonging to the defender which the deceased was bound to hand over to the pursuer. Accordingly we may apply to the defender's intromission with the money what Mr Erskine says (Inst. iii. 9, 51),—"Intromission cannot create a title, nor consequently infer a passive title, where the subject intromitted with was not truly in *bonis defuncti*, no part of the estate of the deceased to be such before the intromission."

It is quite true that if Messrs Speedie had not been willing to cash the old cheque and grant a new one, it might have been necessary for the pursuer to take out confirmation to the cheque as to money held in trust by the deceased as agent or trustee for those to whom the bulls belonged. It would not have been necessary for the pursuer to have paid the proceeds to himself, which he had quite a right to do. Indeed, even supposing that the defender had not been decerned against as to the money, but that the pursuer had taken out confirmation to the cheque as creditor, I cannot doubt that the defender could have successfully defended the sum in question, which was never immixed with James Christie's own funds, as being money truly belonging to him, and representing the proceeds of the farm stock in which the deceased had no pecuniary interest. The same result would have followed had sequestration been taken out against James Christie's estate, the sum being distinguishable from the rest of the estate.—See *Macadam v. Martin's Trustees*, 1872, 11 Macph. 33.

So far, then, I think it cannot be doubted that although the defender was treated in a somewhat shorthand way by the pursuer, he has not done anything more than vindicate practically what was truly his own right, as he would have been entitled to do in a more roundabout way in the ordinary form of law. The only answer of any consequence to the pursuer's claim upon this money is that the deceased being decerned against with many of the financial transactions connected with the farm, the pursuer might have been entitled to retain the money in question against advances which he might have made on behalf of the defender and those interested in the farm. I am of opinion that this would be a sufficient answer if the pursuer could prove it, and the *onus* is upon him to do so, that at the time of James Christie's death the defender or those interested in the farm were entitled to the money to him on a just accounting. But so far from anything of the kind being proved, I think the evidence goes to shew that whereas the money was easily paid its way during the lifetime of Alexander Christie so that he never had frequently difficulty in meeting debts due by the farm, the proceeds of sales, and after his death it was found that many of the accounts were unpaid which ought to have been paid out of the money received from the sales of crop and stock. I think this appears from the evidence of Mrs Margaret Christie, and the impression which the whole evidence leaves on my mind is that James Christie was not successful in his business of cow-dealing, and that so far as can be conjectured the balance was against him and not in his favour with reference to the cow-dealing business which from time to time he performed for the defender and those interested in the Bankend farm, in other words, that moneys due to the Bankend farm frequently went to cover James Christie's losses.

in cows. But it is enough for the disposal of this part of the case, first, Dec. 20, 1907 that it is proved beyond the possibility of a doubt that the money in the cheque was the property of the defender and those interested with him in Bankend stock, and second, that the pursuer has failed to prove that at the time of his death James Christie had any claim of retention or otherwise over the said money in respect of sums due to him by the defender.

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On the whole matter I am of opinion that the pursuer has failed to prove that there has been any vitious intromission on the part of the defender with his deceased uncle's estate, and it follows that the interlocutor of the Sheriff should be affirmed and the defender found entitled to the expenses of the appeal.

LORD STORMONTH-DARLING.—The only relevant facts of this case seem to me to lie in small compass, though the proof ranged over the whole business relations for forty years of two brothers, Alexander and James Christie, who are both now dead, Alexander having died on 12th December 1902, and James on 7th March 1905. Alexander was married and had a family, one of whom is the defender. James never married. The two brothers were for some time joint tenants of a small farm of 80 acres on the Polmaise estate near Stirling, at a rent of £110 a year, where their father had been tenant before them. In 1879 James became tenant of a much larger farm on the same estate, but he does not seem to have succeeded in it, and after six years the landlord took the farm off his hands. James then returned to the family home at Bankend, and after Alexander's death James was recognised by the factor as the tenant of Bankend, and paid the rent regularly. The defender says James did so as manager for the family. What was the exact footing on which he stood towards his late brother's widow and children is left, as I think, to pure conjecture, just as there is no definite proof as to the precise financial relations of the brothers themselves. How your Lordships can say that there is anything like proof of what these relations were I do not myself profess to understand.

The only facts that can be said to be known with certainty are these: In 1902, and again in 1904, James borrowed money from the pursuer, who was his brother-in-law, to the amount in all of £57. For these sums of money (£20, £12, and £25), James granted receipts to the pursuer, the last dated 5th February 1904 (a little more than a year before James' fatal accident). It is in these terms:—"Received from Mr David Greig the sum of Twenty-five pounds further to enable me to pay rent and taxes, &c., and for which I am to grant a conveyance to him of my Upper Bridge Street property to secure repayment of this and any other advances that may be made in future." This document was signed through a stamp "James Christie, 5th February 1904." It is not said that the security there mentioned was ever granted. Nor is it said that the loans were ever repaid. But as tending to corroborate the statement in the last receipt that the loans were wanted to pay rent and taxes, it is significant to find that the loans were made a few days before the half year's rent was payable.

The pursuer, being thus undoubtedly a creditor of the late James Christie at the time of his death, applied to the defender for repayment of the loans as representing his uncle. The defender denied liability, and

Dec. 20, 1907. the present action was raised on the footing that the defender was
 Greig v. the late James Christie as executor-dative, or otherwise as vi-
 Christie. mitter with his goods, gear, and effects. In the course of the p
 LdStormonth- it appeared that on 2d May 1905 the defender, along with other
 Darling. of the family, was appointed executor-dative *qua* one of the ne
 but he admitted that he had not given up any inventory of the
 estate nor obtained confirmation. For this the defender gave as
 that he and his co-executors had not been able to discover any
 belonging to the deceased other than some bedroom furniture
 value, with which they had not intermeddled. The sole quest
 action thus resolved itself into one of vitious intromission, aye or

For the principles on which this passive title is founded one
 revert to the institutional writers and to decisions which do not
 later than Dunlop and the early volumes of Macpherson. P
 reason is that questions of intromission without a title genera
 the Sheriff Court, and are confined to subjects of small value.

Erskine in his Principles (iii. 9, 25) defines vitious intromission
 unwarrantable intermeddling with the moveable estate of a person
 without the order of law," and adds, "The bare intermeddling
 passive title, though the thing intermeddled with should not be
 any use by the intromitter." The subject is treated more at length
 Institutes (iii. 9, 49-56), where it is said that the passive title is
 when the thing intermeddled with was no part of the estate of the
 and also that the vitiosity may be purged if the intromitter give
 confirmed executor, "as it shews a willingness in the intromitter
 himself to account." The full penalty of vitious intromission be
 Erskine remarks, "extremely severe, and introduced as a check t
 excluded in every case where equity interposes for the intromit
 for instance, the value of the things intermeddled with is so inco
 as to remove all suspicion of fraud, unless there be direct evid
 least, pregnant presumptions to the contrary." Then he goes on t
 any probable title of intromission though imperfect in itself, such
 of administration in England, as saving the intromitter from t
 title. Mr Bell in his Principles (section 1921) begins by stating
 proper mode of entry, and the only effectual check on dishonest
 mission with the moveable funds of a person deceased, is confirm
 wherever one having an opportunity of intromitting does so wi
 firmation a universal responsibility is raised against him." The
 on to qualify this general statement by saying, "Any *bona fide*
 intromission, or circumstances removing the suspicion of fraud and
 a check on the intromission, will relieve against the penal cons
 (i.e., the incurring of universal liability).

Now, what were the actual intromissions founded on? They
 simplest description, and stand on the evidence of the pursuer
 defender himself. The pursuer's account of it is,—"I remember
 of James Christie. I was telegraphed to come and see him. I f
 valuables in his cash-box. They were four single pound note
 notes, a cheque from Speedie Brothers for young shorthorn bul
 them and amounting to £46, 5s. 7d. There was also a gold wat

were all put into the box, and the box locked up, and I have the key in my possession. That box still remains at Bankend in the possession of defender." The defender's account of what happened is in substance the same, with an important addition. He says,—“There was a cash-box in the house. Pursuer put in it two £5 notes, a gold watch, and cheque for £46, 5s. 7d. He locked the box and took away the key. The box is still at Bankend. We opened it with a key we got in the house. I took the money out of the box to pay the funeral expenses. I produce the account for the same amounting to £11, 13s. 9d. (No. 6/7 of process). The cheque was in payment for bulls sold at Speedie's sale. The account No. 6/2 of process is the account for them. The bulls belonged to my father. I took the cheque into Speedie's, and they gave me another cheque in my name. Mr Speedie knew to whom the bulls belonged. The watch is still at Bankend.” There is some corroboration by the mother and sister of the defender, but the defender's own admission is enough. The only other witness who deals with this matter is M'Dermont, the cashier of Speedie Brothers. Speedie himself, who is referred to by the defender as “knowing to whom the bulls belonged,” was not examined, and the defender is not corroborated as to Speedie's knowledge by M'Dermont, who says,—“After Alexander's death in 1902 there would be grazing cattle sent in for sale from Bankend. They were entered in the name of Mr Christie—probably because we did not know who the owner was.” It is fair to add that this witness deposes that, while the two brothers were alive, it was James that sent in cows, and Alexander's name that was entered in connection with the sale of shorthorn cattle, but he admits that after the death of Alexander the auctioneers knew no other name but James' to put in the catalogue, and so both the account for the lot in question and the cheque for £46, 5s. 7d. were made out in James' name. I say this, as bearing on the *bona fide* belief of the defender when he possessed himself of the cheque, and got Speedie's cashier (most irregularly) to substitute a cheque in the defender's favour. This matter of the cheque is really the only element of importance in the case, for I agree with the Sheriff that the money taken out of the cash-box and spent in funeral expenses was in a totally different position, and must be disregarded. Indeed the pursuer's counsel ultimately presented his case on the footing that it raised no question of universal liability, but affected the defender's intromission with the sum in the cheque alone.

Now, what is a cheque? It is defined by section 73 of the Bills of Exchange Act, 1882, as “a bill of exchange drawn on a banker payable on demand.” According to the ordinary course of mercantile dealing it is, at all events when drawn on a man's own bank, universally regarded as a cash payment. The creditor may not be legally bound to receive it, for he is not bound to be satisfied with anything but current coin of the realm; but if he takes it without objection, subject only to the condition of its being duly honoured on presentation, he is held to have been paid in cash. All this was clearly expounded by the Lord President within the last six weeks in the case of *Leggat Brothers v. Gray*.¹ Now, this cheque was sent to the late James Christie, the proper creditor of the

¹ 1908, S. C., at pp. 73-75.

Dec. 20, 1907. auctioneer, on 17th February 1905, and it was received and
 Greig v. him down to the time of his death. What right, I ask, had t
 Christie. or anyone else to abstract it from the deceased man's cash-bo
 LdStormonth- the connivance of the auctioneer, to substitute another cheque i
 Darling. a different person? The defender may have believed, and it is e
 that he may have been right in believing, that the cheque repr
 value of cattle which truly belonged to his father's representa
 that was a question which might require a long and complicated
 of accounts, and could not certainly be summarily solved by t
 taking the law into his own hands. Moreover, he and the oth
 of his family had been parties to placing the deceased man in
 of being the proper legal representative of the farm, responsible
 and other outlays, and entitled to the drawings for stock and
 defender was the last man, therefore, who could fairly disturb
 ment for which he was largely responsible. I think it would u
 benefits which the law endeavours to secure by the orderly
 administration of the estates of deceased persons if a wholly un
 and in some respects clandestine proceeding of this kind r
 encouragement.

It is said that the *bona fides* of the defender ought to save t
 from the penal consequences of his own acts, however irregular th
 been. Perhaps from the full penal consequences, i.e., of being held
 liable, but not certainly from the consequences of intromissio
 title, to the extent at least of that intromission. "Every p
 Lord Cowan in *Wilson v. Taylor*,¹ "who intromits without ti
 effects of a person deceased is a vitious intromitter, according
 acceptation of the term. He may have intromitted in perfect
 and, if so, it may be that, although he is not the less a vitious
 he may not suffer the penal consequences of vitious intromission.
 liability is by no means the necessary consequence of vitious i
 and in the present case I would be slow to sustain any claim
 liability against the defender. But if there has been *de facto* i
 without a title with the estate of a deceased to a certain extent, i
 any good ground, be contended that the good faith of the introm
 defence against a claim to that, or, to a less extent, by a cre
 deceased." The other Judges concurred, and it appears that
 one in which the *bona fides* of the intromitter was unusually cl
 deceased, a woman who had borne an illegitimate child, had
 money on deposit-receipt, and the bank where it was deposited
 the footing that the amount was not sufficient to warrant the
 confirmation, on receiving a discharge from the whole of the
 relatives, and yet the defender was held a vitious intromitter t
 of the money (about £90) which he had received from the b
 taking out confirmation, and responsible on that ground to a cre
 deceased woman in a claim within that amount.

If the principles applied in *Wilson v. Taylor*¹ were sound,
 me that they lead straight to the decision of this case in favour

¹ 3 Macph. 1060.

suer to the extent of £46, 5s. 7d. The amount of the cheque was undoubtedly part of the estate of the deceased James Christie at the time of his death. He alone had the right to cash it. What he was to do with the proceeds afterwards was for subsequent adjustment. The defender admittedly intromitted with the cheque, first by abstracting it from the repositories of the deceased, and then by exchanging it for another cheque in his own favour. This was, in my opinion, a vitious intromission, both because it was intromission without the shadow of a title, and also because there was a certain amount of clandestinity in it, at all events as regards the pursuer. Lastly, no amount of honest belief that the cattle were the property of himself and his family could save him from the consequences of intromission to the extent of the amount intermeddled with. I should therefore be in favour of recalling the Sheriff's interlocutor, and giving decree for £46, 5s. 7d., with expenses in both Courts.

But your Lordships are deciding otherwise. I cannot pretend to regard your decision otherwise than with regret and apprehension. It not only defeats a just claim, with which the Sheriff himself expresses "much sympathy," but it rewards with success a proceeding of the most irregular and, as I think, most reprehensible kind. If that were all, its effects might end with the case in hand. But I am apprehensive that it will encourage the belief among people who already, perhaps, have not too scrupulous a regard for regularity of procedure, and who certainly have unusual facilities for tampering with the moveable funds of deceased persons, that they are safe to disregard the check—"the only effectual check," as Mr Bell describes it (Prin. sec. 1921)—afforded by confirmation, and to act upon their own ideas of what they are pleased to consider equity.

THE COURT pronounced this interlocutor:—"Refuse the appeal: Find in fact and in law in terms of the findings in fact and in law in the interlocutor . . . appealed against: Therefore affirm the said interlocutor, and of new assoilzie the defender from the conclusions of the action, and decern."

GEORGE STEWART, S.S.C.—MURRAY LAWSON & DARLING, S.S.C.—Agents.

ANDREW ROBERTSON, Pursuer (Reclaiming).—*J. W. Forbes*.
JOHN JOHNSTON, Defender (Respondent).—*Munro*.

No. 54.

Process—Reponing—Failure to lodge prints—Act of Sederunt, Nov. 2, 1872, sec. 5.—Circumstances in which the Court recalled an interlocutor of a Lord Ordinary, dismissing an action on the ground that prints of the record had not been lodged as required by sec. 5 of the Act of Sederunt of 2d November 1872.

ON 3d October 1907, Andrew Robertson, accountant, Edinburgh, assignee of William Charles Steven, who was the judicial factor appointed on the trust-estate constituted by Mr and Mrs Scott's marriage-contract, brought an action against John Johnston, chartered accountant, Edinburgh, judicial factor on the trust-estate constituted by Mr and Mrs Lamond's marriage-contract, concluding for payment of £92, 9s. 10d. Mr Lamond and Mrs Scott, who were brother and sister, were the beneficiaries, under the trust-disposition and settlement of their grandfather, in equal shares, of certain heritable subjects

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1st

Division.

Lord

Salvesen.

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 —
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 Johnston.

which were burdened with heritable bonds. Their interest subjects fell to be held by their marriage-contract trustees, division of the subjects the heritable bonds remained un- and fell to be a burden to the extent of one-half each on the the two beneficiaries. It was subsequently found expedient off the bonds, and the sum sued for was a balance alleged under certain complicated transactions between the pursuer two judicial factors in connection with the paying off of the

On 20th November 1907 the Lord Ordinary (Salvesen) record, and sent the cause to the Procedure-roll.

The parties having failed to lodge prints of the record, the Court made the following note on the interlocutor sheet December 1907.—Prints not lodged in terms of Act of Sederunt November 1872, and cause deleted from Procedure-roll," and December 1907 the Lord Ordinary pronounced this interlocutor. "The Lord Ordinary, in respect that parties have failed to comply with the provisions of section 5 of the Act of Sederunt of 2d November 1872,* dismisses the action: Finds neither of the parties liable to expenses."

The pursuer reclaimed, and produced to the Court the correspondence between the law-agents of the parties. On 20th November 1907 the pursuer's agent wrote:—"On seeing me in the end of the week for his adjustments, he told me my counsel had told him he need not trouble about adjustments as the case was to be settled. I would be pleased were this so. Is that to be done?" On 28th November he wrote:—"I have received from the printers proof prints of the closed record of the case. Please return it with any corrections you may wish to make, and say how many prints you want. We must, of course, observe the rules of Court." On 3d December he wrote:—"Is it just to print off? If you have no amendments to make I may do so. But if you have, please return the print sent to you, and attend to them thereon. Kindly attend to this, else we may be blamed."

* The Act of Sederunt, 2d November 1872, enacts, sec. 5:—"The clerk of the Court, or the pursuer, or for the party appointed to print the record, shall, within four days from the date of the interlocutor closing the record, the record, shall lodge with the clerk to the process two printed copies of the record as finally approved and closed . . . And failing the said agent lodging such copies within the prescribed period, the clerk shall record such failure by a note on the interlocutor sheet . . . and failing the two copies of the print being lodged as aforesaid, the cause shall be deleted from the Procedure-roll, as the case may be, and shall be restored to the roll on motion made to the Lord Ordinary by any party to the cause lodged with the said two printed copies as aforesaid. Provided that, if none of the parties to the cause move the Lord Ordinary to restore the same to the roll, the Lord Ordinary shall, on the day of the interlocutor dismissing the action, and finding neither party liable to expenses, which shall not be recalled by the Lord Ordinary of course, may be recalled only in the manner and on the conditions aforesaid."

The method of recall referred to is that provided by sec. 1 of the Act of Sederunt to the effect that such interlocutors "may be recalled on reclaiming note to the Inner-House, upon such conditions as to expenses and otherwise as may be imposed by the Court, or by the Lord Ordinary remitting."

Court." On 7th December he wrote:—"Why are you delaying returning the prints? I will print off on Tuesday, assuming that, unless I have the print back on Monday shewing any amendments you may have to make, you have none." The defender's agents replied on 9th December:—"Our Mr Stewart who has been out of town for some time has just returned. We trust to be in a position to return you the print with our adjustments thereon in the course of to-morrow." On 11th December the pursuer's agent wrote:—"I find I must lodge prints of the closed record on Friday. Be pleased to say if you have any amendments by return," and on 18th December he wrote:—"You are to blame for the delay. I must print off and lodge prints to-morrow." He also stated to the Court that prints had been tendered on 19th December, but were refused by the Clerk.

The reclamer moved that the Lord Ordinary's interlocutor should be recalled. The motion was not opposed, but the reclamer was called on to shew cause why the motion should be granted. He argued;—The failure to comply with the provisions of the Act of Sederunt was not due to contumacy, but was occasioned by the pursuer giving the defender too much time to furnish him with his adjustments. He was induced to do so by the prospects of a settlement, and by the desire, looking to the complicated nature of the case, that the record should be satisfactorily adjusted. In such circumstances the Court would recall the interlocutor and allow the cause to proceed.¹

THE COURT recalled the interlocutor, and remitted the cause to the Lord Ordinary to proceed therein as accords, finding no expenses due to or by either party in connection with the reclaiming note.

ROBERT BROATCH, Solicitor—GALBRAITH STEWART & REID, S.S.C.—Agents.

PETER BEGG AND OTHERS (Anderson's Trustees), Compearers
(Reclaimers).—*C. H. Brown.*
JAMES DONALDSON & COMPANY, LIMITED, AND LIQUIDATOR,
Respondents.—*Constable.*

No. 55.

Jan. 8, 1908.

Anderson's
Trustees v.
Donaldson &
Co., Limited
(in Liquidation).

Expenses—Decree for "expenses"—Company—Winding-up by Court—Petition for leave to proceed with an action against Company—Unsuccessful opposition by Liquidator and Company—Companies Act, 1862 (25 and 26 Vict. cap. 89), sec. 87.—A note was presented in the compulsory winding-up of a company, praying for leave, under sec. 87 of the Companies Act 1862, to proceed with an action against the Company, and to find the Company and liquidator, if they or either should appear to oppose the prayer, liable in expenses. The note was opposed by the Company and its liquidator. The Court authorised the petitioners to proceed with their action, and found them entitled to "expenses." The Auditor having disallowed the expenses incurred by the petitioners prior to the date of lodging answers by the Company and its liquidator, the petitioners lodged a note of objections to the Auditor's report.

The Court *sustained* the objection, holding that as the petitioners had

¹ *Glen v. Thomson*, Nov. 21, 1901, 4 F. 154; *Donald v. Irvine*, March 17, 1904, 6 F. 612; *Boyd, Gilmour, & Co. v. Glasgow and South-Western Railway Co.*, Nov. 16, 1888, 16 R. 104; *Liquidator of the Gael Iron Co., Limited, v. Orr*, Dec. 18, 1884, 12 R. 345.

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2D DIVISION.

been found entitled to "expenses" without limitation, it was too late for the Company and its liquidator to raise the question of liability for expenses incurred by the petitioners prior to the date of lodging answers.

Observed that the Company and liquidator by appearing incurred expenses of being held liable for the prior expenses.

(SEE *supra*, p. 38.)

On 1st June 1907 an order was pronounced for the winding-up of James Donaldson & Company, Limited, Junction Street, Leith.

On 4th June 1907 the testamentary trustees of James Donaldson, manufacturing chemist, Edinburgh, raised an action against James Donaldson & Company, Limited, praying for sequestration of James Donaldson & Company, Limited, for non-performance of feo-duty.

Anderson's trustees had not obtained leave, under sec. 87, Companies Act, 1862,¹ to commence this action, but in the liquidation they presented a note in the liquidation, under sec. 87, for leave to proceed with the action, "and to find the said Company and its liquidator, if they or either of them appear to oppose the action, hereof, liable in expenses."

The Company and its liquidator lodged answers in which they opposed the granting of the prayer of the note.

On 25th July 1907 the Lord Ordinary on the Bills (M'Leod) refused the prayer of the note.

Anderson's trustees reclaimed.

On 26th October the Court recalled the Lord Ordinary's decree; found the sequestration at the instance of the reclaimers competent; authorised them to proceed therewith, and decerned that the reclaimers were entitled to expenses, and remit the account thereof to the Auditor to tax and report.

The Auditor, *inter alia*, disallowed all expenses incurred by Anderson's trustees prior to the date of lodging answers by the Company and its liquidator.

Anderson's trustees presented a note of objections to the Auditor's report, in which they, *inter alia*, objected to the disallowance of expenses.

Argued for Anderson's trustees;—It was too late to raise the question as to the disallowance of the expenses incurred prior to the lodging of answers. The interlocutor of 26th October found the reclaimers entitled to "expenses"; that meant "expenses of the cause," there not being anything in the interlocutor to show that certain of the reclaimers' expenses were excluded. In an action by the Company and its liquidator, if they chose to appear and oppose the action, they were to pay the expenses now in question.

Argued for the Company and its liquidator;—Under sec. 87, Companies Act, 1862, it was necessary for the reclaimers to obtain leave to proceed with their action of sequestration, to ask the Court for leave to proceed. The expenses incurred by the Company and its liquidator prior to the date of lodging answers would thus have been incurred even if no answers had been lodged. The Company and its liquidator ought not to be found liable in expenses if they had not occasioned.² The reclaimers, in the prayer of the note, asked for expenses only in the event of opposition, wh

¹ Quoted *supra*, p. 39, note.

² M'Leod v. Leslie, May 27, 1865, 3 Macph. 840.

virtual admission that they were entitled only to the expenses caused by opposition. The question was a proper question of taxation, which it was the duty of the Auditor to determine.

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LORD JUSTICE-CLERK.—I think that the first objection should be sustained. Whatever may be the merits of the question as to whether expenses should be given, as between the successful and the unsuccessful parties to the case, only from the time when the opposition began, that question should have been settled at the time when the motion for expenses was made. Any other rule would be productive of the greatest inconvenience. It is out of the question that the matter should be decided by the Auditor on statements made by a party, and should then come up here on a note of objections to his report. The Court having found the petitioners entitled to expenses, it seems to me that "expenses" means "expenses in the cause" unless there is something in the interlocutor to shew that some expenses, which would otherwise be legitimate, are excluded. The liquidator does not need to appear unless he chooses. But if he chooses to appear and take up the case, he takes up the whole case, including a possible liability for expenses already incurred. Here the liquidator saw fit to appear, and I can see no ground for writing off expenses merely because they happen to have been incurred before he appeared. If he loses his case his liability is just that of an ordinary litigant.

LORD STORMONTH-DARLING and LORD LOW concurred.

LORD ARDWALL was absent.

THE COURT sustained the objection to the Auditor's report.

W. & T. P. MANUEL, W.S.—DAVIDSON & SYME, W.S.—Agents.

MRS JANE CAMPBELL (with consent), Pursuer (Respondent).—

Fleming, K.C.—Maitland.

No. 56.

ESDAILE CAMPBELL MUIR, Defender (Appellant).—*Johnston, K.C.—*

Jan. 10, 1908.

Constable.

Fishing—Salmon-Fishing—Fishing by rod and line—Extent of right—Medium filum—Fishing in æmulationem vicini.—M., the proprietor of salmon-fishings *ex adverso* of one bank of a river 60 feet wide, anchored a boat about mid-stream and fished therefrom with rod and line, casting his line not only on his own side of the *medium filum*, but also on the other side, in such a way as to interfere with an angler fishing for salmon from the opposite bank.

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In a petition for interdict at the instance of the owner of the salmon-fishings on the opposite bank, *held* that, even if M. had a right to cast his fly beyond the *medium filum*, he was not entitled to exercise that right in *æmulationem vicini*; that here he had acted in *æmulationem vicini*; and that the petitioner would have been entitled to interdict if she had insisted on it.

Lord Cowan's statement in *Earl of Zetland v. Tennent's Trustees*, Feb. 26, 1873, 11 Macph. 469, of the principles applicable to the regulation of fishing rights between opposite proprietors, as regards the *medium filum* of the river, *approved*; and *opinion* that these principles apply to fishing by rod and line as well as to fishing by net and coble.

Jan. 10, 1908.

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Muir.

1st DIVISION.
Sheriff of
Argyllshire.

ON 8th August 1906 Mrs Jane Campbell of Inverawe, sent of her husband, A. J. H. Campbell, as her curator and tutor-in-law, presented a petition in the Sheriff Court of Argyllshire at Oban against Esdaile Campbell Muir, Larach Bhain, K. G., or otherwise from interfering with or annoying or Sir Robert Usher, Baronet, of 37 Drumshough Gardens, in the present tenant of said fishings under the pursuer, in the exercise of his rights as such tenant; and to grant interim interdict.

The pursuer and defender were proprietors of lands on opposite sides of the River Awe in the Pass of Brander, and possessed respectively the right of fishing for salmon by rod and line in the River Awe *ex adverso* of their own lands. The pursuer claimed that she had leased to Sir Robert Usher the rod-fishing rights in the River Awe, so far as situated in the Pass of Brander for the months of July, August, and September 1906. The defender claimed that while the said Sir Robert Usher was exercising his legal rights under said lease of fishing in the portion of said river to him by the pursuer, the defender approached him in a boat which he anchored almost in mid-stream, and proceeded to fish with a line in the direction of the said Sir Robert Usher, with the result that the said Sir Robert Usher was by the illegal conduct of the defender compelled to desist from the exercise of his said legal right of fishing in said river. . . . Explained that the pursuer has no knowledge of any understanding or arrangement between the parties as to fishing over the whole breadth of the river." It was subsequently proved that at the point where the incident was alleged to have occurred the river was about 100 yards broad.

In answer the defender averred that, on the occasion in question he "was fishing over the whole breadth of the river, as the pursuer and their respective tenants have been in use to do." The said Sir Robert Usher gradually fished down the right bank of the river into the water in which the defender was fishing. The defender denied. If the pursuer wished to terminate the understanding which each party was in use to fish over the whole breadth of the river, it was her duty to make formal intimation of her intention to do so to the defender. . . . In view of the defender being proprietor of the fishing rights *ex adverso* of his said lands, and of the said understanding the defender was acting legally and within his rights in fishing in the place libelled. He committed no trespass on the pursuer's fishing. Since the pursuer now wishes the defender restricted to the *medium filum* of the river, she and her tenants must accept the same limit." He further averred that, in respect of his own salmon-fishings in the Water of Awe, and of the understanding mentioned as to fishing over the whole breadth of the river, he was exercising his rights in an appropriate manner when he was interfered with by Sir Robert Usher. In these circumstances he prayed that not an appropriate remedy, and it ought to be refused."

The pursuer pleaded;—The defender having encroached on the pursuer's fishing rights in said river, and by his illegal actions prevented the pursuer's tenant from exercising his legal rights therein, the pursuer is entitled to interdict as craved, with expenses. Jan. 10, 1908.
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The defender pleaded;—(1) The action is irrelevant, and ought to be dismissed, with expenses. (2) The defender not having trespassed or encroached on the pursuer's fishing rights in the Water of Awe, the action should be dismissed, with expenses. (3) The defender being the owner of fishings in the Water of Awe (up to the *medium filum* thereof) *ex adverso* of his lands, has a legal right to fish up to the *medium filum* at the place libelled, and is entitled to absolvitor, with expenses.

On 8th August 1906 the Sheriff-substitute (MacLachlan) granted interim interdict in terms of the prayer of the petition, and on an appeal the Sheriff (McClure) adhered. Subsequently the Sheriff-substitute repelled the defender's first plea in law, and allowed a proof; and proof having been led,* on 4th April 1907 he pronounced the following interlocutor:—"Finds that the principal pursuer is proprietrix of the estate of Inverawe, and also of, *inter alia*, the salmon and other fishings in the River Awe *ex adverso* of that portion of her estate in the Pass of Brander, known as the lands of Branrie, which she had let, *inter alia*, to Sir Robert Usher, Baronet, of 37 Drumsheugh Gardens, Edinburgh, for the period from 1st July to 30th September 1906, both inclusive: Finds that on 6th August 1906, while the said Sir Robert Usher was fishing from the bank at a part of said river called the Brander Pool, let to him aforesaid, the defender approached in a boat which he had moored in mid-stream, or nearly so, and allowed to float down the river by lengthening or letting out the mooring rope, and when he came opposite to the place where the said Sir Robert Usher was fishing, interfered with him in such a manner as to make it impossible for him at the time to continue fishing there: Finds that the defender is proprietor of fishings on said river on the opposite side from those belonging to the principal pursuer, but that his actings on the occasion above mentioned were illegal and unwarrantable, and an encroachment on her rights of fishing as above mentioned: Therefore continues the interim interdict formerly granted, and

* In his evidence given at the proof Sir Robert Usher described the incident complained of as follows:—"I remember on the forenoon of 6th August last, between 11 and 12 o'clock, while I was fishing at the Brander Pool, seeing Mr Muir coming down the loch in his launch. Mr Muir landed first from his launch with two friends, and the friends and he separated. Then Mr Muir got a boat, and with the assistance of his servant, launched her. The boat had been lying on the bank, I think. Having launched the boat, he pushed it out to mid-stream, or about mid-stream, above where I was fishing. You understand I had begun to fish, and was fishing at this time. I had been there probably five minutes before he came. When he got to mid-stream he anchored the boat, and proceeded to cast his line upon both sides of the river, on his own side first, and then he began casting over towards me. His line came quite close to me, and fell above me first, but as he lengthened his line out, it came down, and came practically just opposite where I was standing. Lengthening his line still further, it got below me, and fell in such a way as effectually to prevent me from fishing, unless, of course, I had risked casting over him, and hooking his line in my fly. I stopped fishing then."

Jan. 10, 1908. declares the same perpetual : Finds the defender liable in
 allows," &c.*
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* "NOTE.—This action between Mrs Campbell, of Inverawe, and Campbell Muir, of Inistrynich and Larach Bhain, two proprietors of lands extend along the two opposite banks of the River Awe, and as pertinents of their lands the right of fishing in said river, and the above-mentioned incident of 6th August 1906, described in the evidence of Sir Robert Usher, and of Walter Macgregor, Mrs Campbell's tenant, was so rudely interfered with by the defender's conduct I am unable to justify on any ground. He maintains that there was an arrangement or understanding between the proprietors of fishings on the River Awe that they could fish over the whole breadth of the river but there is no proof of such an arrangement, and if he had such a right either by law or agreement, it must be limited by the condition that he must not act in *emulationem vicini* (Stewart on the Right of Fishing, p. 143). The Brander Pool, where the occurrence took place, is about 100 yards long and about 60 yards wide, and there was quite enough room there for more than one fisherman to enjoy the sport without interfering with one another, and when the defender saw Mrs Campbell fishing there he could easily have kept away from him, but his conduct in interfering with him in this manner was not only urgent but also characterised by the witness Macgregor, but also illegal, and his hesitation in continuing the interim interdict, in so far as it prevented the defender from interfering with or molesting the pursuer or her tenants who may be fishing from her side of the river. If they had agreed at the same time, the only course would be to have some arrangement either by mutual agreement or by some competent authority, binding them to fish on separate days—a most inconvenient course, and surely unnecessary in a river the size of the Awe. The prayer of the petition goes further, as it seeks an interdict against trespassing or encroaching on the fishing rights of the pursuer *ex adverso* of her lands, and thus requires my defining what these rights are—a question of heritable right which is beyond the competency in this Court, as there is no evidence of the exact nature of the subject-matter ; but I am relieved from any question of this kind by the admissions of the parties themselves. Mrs Campbell, for instance, says 'I understand I have only the right to fish to the middle of the river on my own side,' and the defender in his pleas (No. 3), says 'being the owner of fishings in the Water of Awe (up to the middle of the river) *ex adverso* of his lands, has a legal right to fish up to the middle of the river at the place libelled.' They have both, therefore, equal rights to fish in the River Awe, and as a general rule the rights of each are restricted only to the middle of the river, but there may be some places where the river is so narrow or the water at times so low that the restriction to the middle of the river would amount to a denial of the right of fishing altogether, and at these places it would be necessary that the right of fishing over the whole breadth be conceded, and there need not be much difficulty in making regulations that would prevent fishers on either bank from interfering with each other, but at the part in dispute, where the river is 60 yards wide there is no such necessity, and I think the law laid down in the case of *Smith*, 23d November 1850, 13 D. 112, cited by the Sheriff-principal as an interlocutor of 27th August last, may be applied, so that each fisher is restricted to his own half of the river. By fishing I would understand drawing the line over the water, so that one is fishing wherever his line is cast, and I am unable to agree with the defender's contention, which I gather from his pleadings, that he has a right to fish over the whole surface of the river and cast his line right to the other side provided he keeps himself on his own side, and fishes either standing on the bank or one of the piers.

The defender appealed to the Court of Session. The appeal was ^{Jan. 10, 1908.} heard before the First Division on January 9th and 10th 1908.

Argued for the defender and appellant;—(1) The interdict as granted ^{Campbell v. Muir.} could not stand, for it was couched in alternative terms. Further, neither of the alternatives was sufficiently specific to justify interdict. A person subjected to interdict was entitled to know definitely what he must refrain from doing.¹ Here it would be impossible to say whether the interdict was against fishing from a boat; or against casting across the *medium flum*; or only against doing both of these together. Standing the present interdict the defender was not in fact in safety to exercise his fishing rights at all. (2) If the pursuer desired to have the fishing rights on the River Awe regulated, interdict was not the appropriate method. The proper method was to apply to the Court for regulation, as had been done in *Town of Perth v. Lord and Lady Gray*.² Until that was done the defender, being the proprietor of fishings on the river, had a *prima facie* right to fish the whole river. A right of salmon-fishing was not limited by the *medium flum*,³ nor was a right of trout-fishing.⁴ *Milne v. Smith*⁵ was not a case in point, for it dealt with the Tweed, where the *medium flum* was the boundary between England and Scotland. If, then, the defender was only exercising his fishing rights, he could not be subjected to interdict, though if the exercise of his rights interfered with other rights in the same river, a case for regulation might arise. (3) Further, it was established by the proof that not only was it the custom in Scotland generally, but it had long been the custom in this river, that the proprietors of fishings on each bank should exercise their rights by fishing across the whole stream. It was, therefore,

jetties placed there for the convenience of anglers, or wading in the water, or, as in the present case, from a boat. As it would be almost impossible to mark down the exact line beyond which one may not cast, it may frequently happen that a good fisher would make his cast reach beyond the middle of the stream, but in that case I must hold that it is not done by any legal right, but only permitted by sufferance and the good neighbourly feeling that ought to subsist between neighbouring proprietors, and I think there should be no reasonable objection, except that it might incommode someone fishing on the opposite side of the river, and I also think the defender is not likely ever to find himself restricted in his casting so long as he refrains from interfering with others who may have as good a right of fishing as he has himself. This right of fishing in the River Awe adds very much to the letting value of such an estate as Inverawe, but would be of little use if the owner were unable to guarantee her tenant against interference or molestation, and it is for this purpose that interdict is sought. I may observe that there is now no doubt as to the Brander Pool, the place in dispute, being part of the River Awe. This is admitted in the pleadings, and it is in evidence that the river, as distinct from the loch, begins at a place called Rudha-na-ha, about 100 or 120 yards further up than the Brander Pool.”

¹ Cairns v. Lee, Oct. 29, 1892, 20 R. 16; Cathcart v. Sloss, Nov. 22, 1864, 3 Macph. 76.

² Jan. 9, 1750, M. 12,792, 1 Pat. App. 645.

³ Lady Ashburton v. Mackenzie, July 8, 1829, 7 S. 849, Lord Craigie, at 851; Earl of Zetland v. Tennent's Trustees, Feb. 26, 1873, 11 Macph. 469, Lord Neaves, at 474.

⁴ Arthur v. Aird, 1907, S. C. 1170, Lord Low, at 1174; Question reserved in Somerville v. Smith, Dec. 22, 1859, 22 D. 279.

⁵ Nov. 23, 1850, 13 D. 112.

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incompetent to subject a proprietor to summary interdict had only followed a long established custom, and had received warning that that custom was to cease.

Argued for the pursuer and respondent;—(1) The pursuer had been interfered with in the exercise of his undoubted fishing in the Awe, and the appropriate remedy for such an offence was a decree of interdict against the offender, who, whose own fishing rights might be, had acted in *emulationem* interfering with his neighbour's rights. (2) In any event the defender had no right to fish beyond the *medium filum*. The order was that the limit of a right of fishing *ex adverso* of one bank to the middle of the stream.¹ When that was extended it was only because the stream was too narrow to admit of fishing successfully within the limit of half the stream.² The river here was of such a breadth that no such necessity arose. Such an extension too was only recognised as regarded net and coble, not as regarded fishing by rod and line. No custom had any been made out for an extension of the *medium filum* limit here. Any casting beyond the *medium filum* that had been practised was by toleration only, and not of right, and at any rate had never been practised while an angler was fishing the opposite bank. Moreover, nothing whatever had been proved that could justify such an extension in this way from a boat. The Sheriff's findings, therefore, were correct and should be affirmed. [On the suggestion of the Court that the interdict as granted was incompetent, respondent's counsel pressed for a continuation of the interdict.]

LORD PRESIDENT.—The view of the situation here taken by the Sheriff-substitute seems to me to have been perfectly correct, and I have nothing to add to what he says in his note and what he expresses in his judgment where he pronounces findings as to the actual facts which happened. On that view it is perhaps unnecessary to say anything more. But as the case has been so carefully argued, and the question of the right of fishing *ex adverso* the *medium filum* has been raised, I should perhaps say something on the law of the subject. I do not think I can add anything to what was said by Lord Cowan in the case of the *Earl of Zetland*,⁴ taken along with the observations thereon made by Lord Neaves at a subsequent period of the judgment. Lord Cowan says:—"A good deal has been said about the *medium filum* in the stream. If there had been no possession at all, and we came to consider how the different competing rights of heritors on the banks of a stream, each having each a right of salmon-fishing *ex adverso* of their lands, were to be regulated, then indeed I think the Court have recognised clear principles which the fishings must be carried on. If the stream is broad enough to admit of a clear sweep of the nets without crossing the *medium filum*, each proprietor must so exercise his right as to keep within the *medium filum* of the stream. But then, again, a different state of matters arises when the stream is not sufficiently broad to admit of this. The Court in a

¹ Stewart, Rights of Fishing (2d ed.), p. 142-3; Moore on Fishing, p. 118.

² *Earl of Zetland v. Tennent's Trustees*, 11 Macph. 469, Lord Cowan at p. 474.

³ *Milne v. Smith*, 13 D. 112, Lord Medwyn, at p. 121.

⁴ 11 Macph., at p. 474.

has found that some arrangement must be made for an alternate sweep of Jan. 10, 1908. the nets from the different sides. In the case, however, where immemorial possession has been enjoyed, I cannot think that the ascertainment of the *medium filum* is of any avail in determining such rights of fishing.”

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Ld. President.

He is dealing there with fishing by means of net and coble, but the same principles I apprehend apply equally to rod-fishing. Now, I agree with that exposition of the law. After all a right of salmon-fishing has nothing whatever to do with the *medium filum*, but it must be defined as to the place for its local exercise. When that is defined by immemorial practice the matter is settled thereby, but rights of fishing are not necessarily so defined, and it is by no means impossible, even at this day, to figure a case where there will be no such definition. Take for example the case of the Tummel. If the Falls of Tummel were blown up and salmon were thereby enabled to get to the upper reaches of the river, the Crown might, saving any fishing rights existing in the barony of Athole, grant rights of salmon-fishing in the upper waters of the Tummel to the *ex adverso* riparian proprietors. If this were so, and the question of the limits of their rights were raised, I apprehend that they would fall to be determined on the principles laid down by Lord Cowan. In the particular portion of the Tummel to which I have referred the stream is so narrow that the method of regulation would have to be by the adoption of fishing on alternate days or something of that sort.

But coming back to the facts of this case, the findings of the Sheriff shew no immemorial practice of exercising a right of fishing by means of anchoring a boat in the river and fishing from it in the way the defender here has done. I think it is also shewn that a perfectly reasonable way to exercise the rights of fishing here would be that each proprietor should remain on his own bank of the river. It may be that a good caster, such as Mr Muir seems to consider himself, might be able to cast across the river so that his fly would get beyond the *medium filum*. That is certainly a different thing from starting out in a boat and anchoring in the middle of the stream, and then proceeding to fish over to the opposite bank. I come to the result embodied in the findings that the defender was on the particular occasion acting *in emulationem vicini* against his neighbour's right, and that that was a just ground for complaint.

Now, when the parties came into Court I think the whole case might have taken a perfectly different turn if the defender had chosen to act up to the situation and had frankly said—“I agree I did what I see I ought not to have done, but this is not a case for interdict.” I think the case would not have gone on if he had said so. There might have been a matter of expenses for bringing the process up to that early stage. He does not take that position, but the case goes to proof and the defender says he is absolutely entitled to do what he did, and so *sibi imputet* if he finds himself cast in the expenses. The interdict, I agree, cannot stand, because it was an interim interdict made perpetual in terms of an alternative conclusion, and that is sufficient to condemn it at once. At the same time I do not think there would be any difficulty in framing an interdict appropriate to the action out of the prayer. We have been relieved from that by the concession which has been made by Mr Fleming that he does not press for the

Jan. 10, 1908. continuation of the interdict. I am for recalling the interdict
 Campbell v. ultra affirming the findings of the Sheriff, and finding the pursuer
 Muir. to expenses.

LORD KINNEAR.—I agree both upon the general law and upon the particular question which is raised in this case.

LORD ARDWALL.—I concur.

LORD M'LAREN and LORD PEARSON were absent.

THE COURT recalled the interlocutor of the Sheriff-substituted in the interdict, but repeated the Sheriff-substituted's findings and "in respect it is now stated for the pursuer to be satisfied with the foregoing findings and does not object to the circumstances, on interdict being pronounced against the defender, find the defender liable in expenses before the Court and in the Sheriff Court; and remit," &c.

MURRAY, BEITH, & MURRAY, W.S.—MACRAE, FLETT, & RENNIE, W.S.

No. 57. LEWIS DAVIS WIGAN, Pursuer (Respondent).—*Dickson, Pitman.*
 Jan. 10, 1908. WILLIAM HARRISON CRIPPS, Defender (Reclaimer)
 Wigan v. D.-F. Campbell—*Brodie Innes.*
 Cripps.

Sale—Sale of Heritage—Assignment of rents—Legal and Conventional Terms—Pastoral Farms—Titles to Land Consolidation (Scotland) Act, 1868 (31 and 32 Vict. cap. 101), sec. 8.—The Titles to Land Consolidation (Scotland) Act, 1868, sec. 8, enacts that a clause of assignment in the statutory form, viz.:—"And I assign the rents" "to be specially qualified, be held to import an assignment to the rents due for the possession following the term of entry, according to the legal and not the conventional terms, unless in the case of foreclosure, in which case it shall be held to import an assignment to the rents due on the conventional terms subsequent to the date of entry."

A disposition of an estate, with entry at 2d February 1905, contained a clause of assignment of rents in the statutory form. The farms of the estate were pastoral, and were let on leases of which the term was Whitsunday, and under which the legal terms of payment were conventionally postponed till the following term.

In an action by the seller against the purchaser, who had paid the rents legally payable at Whitsunday 1905 and conventionally at Martinmas 1905, the pursuer maintained that in the case of pastoral farms with entry at Whitsunday (when the first half-yearly rent became legally due) the rents legally due at each term were due for the possession during the half-year preceding the legal term, and consequently that the rents legally due at Whitsunday 1905 were for the possession during the half-year ending Whitsunday 1904, and "rents to become due for the possession following the term of entry of the defender within the meaning of sec. 8 of the Titles to Land Consolidation (Scotland) Act, 1868.

Held that the rents legally payable at Whitsunday 1905 were due for the possession subsequent to Whitsunday 1905, and so were due from the defender by the clause of assignment of rents.

Mackenzie's Trustees v. Somerville, 2 F. 1278, commented on.
Sale—Sale of Heritage—Minute of Sale providing for appointment of rents—Disposition containing statutory clause of assignment

Whether disposition superseded minute.—The proprietor of an estate consisting of pastoral farms let under leases of which the term of entry was Whitsunday, and under which the legal terms of payment of rent were conventionally postponed until the following term, agreed by minute of sale to sell the estate with entry at 2d February 1905. The minute of sale contained, *inter alia*, this clause:—"The rents, rates, and taxes for the possession of said lands for the half-year from Martinmas 1904 to Whitsunday 1905 shall be apportioned between" the seller and the purchaser.

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The disposition in favour of the purchaser following on the minute contained a clause of assignation of rents in the statutory form.

In an action by the seller against the purchaser, who had uplifted the rents legally payable at Martinmas 1904 and conventionally payable at Whitsunday 1905, the pursuer maintained that the minute of sale was superseded by the disposition, and consequently that the clause in the minute apportioning the rents was no longer effectual.

Held that the rents legally due at Martinmas 1904 and conventionally payable at Whitsunday 1905 vested at Martinmas 1904 in the pursuer; and therefore that the clause in the minute providing for the apportionment of rents constituted a contract for payment of money by the pursuer to the defender which was not affected by the disposition of the lands.

By minute of sale, dated 30th July and 5th August 1904, between Lewis Davis Wigan, of Glendaruel, Argyllshire, first party, and William Harrison Cripps, 2 Stratford Place, Oxford Street, London, second party, Wigan agreed to sell and Cripps to purchase the estate of Glendaruel, with entry on 2d February 1905.

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The minute of sale contained, *inter alia*, an article in the following terms:—" (Eighth) The second party shall have right to the rents and duties of the said lands, and shall be liable in payment of the feu-duties and public burdens for the possession following the said term of entry, the first party having right to the rents and duties of the said lands, and being liable in payment of the feu-duties and public burdens for the possession prior to the said term of entry, and that notwithstanding that payment of the rent for the possession prior to the term of entry may be conventionally postponed to a date subsequent to that term. The rents, rates, and taxes for the possession of said lands for the half-year from Martinmas 1904 to Whitsunday 1905 shall be apportioned between the first and second parties."

The disposition, dated 27th January 1905, by Wigan in favour of Cripps, which followed on the minute of sale, contained the usual clauses, including a clause assigning the rents in the statutory form provided by the Titles to Land Consolidation (Scotland) Act, 1868, sec. 8, viz., "And I assign the rents." *

In March 1906 Wigan raised an action against Cripps concluding for decree for payment of £638, 13s. 2d. The sum sued for consisted mainly of the amount of certain rents which had been paid by the tenants of Glendaruel to the defender.

The pursuer set forth article 8 of the minute of sale and the clause in the disposition assigning the rents, and averred:—(Cond. 5) "The farms on the estate of Glendaruel are pastoral. The term of entry under the leases is Whitsunday, and the term of payment of the rents is conventionally postponed for six months, and the half-year's rents payable at Whitsunday 1905 are those legally payable at Martinmas 1904, in respect of the second half of the crop and year 1904. The pursuer maintains that he is, by the terms of the contract of sale,

* See rubric.

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entitled to the rents which were legally due in respect of the possession up to the date of the defender's entry, and accordingly the half-year's rents for the second half of crop and year 1904 payable at Martinmas 1904, but conventionally payable at Whitsunday 1905, together with the proportion applicable to the period from Martinmas 1904 to the date of the defender's entry of the year's rent for crop and year 1905 legally due at Whitsunday 1905 but conventionally payable at Martinmas 1905."

The defender answered:—(Ans. 5) "Admitted that the lands of the estate of Glendaruel are pastoral; that the term of entry under the leases is Whitsunday; and that the rents for the first year are legally payable at Whitsunday, the term of entry, and thereafter, are conventionally payable at Martinmas and Whitsunday following. *Quoad ultra* denied. The defender maintains that he is entitled to retain the whole of the rents conventionally payable at Martinmas 1905 (being for the first half of crop and year 1905) and that the rents conventionally payable at Whitsunday 1905 are apportioned between the pursuer and the defender."

The defender pleaded, *inter alia*;—(2) The date of entry under said subjects being 2d February 1905, the defender is entitled to retain the whole of the rents of the pastoral farms legally payable at Whitsunday 1905, but conventionally payable at Martinmas 1905. (3) In respect of the agreement between the parties for the apportionment of the rents for the possession of said lands for the period from Martinmas 1904 to Whitsunday 1905, the defender is entitled to retain a proportion of the rents of the pastoral farms, legally payable at Martinmas 1904, but conventionally payable at Whitsunday 1905 corresponding to the period from 2d February to Whitsunday 1905.

On 17th January 1907 the Lord Ordinary (Dundas) pronounced an interlocutor decerning against the defender for payment of the sum sued for.*

* "OPINION.—This case is not, in my opinion, a difficult one. It belongs to a category of law in which perplexities are apt to arise when the facts are few and simple. The pursuer sold the estate of Glendaruel to the defender, with entry at 2d February 1905. A copy of the writ, dated 27th January 1905, is No. 7 of process. It contains the following in the statutory form, 'And I assign the rents.' The import of this is defined by 31 and 32 Vict. c. 101, section 8, repeating the words of 11 Vict. c. 48, section 3. The farms on the estate are all pastoral. The term of entry under the leases is Whitsunday. Payment of the rents legally due for each year at Whitsunday and Martinmas is conventionally postponed for six months, *i.e.*, to the following terms of Martinmas and Whitsunday respectively. There can, I think, be no doubt that the rents for crop and year 1904 belong to the seller, and that the rents for the first half of crop and year 1905 must be apportioned between the pursuer and the purchaser in the proportions corresponding to the period before and the period after 2d February 1905 respectively. Nor is there, in my judgment, any difficulty in affirming that the rent for the first half of crop and year 1905, so to be apportioned, is that which was legally due at Whitsunday 1905, but conventionally payable at Martinmas thereafter. In my opinion, therefore, the pursuer's argument is entirely right, and should be given effect to. The defender maintains (answer 5) that 'he is entitled to retain the whole of the rents conventionally payable at Martinmas 1905 (being for the first half of crop and year 1905), and that the rents conventionally payable at Whitsunday 1905 fall to be apportioned between the pursuer and the defender'; and in answer 6 it is 'explained' that

The defender reclaimed, and argued ;—(1) In the case of leases of Jan. 10, 1908. pastoral farms where Whitsunday was the term of entry the first half-year's rent was legally due at entry, although conventionally payable at the following Martinmas, and the rent so due and payable was for the tenant's possession from Whitsunday till Martinmas, and not for possession from the Martinmas preceding the tenant's entry until the Whitsunday of entry.¹ In short, the rent was due, legally, in advance. Therefore the rents here due legally at Whitsunday and conventionally at Martinmas 1905, being rents paid for possession from Whitsunday to Martinmas 1905, and consequently for the pos-

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payable at Whitsunday 1905 for the second half of crop and year 1904, 'were payable for the possession from Martinmas 1904 to Whitsunday 1905.' In short, the defender's claim is that the rents for the second half of crop and year 1904 should be apportioned between the parties, and that all subsequent rents belong to himself. This contention is, in my judgment, in the teeth of the authorities, and appears to me to proceed upon a misconception of their import. The rents assigned to the defender are (in the words of the statute) those 'to become due for the possession following the term of entry,' viz., 2d February 1905, 'according to the legal and not the conventional terms.' It is, I think, palpably wrong to assert, as the defender does, that the rent for the second half of crop and year 1904 is, to any extent, due for possession after 2d February 1905; or that the rent conventionally payable at Martinmas 1905 for the first half of crop and year 1905 is due wholly in respect of possession subsequent to that date. I was referred to some of the authorities upon this branch of the law, and have examined a number of others. Those which appear to me to be specially useful are *Sir Wm. Johnston*, 1727, M. 15,913; *Sir Francis Elliott's Trustees*, 1792, M. 15,917; *Campbell's Creditors*, 1800, M. App. 'Term legal and conventional' No. 1; the recent case of *Mackenzie's Trustees*, 1900, 2 F. 1278, particularly Lord Adam's opinion; *Ersk. Inst. ii. 9, 64*; and *M. Bell's Conv. (3d ed.)*, p. 639. A question was raised and argued as to whether the terms of the minute of sale between the parties could competently be referred to. I was referred to some strong judicial opinions in the negative, e.g., *Lord Glasgow's Trustees v. Clark*, 1889, 16 R. 545, Lord Trayner, 547, Lord Adam, 549; *Maxwell's Trustees v. Scott*, 1873, 1 R. 122, Lord Benholme, p. 131; *Lee*, 1883, 10 R. (H. L.) 91, Lord Watson, p. 96. But it is unnecessary that I should form or express a definite opinion upon this point, because I think that the language of the minute of sale, which is quoted in condescendence 2, is quite in harmony with the view which I have expressed in regard to the rights of parties *inter se*. The defender founded upon the last sentence quoted in condescendence 2. But the words there used are, in my judgment, correct, and mean in effect (what I hold to be the case) that the rents for the first half of crop and year 1905, being those legally due at Whitsunday 1905, but conventionally postponed to the following Martinmas, shall be apportioned between the parties. For the above reasons, decree must, in my opinion, pass in the pursuer's favour. There are admittedly certain deductions to be made from the sum actually sued for, but counsel for the parties stated that they would adjust the proper figure when the legal principle had been decided.

"I may add that it occurred to me that the special circumstances averred in regard to the farm of Strondavain (condescendence and answer 11) might afford room for a distinction in favour of the defender. But his counsel, though invited to do so, submitted no argument upon that head."

¹ *Kerr v. Turnbull*, 1760, 5 Br. Supp. 876; *Campbell v. Campbell*, July 18, 1849, 11 D. 1426; *Hunter v. Stewart*, Nov. 8, 1857, 20 D. 60; *Mackenzie's Trustees v. Somerville*, July 20, 1900, 2 F. 1278; *Kames' Elucidations*, p. 67.

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session following the defender's term of entry, were carried by the defender under the clause of assignation of rents. (2) The rents legally due at Martinmas 1904 and conventionally payable at Whitsunday 1905, belonged, in so far as the disposition was concerned, entirely to the pursuer; because the clause of assignation did not import an apportionment of the rents where the disposition was not at one of these terms; in order to effect an apportionment there must be a special contract, which was, namely, in the minute of sale, article 8. The pursuer contended that that article had been superseded by the disposition, and in so far as it dealt with rents becoming due for possession at the defender's term of entry, it had been superseded by the assignation of rents in the disposition, but in so far as article 8 apportioned the rents for the possession from Martinmas 1904 to Whitsunday 1905, it was not superseded, for, as already pointed out, the disposition did not touch the question of apportionment. Strictly speaking, the defender was not entitled to collect the rents conventionally payable at Whitsunday 1905, but however that might be, the rents apart from special contract belonged to the pursuer, and in effect he in effect contracted to pay so much money to the defender, so that that contract remained effectual notwithstanding the execution of the disposition.¹

Argued for the pursuer;—Rent was payable for the crop at entry. In the case of pastoral farms practically the whole crop was raised during the summer months, and accordingly where a tenant entered a pastoral farm at Whitsunday the first half-year's rent was payable at entry, although conventionally payable at the following Whitsunday, because he found his crop ready for him at entry. He was regarded as having been constructively in possession during the half-year preceding his entry, when his crop was growing for him, so that the half-year's rent legally due at entry was to be regarded as due in respect of his constructive possession during the preceding half-year. In other words the rent of pastoral farms was not payable in advance; it was due in respect of the half-year preceding the term of payment. To apply that to the present case, the rents payable at Martinmas 1904 and conventionally at Whitsunday 1905 were for the possession between Whitsunday and Martinmas 1904, and belonged wholly to the pursuer, and the rents legally payable at Whitsunday 1905 and conventionally at Martinmas 1906 were for the possession between Martinmas 1904 and Whitsunday 1905, and fell to be apportioned, assuming that the minute of sale had been superseded by the disposition. The minute was superseded by the disposition, which gave the defender right to the rents carried by the statutory clause of assignation and to no more, and it was in effect to read into the disposition a clause of apportionment which the disposition might have contained but did not. In the case of *Campbell v. Campbell*, on which the defender founded, the missives contained a separate contract for the delivery of certain moveables with which the defender there did not deal, whereas here the disposition did deal with the matter of rents.

¹ *Jamieson v. Welsh*, Nov. 30, 1900, 3 F. 176.

² *Campbell v. Campbell*, 11 D. 1426, *per* Lord Wood, at p. 1426; *Mackenzie's Trustees v. Somerville*, 2 F. 1278, *per* Lord Kyllachy, at p. 1281, Lord Adam, at p. 1285, and Lord Kinneir, at p. 1287.

At advising,—

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LORD LOW.—The pursuer sold the estate of Glendaruel to the defender, with entry at 2d February 1905. The farms upon the estate were all pastoral, the term of entry under the leases being Whitsunday, and the first half-year's rent being payable at Martinmas thereafter and the second half at the succeeding Whitsunday.

In this action the pursuer claims that he has right to the half-year's rents conventionally payable at Whitsunday 1905 but legally payable at Martinmas 1904, and he also claims the proportion corresponding to the period from Martinmas 1904 to 2d February 1905 of the half-year's rent conventionally payable at Martinmas 1905 but legally payable at Whitsunday 1905.

The defender, upon the other hand, maintains that he is entitled, under the assignation of rents in the disposition in his favour, to the half-year's rent conventionally payable at Martinmas 1905 but legally payable at Whitsunday of that year, and that he is also entitled, under a special contract made between him and the pursuer, to the portion of the half-year's rents conventionally payable at Whitsunday 1905 but legally payable at Martinmas 1904, corresponding to the period from the date of his entry (2d February 1905) to Whitsunday 1905.

I am of opinion that the defender's claim to the half-year's rent legally payable at Whitsunday 1905 is well founded, and that the pursuer is entitled to no part of that half-year's rent.

It is settled that when a proprietor dies between Whitsunday and Martinmas his executor is entitled to the half-year's rent legally payable at the term of Whitsunday before his death, and that if he dies between Martinmas and Whitsunday the executor is entitled to the half-year's rent legally payable at Martinmas. The same rule applies in the case of seller and purchaser, and accordingly, apart from the special contract which I shall consider presently, the pursuer is entitled to the half-year's rents conventionally payable at Whitsunday 1905. The defender does not dispute that that is the case.

The pursuer, however, also claims a proportion of the half-year's rent legally due at Whitsunday 1905, which is conventionally postponed until Martinmas 1905. That claim is founded upon the clause in the disposition assigning the rents. The clause is in the form "And I assign the rents," provided by the Titles to Land Consolidation (Scotland) Act, 1868, which declares that the clause shall "be held to import an assignation to the rents to become due for the possession following the term of entry, according to the legal and not the conventional terms."

In order to test the pursuer's claim I shall assume that the question arises in regard to the rent of a farm which had been let to a tenant under a lease with entry at Whitsunday 1904. The first half-year's rent would be legally payable at Whitsunday 1904, and the second half-year's rent at Martinmas 1904. The pursuer is admittedly (apart from special contract) entitled to these two half-years' rent, but his claim is that he is in addition entitled to a proportion of a third half-year's rent, which he says is payable in respect of the possession of the farm from Martinmas 1904 to Whitsunday 1905.

Jan. 10, 1903. That looks very like a claim for three half-years' rent in respect possession of the farm.

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The pursuer's counsel, however, explained that the claim is the ground that the first half-year's rent legally payable at Whitsunday (the term of entry) is truly for possession for the half-year from 1903 to Whitsunday 1904. I confess that that is to me an extraordinary idea. Plainly a tenant in a farm does not in fact pay rent in possession of the farm prior to his term of entry, because not on possession and no right to possess until the term of entry, but until that date the farm is in the possession of the outgoing tenant. For rent is properly payable for possession. I take it that rent from a legal point of view is the consideration which the tenant pays, in money or money's worth, for the possession and use of the subject of the lease, and that is as applicable to a farm as to any other subject. Again, whether rent is payable backhand or forehand, or at the legal term, a farm is not a yearly rent, and the tenant, at one time or another, pays rent for every year and half-year during which he possesses the farm.

It seems to me that the idea that, by what must be a legal fiction, a tenant entering a grass farm at Whitsunday is to be regarded as paying for a half-year's rent, which is legally due at that term, in respect of possession of the farm for the preceding half-year, arises out of the fact that, for the purpose of regulating the division of rents between the heir and the executor of a deceased proprietor, or between the fiar and the executor of a liferenter, a somewhat artificial rule has been adopted in which rent is payable not to possession but to crop.

For that purpose all farms are regarded as being either wholly or partly corn lands as they used to be called, or grass farms. In the case of corn lands the rent was always at Martinmas (or as it was sometimes expressed "the rent of the crop"), because the outgoing tenant was then presumed to have gathered his crop, and the incoming tenant required to get possession of the lands for the purpose of preparing them for the next crop. It was considered that a tenant could not be required to pay any rent until he had sown a crop, and accordingly the legal term of payment of the first half-year's rent was held to be the term of Whitsunday following the term of entry, when the incoming tenant was presumed to have completed the sowing of his crop, and the legal term of payment of the second half-year's rent was held to be the succeeding term of Martinmas, when the tenant was presumed to have reaped the crop. The rule applied even although entry to corn and grass lands was (in conformity with the almost universal custom) at the term of Whitsunday preceding the entry to the corn lands, but, as I have said, the corn lands alone were regarded. No doubt the result was that in a case was that at the beginning of the lease the tenant had paid rent in possession for six months, for which he paid no rent at the time, but that at the right at the end of the lease, and in a succession of leases the landlord was entitled to a half-year's rent for every half-year of possession.

In the case of grass farms, the entry to which is by custom at Whitsunday, Mr Bell, in his *Treatise upon Leases*, points out that if the principle applied to the full year's rent should not be payable until the crop has been gathered, then in grass farms the second half-year's rent should not be payable until the

term of Whitsunday, twelve months after entry, "because" (I quote the Jan. 10, 1908. learned author's words) "the tenant is constantly, during the whole period, ^{Wigan v.} enjoying the benefit of the crop." The more logical course therefore would ^{Cripps.} have been to hold that the first half-year's rent in a grass farm was legally ^{Lord Low.} payable at Martinmas six months, and the second half-year's rent at Whitsunday twelve months after entry. But, says Mr Bell, the Court have held otherwise, because "the practice of the country has so fixed the point."

I may add that my impression from a study of the old cases is that the legal terms in grass farms were originally fixed at the Whitsunday of entry and the following Martinmas, because the position of the tenant at his entry and at the following term of Martinmas respectively was supposed to be analogous to the position of a tenant in a corn farm at the term of Whitsunday after his entry and at the following term of Martinmas respectively. The tenant of a grass farm at his entry finds upon the land a growing crop of grass, which was regarded as being analogous to a completely sown corn crop, and by the term of Martinmas he has obtained the benefit of the summer pasturage, from which his profit is chiefly derived, and therefore his position at that term was regarded as being analogous to the position of the tenant of a corn farm, who at the term of Martinmas had reaped his corn crop.

But however that may be, there was this advantage in the legal terms of payment adopted in the case of grass farms, that one rule was fixed for all cases, the rule being that if the landlord survived Whitsunday one-half of the rent applicable to the crop of the year in which he died belonged to his executor, and if he survived Martinmas the whole rent applicable to that crop belonged to his executor.

The rule is nowhere more clearly stated than in the report in Brown's Supplement (vol. v., p. 876), of the case of *Kerr v. Turnbull*.¹ In that case a tenant entered to a grass farm at Whitsunday, and by the lease the rent was payable one-half at the following Martinmas and the remaining half at the succeeding Whitsunday. The landlord died after Martinmas, and it was held that his executor was entitled to the half-year's rent payable under the lease at the following Whitsunday.

In a note to the report the reporter (Monboddo) states the ground of judgment thus—"The simple rule in this case, and which will apply equally to corn and grass farms, is the crop, without attending to the division of the year, which is arbitrary as to its commencement. According to this rule, the crop, whether of grass or corn, belongs to that year in which it grows and is reaped; and the rent of that crop is divided betwixt the heir and executor, by the legal terms, of the Whitsunday when the crop was sown, and of Martinmas when it is reaped; so that without inquiring about years at all, it is sufficient to consider whether the rent for that crop be still in the tenant's hands, or if it be uplifted by the defunct. . . ."

Now, that statement of the law shews, in the first place, that, for the purpose of apportioning rents between heir and executor, every crop is assumed to be grown and reaped within the calendar year, or, to put it more definitely,

¹ 5 Brown's Sup. 876.

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the crop, whether corn or grass, is assumed to have been reaped at Martinmas in each calendar year. Therefore, for the purpose foresaid, it is necessary to consider what may be called the farm year—that is, twelve months from and after the term of entry, for possession of the first year's rent is in fact paid. Let me give a practical illustration. The tenant of a corn farm enters upon full possession of the farm at Martinmas 1904, but his first corn crop is grown and reaped entirely in 1905. Therefore, in a question between heir and executor, the possession of the farm during 1904 is disregarded, and the whole rent is due in 1905, being payable for the crop of 1905. Again, the tenant of a grass farm enters upon full possession at Whitsunday 1904, and his first crop, which is growing when he enters, is assumed to have been wholly reaped at Martinmas in 1905. Therefore, in a question between heir and executor the rent is due in 1905, being wholly payable for the crop of 1905, and the possession of the farm during 1904 is disregarded. It therefore seems to me that the rule for apportioning rents between heir and executor, and the like, is a general rule, fixed for that purpose alone, and has no application to the question of what possession of the farm is a particular payment of a year's rent made?

That, however, is the question raised under the assignment of the rents in the disposition. I have already quoted the statutory declaration of the meaning of the clause assigning the rents, and it will be observed, in the first place, that the rents assigned are only rents "to become due after the term of entry," therefore the assignment does not include the rents legally due at Martinmas 1904, because these rents had become due prior to the term of entry of the defender. In the second place, the rents assigned are rents "to become due for the possession following the term of entry," namely, 21st March 1905. The first rent answering to that description appears to me to be a half-year's rent legally payable at Whitsunday 1905, because, in the case which I have been supposing, of the tenant entering under a lease at Whitsunday 1904, he would have already paid one year's rent at Martinmas 1904, and would have been in actual possession of the farm for one year at Whitsunday 1905.

Certain *dicta* in the recent case of *Mackenzie's Trustees v. Scott* were quoted as supporting the view that the half-year's rent legally due at Whitsunday 1905 was truly for possession of the farm from the term of entry at Martinmas. The main question in *Mackenzie's* case¹ was whether the farms upon the estate of Portmore, which had been sold with effect from Martinmas 1897, were arable or pastoral? It was held that they were arable, and that accordingly rents legally due at Martinmas 1897, but actually payable at Whitsunday 1898, were not carried to the purchase price by the assignment of rents in the disposition.

The judgment, therefore—it being held that the farms were arable—was merely an application of the well-established rule upon which I have already commented, and it is to be observed that the purchasers' title was not affected at the term of Martinmas, there was no question in regard to the divided term.

The pursuer founds upon certain *dicta* of Lord Kyllachy, who was Lord Jan. 10, 1908. Ordinary, and of Lords Adam and Kinnear. Lord Kyllachy said ¹—"The rents in question, which were conventionally payable at Whitsunday 1898, Cripps. were legally due at Martinmas 1897, and were so due as being the second half of the rent payable for the grass crop of 1897. To put it otherwise, they were legally due for the possession from Whitsunday to Martinmas 1897—the possession during the winter and spring 1897-98 being thrown in as an unimportant accessory." Lord Low.

Now, the first of these sentences is an accurate statement of the rule that in questions between heir and executor or seller and purchaser the rent is to be regarded as payable for the year in which the crop is assumed to be reaped. In the second sentence I think that Lord Kyllachy evidently had in view the theory or hypothesis upon which the rule is founded in the case of grass farms, namely, that the whole of the grass crop has been reaped, in the sense that the tenant has received the whole benefit of it, by Martinmas. But however that may be, Lord Kyllachy does not say that the rent which is legally payable, one-half at Whitsunday and one-half at Martinmas, is not paid for possession from Martinmas to the following Whitsunday. What he says is, that the possession from Martinmas to Whitsunday is "thrown in." That is to say, possession for the latter period is thrown into and therefore is included in and forms part of the possession for which the rent is paid. If that be so, then it is obviously immaterial that the possession between Martinmas and Whitsunday is of little value to the tenant, because the rent stipulated is always the rent for the year, and it is only payable in two equal portions because it is the inveterate custom to do so.

Certain expressions used by the learned Judges in the Inner-House were also founded on. Thus Lord Adam, referring to the half-year's rents conventionally due at Whitsunday 1898, but legally due at Martinmas 1897, said,²—"These rents were the rents due for the possession of the crop of 1897." The phrase "for the possession of the crop," is unusual, but I think that his Lordship's meaning would have been the same, only more accurately expressed, if he had said "for the crop of 1897," leaving out the word "possession." That, I think, is clear from the next sentence, in which his Lordship says,—"The rent is due for the year in which the crop, whether agricultural or sheep, is raised." That is, in my opinion, a correct statement of the rule of law applicable to the kind of question which was under consideration.

In the same case Lord Kinnear said³—"The rent in question, although collected by this defender, was rent derived from possession prior to his entry as purchaser, although it was payable at a term after that entry." It humbly appears to me that that was not a correct statement of the legal situation. His Lordship was dealing with the effect of the clause assigning the rents as interpreted by the statute, and it seems to me that the true ground for holding that the rent in question was not assigned to the purchaser by the statutory clause was, in the words of the statute, that it was not rent "to become due for the possession following the time of entry." I

¹ 2 F. at p. 1281.

² 2 F. at p. 1285.

³ 2 F. at p. 1287.

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think that that was what Lord Kinnear was referring to, but no question between the parties as to rent due for a divided term. The pursuer's counsel did not pay so much attention to the form of the expression used as he would otherwise have done.

I have commented on the *dicta*—which are no more than *Mackenzie's* case¹ at so great length, because they constitute the only authority in the way of authority which the pursuer's counsel was able to put forward in support of the proposition which is the foundation of his claim, namely, that a person who enters to a grass farm at Whitsunday, and then becomes liable for a half-year's rent, is to be regarded as being so liable in respect of his constructive possession for the half-year preceding his entry. I do not think that the *dicta* in *Mackenzie's* case¹ support that view, and I have given my reasons for holding that it is a proposition which is contrary to fact and principle.

I am therefore of opinion that the half-year's rent legally assigned to the pursuer at Whitsunday 1905 was assigned to the defender, and that the pursuer is entitled to no part thereof.

I now come to the defender's claim for a portion of the rents at Martinmas 1904. The defender admits that he has no right to the rents at common law or under the assignation of rents in his position, but he says that he is entitled to a share of the rents payable to the period from 2d February to Whitsunday 1905 in respect of an agreement entered into between him and the pursuer. That agreement is contained in the 8th article of a formal minute of sale executed by the parties in July and August 1904.

The article is in the following terms:—"The second party assigns to the first party the right to the rents and duties of the said lands, and shall be liable for the payment of the feu-duties and public burdens for the possession for the said term of entry, the first party having right to the rents and duties of the said lands, and being liable in payment of the feu-duties and public burdens for the possession prior to the said term of entry, notwithstanding that payment of the rent for the possession prior to the said term of entry may be conventionally postponed to a date subsequent to the said term. The rents, rates, and taxes for the possession of said lands for the half-year from Martinmas 1904 to Whitsunday 1905 shall be paid by the first party between the first and second parties."

It was maintained for the pursuer that that article was a valid disposition, and cannot be founded upon or enforced. The only disposition which could be regarded as superseding the article in question is the clause assigning the rents, and if it could be shown that the agreement is inconsistent with the effect attributed by the statute to the clause assigning the rents, I should without hesitation hold that the agreement was superseded by the disposition in so far as all events are inconsistent with, or modifies the effect of, the clause assigning the rents.

Now, I would observe in the first place that the agreement deals only with rents, which alone are the subject of the assignation in question, but with public burdens. The agreement is that the p

be liable for the public burdens for the possession prior to the term of Jan. 10, 1908. entry, and that the defender shall be liable for the public burdens for the possession following the term of entry. It was not contended that that ^{Wigan v. Cripps.} part of the agreement was affected by the disposition, and I understand ^{Lord Low.} that as regards public burdens the agreement has actually been carried out. If that be the case it puts the pursuer in a somewhat awkward position, because plainly the defender undertook to pay the public burdens applicable to the period subsequent to his entry only upon the condition that he should have right to the rents applicable to the same period. The two things appear to me to be inseparable, and therefore I do not see how the pursuer can insist upon the defender paying a share of the public burdens and deny him an equivalent share of the rents.

That consideration, however, appears to me not to arise, because I am of opinion that the agreement is quite consistent with the disposition; that is to say, implement of the agreement would not prevent full effect being given to the assignation of rents in the disposition.

The only question which arises under the clause assigning the rents is what rents are thereby carried to the purchaser? I have already expressed the opinion that the half-year's rents legally payable at Whitsunday 1905 were carried to the defender, and that the pursuer had no right to any portion of these half-year's rents. Of course the inference is that the rents legally payable at Martinmas 1904 belonged wholly to the pursuer. And there is no doubt that that was the case, because if the pursuer had died at the date of the defender's entry and the competition had been between his heir and executor, plainly the rents legally payable at Martinmas 1904 would have gone to the executor because they would have been *in bonis* of the pursuer at his death. If, therefore, the rents referred to in the agreement were the rents legally payable at Martinmas 1904, the parties were bargaining about money which at the date contemplated, namely, the defender's entry to the lands, would have vested in the pursuer, and would if he had then died have been *in bonis* of him. If, therefore, the agreement was in regard to the Martinmas rents, it is not superseded or affected by the disposition, because it deals with moveable estate, with which the disposition had nothing to do.

The question therefore is, are the rents referred to in the agreement those legally payable at Martinmas 1904? The answer seems to me to depend upon the question which I have already so fully discussed, namely, whether the rents legally due at Martinmas 1904, and conventionally payable at Whitsunday 1905, were or were not for possession of the farms between these two terms? As I have already answered the latter question in the affirmative, it follows that the rents referred to in the agreement are those legally payable at Martinmas 1904, and accordingly the defender is, in my judgment, entitled to have these rents divided between him and the pursuer in terms of the agreement.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be recalled, and that the second and third pleas in law for the defender should be sustained.

The LORD JUSTICE-CLERK and LORD ARDWALL concurred.

Jan. 10, 1908. LORD STORMONTH-DARLING was absent.

Wigan v.
Cripps,

THE COURT recalled the interlocutor of the Lord Ordinance which sustained the second and third pleas in law for the defence.

J. & F. ANDERSON, W.S.—MITCHELL & BAXTER, W.S.—Agents.

No. 58. JOHN PAXTON AND OTHERS, Pursuers (Respondents).—*Morris v. Maitland*.

Jan. 14, 1908.

ISABELLA ANNIE BROWN, Defender (Reclaimant).—*C. D. Muir v. J. H. Henderson*.

Paxton v.
Brown.

Process—Summons—Competency—Several Pursuers—Common interest—"Convenience"—Amendment of summons—A. S., March 1893, sec. 2.—A testator died leaving a deed of settlement by which he bequeathed a share of his estate to his daughter, and appointed his executors and her tutors and curators. At the time of his death his daughter was under pupillarity, and his executors acted as her tutors and curators, and a law-agent as factor for the purpose of managing the estate. When the daughter attained majority the factor continued to act as her agent and manage for her her income from the estate.

Subsequently an action was brought against the daughter at the instance of the tutors and curators and of the factor, of which the conclusion was for payment to the tutors and curators of certain sums alleged to have been overpaid by them to her during the subsistence of the curatory, and for payment to the factor of certain sums alleged to have been overpaid to her after the termination of the curatory.

Held (1) (rev. judgment of Lord Johnston) that the action was incompetent, in respect that it was at the instance of unconnected persons each suing for a separate debt; but (2) that the summons could be competently amended by striking out one set of pursuers; and amendment in that effect allowed.

Cowan & Sons v. Duke of Buccleuch, Nov. 30, 1876, 4 R. (H. L.) 101, is cited and commented on.

1st Division.
Ld. Johnston.

ON 3d October 1893 James Brown of Tweedhill executed a deed of settlement whereby he bequeathed to his daughter, Isabella Brown, the sum of £2500, to be payable to her on her attainment of twenty-one years, when the said provision was to be made. He further declared that the provision was to form a real burden on his lands and estate of Tweedhill and on his salmon fishing on the River Tweed, and on any other heritable estate which he might possess, and that it was to bear interest at the rate of £4 per annum from the date of his death until payment. He appointed John Paxton, physician and surgeon, Norham, and William Crawford, Sheriff-clerk of Berwickshire, to be tutors and curators to his said daughter, and granted power to them to act as factors for managing the estate. By the same deed he appointed the said John Paxton and William Crawford to be his sole executors.

James Brown, the testator, died on 3d November 1893, leaving his daughter, the said Isabella Annie Brown, still under pupillarity. The said John Paxton and William Crawford accepted their appointment as executors and as tutors and curators for the testator's estate, and appointed James Herriot, solicitor in Duns, to be factor for managing the estate.

The testator's daughter attained majority on 19th May 1900, and the curatory came to an end, but the said James Herriot,

date till 11th November 1906, acted as her law-agent, and continued Jan. 14, 1908. to intromit with the income falling to her from the provision under her father's settlement, and to make payments to her and on her behalf during that period. Paxton v. Brown.

On 23d May 1907 an action was brought against the said Isabella Annie Brown at the instance of John Paxton and William Crawford, "the tutors and curators nominated by and lately acting under deed of settlement executed by the now deceased James Brown of Tweedhill, in the parish of Hutton and county of Berwick, dated 3d October 1893, and recorded in the Books of Council and Session 3d December 1894, to his daughter, Isabella Annie Brown, presently residing at No. 173 Colinton Road, Edinburgh, with consent and concurrence of James Herriot, solicitor, Duns, for any interest he may have, and the said James Herriot as an individual." The conclusions of the summons were:—" (First) to make payment to the pursuers the said John Paxton and William Crawford of the sum of £245, 15s."; and "(second) to make payment to the pursuer the said James Herriot of the sum of £204, 4s. 7d."

With regard to the sum first concluded for, the pursuers averred that the income on the defender's provision of £2500 amounted, at the prescribed rate of 4 per cent, to £100 per annum, and that during the subsistence of the curatory the pursuers John Paxton and William Crawford made payments to and on behalf of the defender in excess of the said £100 per annum. "Said payments were, in the circumstances, necessary and proper, and were made solely to educate and maintain the defender in her position in life as the daughter of a landed proprietor. Said payments over and above the said £100 per annum amounted, as at 15th May 1904, when the curatory accounts were closed, to £245, 15s." They further explained that these advances made to the defender were so made at her urgent request. With regard to the sum second concluded for, the pursuers averred that after 15th May 1904 "the defender's income was insufficient for her needs, and the pursuer James Herriot made payments to and on behalf of the defender in excess of her income. These overpayments amounted, as at 20th April 1907, to the sum of £204, 4s. 7d."

In answer to the claim for the tutors and curators the defender averred, *inter alia* :—"The said pursuers had no right or authority to make payments to the defender or on her behalf either extravagant in amount or in excess of income, as many of said payments were, and any such payments were made by them in breach of their duty to the defender."

In answer to the claim for James Herriot she averred, *inter alia* :—"It was the duty of said pursuer to have advised the defender as to her position and as to the income arising on her capital moneys. No such information was at any time given by the said pursuer to the defender, and it was only in 1906 that the defender was, for the first time, informed that she had overdrawn her income account to a considerable extent." She also stated certain objections to the accounts produced, and reserved her right to state detailed objections thereto, and averred her willingness to pay whatever sums might be found to be due by her on a proper accounting and after audit and taxation of the accounts.

The pursuers pleaded;—(2) The pursuers John Paxton and William Crawford having, as tutors and curators, and the pursuer Mr Herriot having as their factor and as an individual, made the advances to the

Jan. 14, 1908. defender and disbursements on her behalf shewn in the said accounts, they are entitled to repayment of the balance therein brought out.
Paxton v. Brown.

The defender pleaded, *inter alia*;—(1) The action is incompetent, in respect that it is laid at the instance of separate and unconnected pursuers upon separate and independent claims of debt.

On 4th December 1907 the Lord Ordinary (Johnston) pronounced an interlocutor repelling the first plea in law for the defender, and appointed the defender to lodge objections to the accounts, and allowed the pursuers to lodge answers thereto. He also granted leave to reclaim.*

* “OPINION.—(After narrating the creation of the provision in favour of Miss Brown)—The history of the administration of the provision for Miss Brown is to be found in a series of accounts of charge and discharge, Nos. 9 to 17 of process, at first between the curators of Miss Brown and Mr Herriot, their factor, and afterwards between Miss Brown herself and Mr Herriot as her law-agent, Nos. 9 to 15 of process being between Miss Brown's curators and Mr Herriot, and Nos. 16 and 17 between Miss Brown and Mr Herriot. But though there is this distinction made in the heading of the accounts, owing to the young lady having attained majority at 19th May 1904, the accounts are really consecutive, and carry the balance due by Miss Brown on the curatorial account into the personal account. There were over-advances made to or on behalf of Miss Brown, both during the later period of the curatory and afterwards. These advances were out of the pocket of Mr Herriot during both periods. The curators and Mr Herriot want now to recover these advances from Miss Brown, and as their accounts and actings are disputed, it has become necessary to clear up matters in Court. Had the alleged balance been the other way, the young lady would have sued her curators and Mr Herriot for accounting and payment of the balance due to her; but, in the circumstances as they stand, the curators and Mr Herriot can only sue for the amount of the advances they allege, and the accounting arises on Miss Brown's counter claim. But the action is none the less in substance, though not in form, an action of accounting. I lay stress upon this, because it appears to me materially to affect the question with which I have at present to deal.

“The curators and Mr Herriot sue as joint pursuers in the same action. The instance is as follows:—Dr Paxton and Mr Crawford, as tutors and curators nominated by the settlement of the late James Brown of Tweedhill, to his daughter, Isabella Annie Brown, ‘with consent and concurrence of James Herriot, solicitor, Duns, for any interest he may have, and the said James Herriot as an individual,—*Pursuers*; against the said Isabella Annie Brown,—*Defender*.’ The conclusions, however, are separate. (First) to make payment to the pursuers Dr Paxton and Mr Crawford of the sum of £245, 15s., being the alleged balance in their favour on their curatorial intromissions with Miss Brown's income from her father's death in 1893 to her majority in 1904; and (second) to make payment to the pursuer Mr Herriot of the sum of £204, 4s. 7d., being the alleged balance on his intromissions as law-agent with the young lady's income from the Whitsunday when she attained majority to Whitsunday 1906, when I understand her affairs were taken out of Mr Herriot's hands.

“The defender pleads ‘(1) The action is incompetent, in respect that it is laid at the instance of separate and unconnected pursuers upon separate and independent claims of debt.’

“I asked the defender's counsel whether the defender had any interest to press a plea, which, if sustained, and assuming liability to be established, could only be the occasion of increased expense to their client. They candidly admitted, as I think must be apparent, that there was no inconvenience in taking the accounting in this form, but they indicated that the

The defender reclaimed, and the case was heard before the First Jan. 14, 1908. Division on 18th December 1907.

Argued for the defender and reclamer ;—The action was incompetent. It had been laid down in the *Feuars of Orkney*¹ as long ago as 1741 that two separate and independent pursuers could not sue in the same action unless they were connected in the matter sued for or were aggrieved by the same act, and that rule had been followed ever since.² Here the pursuers were separate and independent, and it was not alleged that they had been aggrieved by the same act. The question must therefore be, were they connected in the matter sued for? The debts alleged to be due to the two sets of pursuers were entirely separate debts, and that was made all the more evident by the fact that the defences put forward to them were different. If separate actions had been raised they could not, according to the test of contingency laid down in *Duke of Athole v. Robertson*³ have been

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defender had a tactical reason for stating the plea, and they pressed for a judgment. This the defender is entitled to, whatever may be her reasons for stating the plea. The defender's counsel in particular referred me to the recent cases of *Killin v. Weir*, 7 F. 526, and *Brims & Mackay v. McNeill & Sme*, 1907, S. C. 1106, and they maintained that these authorities determined that it was only competent to conjoin two or more unconnected persons as pursuers of an action where they have a joint interest in the matter libelled, or have been injured by the same act—*Orkney Feuars v. Stewart of Burray*, 1741, M. 11,986. The precise terms used by the Court in that case as descriptive of the two classes of cases were—'had connection with one another in the matter pursued for' and 'being aggrieved by the same act,' and the Lord President, in disposing of the case of *Killin v. Weir*, *supra*, expresses his opinion that all the cases quoted to the Court fall quite distinctly under one or other of these two categories. This may be so as a generalisation, and it was quite sufficient and appropriate for the disposal of the two cases in question, which clearly came under the above descriptions of the two classes of cases. But there are other cases to which it is not so easy to apply the above rule in its generality. In *Killin v. Weir*, *supra*, four pursuers sued in one action for separate sums of damages, on the allegation that they had each been induced to purchase shares in a mining syndicate by false and fraudulent statements, made to each of them separately, at different times and places, though admittedly of a similar nature. They had neither a joint interest in the matter libelled, nor had they been aggrieved by the same act. But I think that the reason of the decision is not so much any technical rule as practical convenience. It would clearly be extremely inconvenient, as was very fully shewn by the Lord Chancellor in *Duke of Buccleuch v. Cowan*, 4 R. (H. L.) 14, at p. 16, to try four different cases of damages, arising out of different circumstances, however much these might be related, in one action. But had the misrepresentations alleged been confined to the contents of a prospectus on which all four pursuers had relied, the inconvenience would have disappeared, and the action would, I think, have been sustained on the analogy of cases of slander, where though two persons cannot conclude jointly and severally for the same sum as damages for the same slander (*Flethers of Dumfries*, 10th December 1816, F. C.), they may competently do so for separate sums (*Harkes v. Mowat*, 24 D. 701).

"In *Brims & Mackay's* case, again, the pursuers, being the parties in

¹ *Orkney Feuars v. Stewart of Burray*, 1741, M. 11,986.

² *Ersk. Inst.* iv. 1, 65; *Shand's Practice*, 203-4; *Killin v. Weir*, Feb. 22, 1905, 7 F. 526.

³ Dec. 16, 1869, 8 Macph. 304.

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conjoined. If that were so it was equally incompetent to conjoin them *ab ante* in one action. The question of "convenience" did not come in; the matter depended on principle. Convenience was not adopted as the guide in *Cowan & Sons v. Duke of Buccleuch*.¹ The decision in *Harkes*² really turned on the fact that both pursuers were aggrieved by the same act. Further, the action if incompetent must be dismissed, and the pursuers should not be allowed to amend their summons. An incompetent summons on which proceedings have followed could not be amended so as to make the proceedings good.³ This was not a case for the Court to grant an indulgence to the pursuers, and the Act of Sederunt of 1907 was not meant to apply to such circumstances as these.

Argued for the pursuers and respondents;—The action was brought in this form solely for the purpose of saving the defender expense, and every consideration of convenience pointed to it being allowed to

right of a dissolved firm, and the new firm which carried on the business in succession, sued an individual and the firm which he afterwards joined for one sum, conjunctly and severally, or otherwise severally. On the *media concludendi*, into which I need not go, it was apparent that the whole sum could neither be due to both sets of pursuers nor by both sets of defenders. It is therefore at once apparent that decree could not on such a summons be competently pronounced either in favour of the pursuers or against the defenders, nor could it be competently enforced.

"A consideration of these two cases leads me to the conclusion that the rule above stated in general terms is based upon two considerations: first, on the consideration of convenience; and second, on the consideration of whether the conclusion can be competently deduced from the *media concludendi*, and the decree ensuing be competently enforced. In truth, the term incompetency, strictly speaking, is hardly descriptive of all the cases in which the objection to combining pursuers or defenders may be taken. It is truly a question of convenience in some cases, and of competency only in others. If it were not so, I do not think that the case of the *Duke of Buccleuch, &c., v. Cowan, &c.*, above referred to, could have resulted in the decision which was then pronounced. The Lord Chancellor (Cairns) and the other Lords who took part in the decision, rest particularly upon the question of convenience, and the Lord Chancellor even goes so far as to say that it is in part a question of the Court's discretion, and he makes a very pertinent reference to the provision for remits *ob contingentiam*. The general rule above expressed must, I think, when it comes to be applied, be read and applied in the light of the reason or principle upon which it is based.

"Now, here it is perfectly clear, and is indeed admitted, that it would be eminently convenient to make this consecutive accounting the subject of the same action, and that had two actions been raised, a remit *ob contingentiam*, and even a conjunction for the purpose of inquiry, would have been appropriate. In these circumstances, I should hesitate to throw out the action because it had been commenced in conjunction, unless I felt myself compelled, merely on a theoretical objection. Had Miss Brown been pursuer she could competently and conveniently have called upon her curators and her law-agent to account for their several consecutive intromissions in the same action, provided she had a several conclusion against them, and I do not see why it should be less convenient and less competent for them to bring about the same accounting by such an action as the present, in which

¹ Nov. 30, 1876, 4 R. (H. L.) 14.

² *Harkes v. Mowat*, March 4, 1862, 24 D. 701.

³ *Fischer & Co. v. Andersen*, Jan. 15, 1896, 23 R. 395.

proceed. "Connected in the matter sued for" was a general phrase, and must not be interpreted as meaning only a strictly legal connection. The matters sued for here were really closely connected. The factor had managed the estate first for the curators and then for the defender; it was all one course of administration, and the accounting that would be necessary if the case proceeded was really all one accounting. Therefore both justice and convenience pointed to the expediency of trying these matters in one action, and if there was sufficient connection to make joint action expedient, that was all that was necessary to satisfy the requirements of the law.¹ In *Brims & Mackay*,² if the pursuers had separated their claims, the action would have been allowed to proceed as one action. In *Mitchell v. Grierson*,³ where they were separated as here, the action was allowed to proceed. If this action were allowed to proceed in its present form the defender could not suffer thereby any conceivable prejudice. If, however, it were to be held that the action could not proceed in this form, amendment of the summons, by deleting one set of pursuers,

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they each reduce their demand to a several conclusion. The convenience and economy is manifest, and the conclusions follow competently on the *media concludendi*, and the ensuing decree can, I think, be competently pronounced and enforced.

"There is an incidental point which gave me at first some trouble, though from one point of view it supports the conclusion to which I have come. In this matter Mr Herriot is the real creditor, and had I been drawing the summons, I think that I should have sued in his name against (first) Miss Brown and her curators for the period of her minority; and (second) against Miss Brown herself for the period of her majority, in which case there could have been, I think, no doubt about the convenience and competency of the action. But Mr Herriot has gone on the footing that he was the factor of the curators during Miss Brown's minority, and that he is entitled to be kept *indemnitas* by them for advances which were made on their responsibility and on their account, and that they are therefore the proper parties to sue Miss Brown with a view to the adjustment of the curatorial accounts between them and her. Though I do not think that the mode of proceeding is so direct and simple as the one which I would have adopted, it is, I think, equally consistent with the legal situation; and as the curators sue with consent and concurrence of Mr Herriot for his interest, no question can arise. The case bears to be distinguished from *Hilop v. Mac-Ritchie*, 8 R. (H. L.) 95. Mr Herriot's interest throughout the whole period creates indeed such a bond between the two ostensible sets of pursuers that they cannot truly be said to be unconnected. I think that I am entitled to look at the substance of the action, and in so doing I find it one to obtain an accounting with Miss Brown for a consecutive series of intrusions which are consecutive in fact and only broken in theory by her coming of age, and the ultimate interest in which is in Mr Herriot on the one side and Miss Brown on the other. There is every convenience in trying that question of accounting in one action, and having regard to the conclusions, there is no incompetency in entertaining them, and no difficulty in giving effect to the decree which would ensue, whatever the result of the accounting may be.

"I shall therefore repel the first plea in law for the defender and appoint her to lodge objections to the accounts, No. 9 to 17 of process, which the pursuers produce and found upon."

¹ *Cowan & Sons v. Duke of Buccleuch*, 4 R. (H. L.) p. 14, Lord Blackburn, at p. 27.

² *Brims & Mackay v. Pattullo*, 1907, S. C. 1106.

³ Jan. 13, 1894, 21 R. 367.

Jan. 14, 1908. which was clearly competent under the Act of Sederunt of 20th March 1907, ought to be allowed.

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At the close of the argument on 18th December 1907 the following opinions were delivered:—

LORD PRESIDENT.—In this case the defender, Miss Brown, was, under the settlement of her father, given certain tutors and curators for the period of pupillarity and minority, which ensued owing to the death of her father taking place while she was still a pupil. Her fortune consisted of heritable property only, and it became the duty of the tutors and curators to administer that property, to draw the profits therefrom, and to provide for Miss Brown's maintenance. The tutors and curators, who are the first pursuers in this action, appointed a Mr Herriot, a solicitor, to act as their factor, and they fulfilled the office of tutor and curator during the pupillarity and minority of Miss Brown, and in particular they paid over certain moneys for her maintenance, and also paid certain sums to herself. After she became major the practical management of the property remained, as it had been all along, in the hands of Mr Herriot, and from time to time he too made payments to Miss Brown.

Now, the present action is brought by the tutors and curators, and also by Mr Herriot, and it concludes for separate sums as due to these different pursuers. The ground of action on which the tutors and curators base their claim is that an accounting for the period from their assumption of office until the majority of Miss Brown would shew that Miss Brown is indebted to them in a certain sum, representing payments made to her during that period in excess of the income drawn from the property. The ground of Mr Herriot's claim is that during the period after she came of age he made certain payments to her in excess of the income from the property.

The defences to the two claims are also different. There is, of course, the general defence, which may be described as putting the pursuers to a strict accounting as regards the due vouching of all the payments stated. But there are also defences which are quite different. With regard to the claim of the tutors and curators, she says:—"You, as tutors and curators, had no right to advance to me more than the bare income amounted to. If you did so it was your own fault, and you cannot recover such advances as a debt due by me." As to the factor's claim that defence is not available, and the defence there put forward is that he ought to have informed her that he was making payments to her in excess of her income, and that having failed to do so he is not entitled to recover them. I do not express any opinion as to the relative cogency of these two defences. I merely point out that they are different.

A preliminary objection has been taken by the defender, and it is that, according to a well-settled rule of law, two separate pursuers cannot conjoin in the same action in respect of separate and independent grounds of debt. The Lord Ordinary has repelled that plea; but I must confess that I am unable to follow the reasons which he states for that decision. He first cites the old case of the *Feuars of Orkney*,¹ which laid down the law long ago that "different parties could not accumulate their actions in one libel,

¹ M. 11,986.

unless they had connection with one another in the matter pursued for, or Jan. 14, 1908. had been aggrieved by the same Act." Now, that is a very old authority, ^{Paxton v.} and not only so, but it has been carried down through the books to the Brown. present day. Erskine was quoted to us as an independent authority, but I ^{Ld. President.} take it he was simply following as his authority the decision in the *Feuars of Orkney*¹—his work being written some thirty years after that decision. That rule has been carried down since then through all the authorities. Ivory and Shand give it in exactly the same words, and your Lordships had an opportunity to reiterate it quite recently in the case of *Killin v. Weir*.² I should have thought that if anything was settled that was settled; but yet, says the Lord Ordinary, after referring to *Killin v. Weir*² and *Brims & Mackay*,³ "there are other cases to which it is not so easy to apply the above rule in its generality." He does not, however, quote any other cases, and the learned counsel here, who I am sure have made a careful search, have been unable to quote any to us. So, in fact, it comes to this, that there are no other cases. Therefore, when the Lord Ordinary goes on to say that "the reason of the decision is not so much any technical rule as practical convenience," he takes upon himself a function that does not belong to him. Convenience is convenience, but a rule remains a rule. I think then that the Lord Ordinary's argument is not in accordance with the long line of authority. I only add that the *Duke of Buccleuch v. Cowan*⁴ leaves, to my mind, the old authority untouched. There is, it is true, much talk of "convenience" in the opinions of the learned Lords in that case, but it must be borne in mind that they were English lawyers, and they begin their opinions by stating that the conjoining of pursuers in these circumstances is unknown in English practice though it does obtain in Scotland, and they then go on to examine the Scots authorities. They held in that case that it was possible for the pursuers to conjoin, for, of course, that case fell within the exceptions as expressed in the *Feuars of Orkney*,¹ and when they come to use the word "convenience" is when they go forward to consider whether there was any reason arising *ab inconvenienti* to prevent the exceptions applying there, and they found that there was not. But I need hardly say that that case does not trench on the old authorities in any way.

We then come to the question put by Mr Morison, Does this case fall within the exceptions, either (first) that the pursuers are connected with one another in the matter pursued for, or (second) that they are aggrieved by the same act? Clearly they are not aggrieved by the same act—the tutors and curators' advance was one thing, and Mr Herriot's was another. But are they "connected in the matter pursued for"? These are general words, and though they are not the same thing as joint interest in its legal sense, yet the idea of joint interest does throw some light on them. I think that the pursuers here are not connected at all, the only suggestion of connection is that, historically, they succeeded one another. In the course of the argument I put the example of a person being sued by his butcher and his baker. The goods in question there would, of course, be supplied for the same house.

¹ M. 11,986.² 7 F. 526.³ 1907, S. C. 1106.⁴ 4 R. (H. L.) 14.

Jan. 14, 1908. hold, and possibly the principal witness would be the same in each case, namely, the housekeeper or house steward who had ordered the goods. But they would clearly be unconnected accounts, and I think that that example is completely analogous to the present case. I am well aware that the whole tendency of modern times is not to turn an action out of Court on a technical plea, and my whole sympathy, if I could have any sympathy, would be against turning this action out. But where there is a rule of law which has been adhered to for so long as this one has, we must be shewn some very weighty reason for not giving effect to it, and no such reason has been advanced here. It appears to me that this is nothing but a case of the parties to two separate actions seeking to enforce their claims in one summons, and therefore I am of opinion that the defender's plea must be sustained.

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Ld. President.

But the question remains, what is to be done next? I think that here the modern practice of not multiplying actions and not putting parties to unnecessary expense comes to our help. But I think the pursuers must put their pen through the name of one set of pursuers and also through one set of averments, and if that is done I think it will remain quite a good action at the instance of the remaining pursuer. The defender will not be prejudiced in any way, and the expenses of preparing and serving new actions and paying the fee fund dues will be avoided. I think, then, that Mr Morison should be given time to consider which of the pursuers he is prepared to strike out, for I think that he has that option.

LORD M'LAREN.—The rule as to combining different claims in the same action is tersely and epigrammatically stated in the case of the *Orkney Fcuars v. Stewart of Burray*.¹ The general rule there laid down is that parties cannot accumulate their actions in one libel, and the two exceptions stated are (1) where there is some connection between the parties in the matter pursued for—which I take to mean some title or interest in common—and (2) where the parties suing are aggrieved by the same act. Here there are two unconnected pursuers, each suing for his own separate debt, and as the law-agent's advances only commenced when those of the curators ended, it cannot be said that there were concurrent accounts. Besides, if the grounds of the action are examined, the questions at issue will be found to be different. For in the first case the question is whether the curators acted within the scope of their duty in making these advances, while the second seems to raise a simple question of debt, viz., a claim by a law-agent for advances to his client.

I agree with your Lordship that two such claims cannot be combined in the same action, and that the opinion which the Lord Ordinary has adopted would tend to relax, and indeed to render inoperative, the rule by which we have hitherto been guided. The rule is not merely formal and arbitrary, but has this substance in it, that if an action is brought by a single pursuer, a defender may more easily come to a settlement, and have the case taken out of Court, while if there are several persons suing on different claims, any one of them by holding out (it may be for a just claim) may not only

¹ M. 11,986.

subject the defender to needless expense, but may prevent any settlement ^{Jan. 14, 1908.} being come to at all. In any view, I should be very averse to relaxing a ^{Paxton v.} rule which has worked well in practice, and in which, as I have indicated, ^{Brown.} there is a good deal of substance. I agree, however, that our modern practice affords a practical remedy, and that by striking out one of the two claims the action thus restricted may be made competent.

LORD KINNEAR and LORD PEARSON concurred.

At the close of advising,—

LORD PRESIDENT.—I ought to have added with regard to the old case of the *Feuars of Orkney*¹ that if, as the Lord Ordinary says, the doctrine of convenience is to be taken as the test, you could not have had a case where convenience pointed more directly to a conjoining of the pursuers, for the subject of proof there was really one continuous course of somewhat nimious doings on the part of Stewart and his men.

The Court continued the cause to enable the pursuers to submit their proposed amendments.

The pursuers subsequently lodged a minute of amendment by which they proposed to delete from the instance the names of the first set of pursuers, viz., the tutors and curators, leaving the action to proceed at the instance of the pursuer Herriot. They also proposed to amend the conclusions (and so far as necessary the condescendence and pleas in law) to the effect of enabling the pursuer Herriot to sue for both the sums concluded for in the original action, averring that he had advanced both sums out of his own funds.

ON 14th January 1908 the Court pronounced this interlocutor:—

“Recall the Lord Ordinary’s interlocutor: Open up the record and allow the pursuers to amend the summons in terms of the minute of amendment: Find the defender entitled to expenses since the date of closing the record, and remit,” &c.

J. GORDON MASON, S.S.C.—KELLY, PATERSON, & Co., S.S.C.—Agents.

MRS ISABELLA YATES OR M’CALLUM, Pursuer (Appellant).—*Trotter*. No. 59.

NORTH BRITISH RAILWAY COMPANY, Defenders (Respondents).—

Dickson, K.C.—G. G. Grierson.

Jan. 14, 1908.

Reparation—Negligence—Railway—Injury to passenger—Crowd on Station Platform.—A married woman with an infant in her arms was standing with her husband at Waverley Station, Edinburgh, on a Saturday evening in September, waiting for additional carriages to be added to a train which was to leave a quarter of an hour later. Before the carriages were in position, an orderly crowd of passengers collecting behind the woman and pressing forward on the arrival of the carriages, the woman was pushed off the platform upon the carriages and was injured.

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In an action for damages raised by the woman against the Railway Com-

¹ M. 11,986.

Jan. 14, 1908. pany, in which the above facts were proved, *held* that the pursuer's injuries were not due to negligence on the part of the Railway Company, and defenders assolizied.

M'Callum v.
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2D DIVISION.
Sheriff of the
Lothians and
Peebles.

IN January 1907 Mrs Isabella Yates or M'Callum, wife of Alexander M'Callum, miner, Broxburn, brought an action in the Sheriff Court at Edinburgh, against the North British Railway Company for damages on account of personal injuries alleged to have been sustained by her through the fault of the defenders.

The defenders denied fault, and pleaded, *inter alia*; — (2) Any injuries sustained by the pursuer not having been occasioned by any fault or negligence of the defenders, or their servants, the defenders are entitled to absolvitor, with expenses.

A proof was allowed and led. The import of the evidence sufficiently appears from the interlocutor of the Sheriff-substitute, which was affirmed by the Court on appeal.

On 22d March 1907 the Sheriff-substitute (Millar) pronounced this interlocutor:—"Finds in fact—(1) That on 1st September 1906 the pursuer, her husband, and three children left Broxburn in the afternoon to proceed to Edinburgh, where they did some shopping; that in the evening they proceeded to the Waverley Station in order to return to Broxburn by the train leaving Edinburgh at 8.38 P.M.; that on arrival at the gate at the end of the platform their tickets were checked by an official stationed there; (2) that the platform, No. 12, from which the Broxburn train started, is a wooden platform, with a concrete margin of 2 feet 9 inches in breadth, and is capable of holding about 2000 persons; that there is a dock on each side for trains, and the Broxburn train was in the dock on the left-hand side of the platform; (3) that on entering the platform and proceeding to the train, the pursuer and her husband found all the third-class carriages filled, but they were told to go in front as more carriages were to be added on; (4) that pursuer went to the front, and waited at the point of the platform where the incoming carriages would likely be stopped; that at this place there was a hoist for goods which contracted the space for passengers; (5) that there were a few passengers already waiting for the carriages, but the arrival of more increased the crowd to about 200 persons; the crowd was orderly, consisting mainly of working people who had been in town shopping with their families; (6) that the pursuer, who had a child in her arms, stood on the wooden part of the platform, within the concrete margin; she was in front of the crowd with no one between her and the place to which the carriages were to be shunted; the platform at this part was well lighted with four powerful electric lamps; (7) that when the carriages were being shunted into the dock, the crowd pressed forward; the pursuer did not attempt to get into the train, but was forced up against the carriages by the pressure from behind, and was thrown down and received severe bruises about the legs and right thigh; (8) that the Company provided two men to check the tickets, two inspectors, porters, and policemen, who were sufficient to regulate any crowd that was on the platform at the time; (9) that there was no neglect of any duty cast on the Railway Company under the circumstances, and the damage that the pursuer sustained was due to the heedlessness of the crowd, and not in consequence of any negligence on the part of the defenders: Finds in law that the defenders, not being guilty of any negligence whereby the pursuer was injured, are not liable in damages to her for any injuries she may have suffered;

therefore sustains the second plea in law for the defenders, and assoil-jan. 14, 1908.
zies them from the conclusions of the summons." *

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* "NOTE.—There was a little difficulty in connection with the proof in this case, as the Railway Company did not receive immediate notice of the accident, and their servants were not informed of the accident until some time after the date on which it is said to have occurred, with the result that it was with some difficulty that they could recall the precise circumstances in connection with the departure of the train upon this occasion.

"I think, however, it is fairly clearly proved that the pursuer and her husband and three children, one of whom was an infant in arms, went down to the Waverley Station on the 1st September 1906 in order to take the 8.38 P.M. train to Broxburn, and arrived at the station ten minutes or a quarter of an hour before the scheduled time for the train to start. At the entry to the platform there are two sliding gates, one for passengers entering to go to the train on the one side, and the other for passengers going by the train on the other side. On the occasion in question only the gate on the Broxburn train side of the platform was open, and both ticket collectors were there at the time. There is no division of the platform once you enter the gate, and it is open to the passengers going by the one train to cross over to the other side. On entering the platform the pursuer and her husband found all the carriages, six in number, going to Broxburn filled, at least, in so far as the third-class carriages were concerned. They were directed, however, by an official to proceed to the front of the train as more carriages were to be added to the train. They went forward, and stood close to the goods hoist, which occupies a considerable part of the centre of the platform, and which was about a carriage length from the end of the carriages then in the dock. There were a few persons waiting for the carriages at the time she went forward, but a constant stream of incomers added to the number, so that when the carriages came in there was a knot or crowd of about 200 persons there. The pursuer and her husband were standing on the wooden part of the platform, but in front of the crowd, looking towards the dock into which the carriages were to be shunted. In my view, if the pursuer, who was not very strong, and who at the time was carrying a child, wished to be in safety, it was her duty to have taken up a position at the back of the crowd, and then there would have been no chance of such an accident happening. When the carriages came in the crowd pressed forward, and the pursuer was forced by the pressure up against the carriages, and was thrown down, and her right leg slipped between the carriages and the platform, with the result that she was severely bruised. I think it proved that she did not attempt to go into the train, but that the accident happened entirely through the pressure of the crowd. She was at once lifted up, and after sitting for a short time with her back to the hoist, she recovered sufficiently to be able to travel in a compartment of one of two carriages which were added to the three which had already been shunted on to the train. Neither she nor her husband made any complaint to any railway official either at the Waverley Station, or at Broxburn when they arrived.

"In these circumstances the pursuer alleges three grounds of liability as against the Railway Company—(First) That the platform was overcrowded; (Second) that it was insufficiently lighted; and (Third) that there were no officials present to regulate the crowd, and that if there had been, an accident would not have happened." (The Sheriff-substitute, after stating his opinion that the first ground of action had not been proved, and that the second had been disproved, continued)—

"The third ground, and more difficult one, is that the pursuer avers that there were no railway officials present at the time. Undoubtedly, at the gate there were two officials to check the tickets, and, in their immediate neighbourhood, several railway policemen, whose duty it was to regulate

Jan. 14, 1908. The pursuer appealed, and founded on the undernoted authorities.¹
The defenders argued that the Sheriff-substitute's judgment was right in fact and in law.
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LORD JUSTICE-CLERK.—I do not think that any sufficient ground has been shewn for interfering with the Sheriff-substitute's interlocutor here. It is quite certain that it is the duty of the Railway Company to provide as best it can, and in a reasonable way, for the safety of persons assembled on the platform and wishing to get into a train. It is quite certain also that in fulfilling that duty in a reasonable sense they cannot always be able to control the crowd on the platform. They cannot always, in a large and busy station be at every spot where a number of people may congregata. Something must be left in these circumstances to the reasonable discretion of the people who are going to get into the train. I am sorry to say that

any crowd. On the platform there was the guard of the train, and in the neighbourhood there were two inspectors, Ogg and Mein, and also a foreman porter, and policemen, whose duty it was to patrol the platform. None of these officials seem to me to recollect the occasion in question very clearly, but I think that is accounted for by the fact that a considerable time elapsed before this matter was brought to their notice, and on the occasion in question there does not seem to have been anything to call their attention to the circumstances, either in the demeanour or size of the crowd or by their observing any accident at this place. The crowd admittedly was of quiet respectable working people who had been in town doing shopping and were returning in the evening. It is not averred that there was any brawling, or fighting, or riotous conduct of any kind. At the same time I think it proved that no one, when the carriages were shunted into the station, called out to the crowd to stand back, but I can scarcely think that, taking a crowd of that kind, the railway officials were bound to assume that their conduct would be anything but quiet and orderly. If a crowd of that character suddenly presses forward and an accident results, I do not think that the Railway Company can be held liable merely because there was no official present to call upon the crowd to stand back. Moreover, the pursuer's evidence is to the effect that even if there had been a call to stand back, the pressure upon those next the carriages was such as to make it impossible for them to obey the call.

"In these circumstances the law applicable to the case rests upon negligence being proved on the part of the Railway Company. They certainly do not insure passengers who enter their premises against accident, and in the event of any accident occurring, before they can be held liable, the pursuer must prove that there had been a neglect of a duty cast upon them under the circumstances, and that that neglect was the cause of the accident which had occurred. The cases I was referred to, so far as the Scotch Courts are concerned, were—(1st) the case of *Macgregor v. Glasgow District Subway Company*, 3 F. 1131. That was the case of an intending passenger from a station of the Glasgow District Subway, who had been injured through being caught between the station platform and an incoming train. He averred that the trains of the Company consisted of two carriages, each with a single entrance door, that only persons holding tickets were admitted to the platform, that on the day in question, owing to a breakdown, the trains were running at intervals of fifteen minutes instead of the advertised time

¹ *Scott's Trustees v. Moss*, Nov. 6, 1889, 17 R. 32; *Macgregor v. Glasgow District Subway Co.*, July 19, 1901, 3 F. 1131; *Fraser v. Caledonian Railway Co.*, Nov. 4, 1902, 5 F. 41; *Hogan v. South-Eastern Railway Co.*, 1873, 28 L. T. 271.

very often that reasonable and moderate discretion is not exercised. Parti-Jan. 14, 1908. cularly it is not exercised by men: if it were exercised by men there would be no difficulty with women at all. Of course it is very natural that people who have been in Edinburgh all day on an excursion, and who desire to catch the 8.38 train back, should be anxious, and take precautions not to be left behind. A practised traveller would have no difficulty about that, because he would insist on being provided with a seat. Still, it is a natural impulse, which is not sufficiently resisted by some people, to rush at the train if they think there is a crowd who will be able to get in in front of them. Here it is alleged that there was a crowd of two hundred people on the platform. I cannot say that I think that was a great or a dangerous crowd; nor can I say that at the time it was assembled there, which was a very considerable time before the train was to start, it was the absolute duty of the Railway Company necessarily to find officials to be at

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Lord Justice-Clerk.

of three minutes, with the result that a larger number of intending passengers than usual came to the station before the train arrived, that on the train entering the station, and while it was still in motion, the crowd concentrated at the point where one of the entrance doors would come to a stop, with the result that the pursuer was pressed against the moving train, and being caught between it and the platform received the injuries on account of which he sued. The pursuer there appealed for jury trial from the Sheriff Court, and parties were heard upon the relevancy, and the Court, with great difficulty, held the action relevant. Lord Young said,—‘I think that it is impossible to say that within the averments here the pursuer could not establish a case of fault against the defenders.’ Lord Trayner said,—‘I have great doubt as to the relevancy of the pursuer’s averments, but I do not dissent.’ Lord Moncreiff says,—‘I say no more than that I think the pursuer is entitled to an issue,’ and the Lord Justice-Clerk,—‘I have had great doubt, but I cannot say that the pursuer’s averments are irrelevant.’ Now, that case seems to me to be much stronger than the present one, and if the Court there had so much doubt, I think their judgment tells against the pursuer’s case here. The second case, that of *Fraser v. Caledonian Railway Company*, 5 F. 41, was an action of damages for personal injury against a railway company. The pursuer averred that the defenders were in fault in respect that they knowingly, and without taking any steps to prevent it, permitted a greater crowd of passengers, of whom the pursuer was one, to congregate in a station than its platforms could accommodate, and had failed to provide a sufficient staff of servants to cope with the crowd, and that in consequence, by the pressure of the crowd, the pursuer had been carried along and hurled from the platform on to the railroad and injured. The Lord Justice-Clerk says,—‘The pursuer avers that the servants of the Company allowed the station to become so overcrowded as to be dangerous, and took no steps to prevent danger from this cause. The averments are certainly somewhat meagre, but I have come to be of opinion that the case cannot be satisfactorily decided without the facts being first ascertained.’ Lord Trayner says: ‘I think, under the pursuer’s averments, she may be able to establish fault against the defenders, involving liability, and I cannot say, especially looking to the state of the authorities on the subject, that the case as presented is one that cannot be made the subject of inquiry.’ These are the only reported Scotch cases to which I was referred, but there is an unreported case which was decided by the First Division on Saturday, 5th July 1902. I was supplied with copies of the judgment in that case, from which it appears that the pursuer was one of a company of 930 young men, who went down to the station in order to proceed to a football match, and that there were on the

Jan. 14, 1908. that train. These officials were probably just as much wanted at that moment at some other train which had to start earlier. If they were engaged at their ordinary work in examining trains which were leaving, or just about to leave, the station, they could not possibly give the attention which they might have given on an ordinary occasion, to a train which was only being made up and was not to start for some time; the two things would have to be worked out to the best of their ability. But it does not seem to me that this train was neglected. The train was a train of six carriages waiting for passengers, and according to practice, the day being a Saturday, three carriages from a train arriving about eight o'clock were put on to the front of the train, because on Saturdays there would be more people to be carried than on ordinary week-days. When these three carriages were put on that was simply making up the train to what it was to be when it came to start some twenty minutes afterwards. Apparently

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platform seven railway servants to regulate this large crowd, and as the result of the crowd at the station he was pressed up against the train and was injured. The jury had found the defendants liable, and had assessed the damages at £50, but the Court, on a motion for a new trial on the ground that there was no evidence to support the verdict, granted the new trial unanimously.

"The cases to which I was referred in England were—(1st) *Hogan v. South-Eastern Railway Company*, 28 L. T. 271. In this case the female plaintiff was one of a crowd of passengers assembled at the defendants' railway station. The crowd, caused by special excursion traffic, of which the defendants had previous notice, had been allowed to enter the station and to disperse over the platform at will. No precautions were taken to regulate its movements. On the approach of a train the plaintiff was, through pressure caused by the swaying of the crowd, thrust off the platform and hurt. Baron Martin, who presided at the trial, non-suited the plaintiff on the ground that there was no evidence of negligence on the part of the defendants. On appeal, the Court of Appeal recalled the judgment and held that the case should have been allowed to go to the jury. It was decided that the question of negligence or no negligence was one for the jury, and not for the presiding Judge. But in deciding the case, Mr Justice Keating, at page 273 says: 'I quite agree that it would be monstrous to expect the company to guard against the pressure of an inconsiderate crowd, and that if the accident did arise from the natural impulse of the crowd, then the defendants cannot be held liable, but it was for the jury to judge of the character of the crowd'; and Mr Justice Grove, who went mainly on the ground that there had been an unlocked gate with no attendant at it to prevent the influx of passengers, says: 'I am far from saying that the jury ought to have found for the plaintiff; the only question for us is whether they might have done so.' The other cases in England do not raise the question directly. *Sturgess v. Great-Western Railway Company*, 56 J. P. 278, was the case of a passenger in a crowd tripping over a box containing signal levers, which projected about two inches above the level of the platform, and the Court held there that, although Lord Chief-Justice Coleridge directed a non-suit, nevertheless the question of negligence ought to have been left to the jury. The case of *Welfare v. Brighton Railway Company*, L. R., 4 Q. B. 693, was a case of a man being injured by the fall of a plank and a piece of zinc from the roof of the station. There the Judge non-suited the plaintiff, and the Court of Appeal held that there was no evidence to go to the jury. The case of the *Metropolitan Railway v. Jackson*, L. R., 3 App. Cases, 199, was the case of a man whose thumb was crushed by the door of a carriage being hastily slammed to by a porter as

there was a rush made for the train when the three carriages were put on, Jan. 14, 1908. and this lady seems to have been run up against a carriage and was to some extent injured. I am unable to say that I can find in this evidence proof that the Railway Company were at fault in not having prevented that. I think the Sheriff-substitute has considered the case with great care, and has given a very moderate and ample statement of the case. Upon the whole matter I do not see that we would be justified in holding that he was wrong in the decision to which he came, and I think his judgment ought to be affirmed.

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LORD LOW.—I am of the same opinion. I do not think that fault is proved on the part of the defenders. It seems to me that this was no unusual occasion, and they had no reason to anticipate that there would be any great crowd or any unusual danger to passengers; and it is perfectly plain that there was the ordinary and usual number of officials to look after the safety of passengers connected with this particular train. The accident which the pursuer sustained seems to have been a pure accident for which the defenders are in no way responsible.

LORD ARDWALL.—I agree. The question is whether fault has been proved against the Railway Company. It appears to me that it is plain upon the evidence that the cause of the accident was the heedlessness and selfishness of the crowd of people, or of individuals composing that crowd,

the plaintiff had risen to protest against the influx of passengers after the carriage was crowded. The judgment mainly goes upon the question whether the question of negligence is to be left to the jury, or whether there is a duty upon the Judge to decide whether, in the circumstances, the proof shewed negligence at all, but in the course of his judgment, Lord Blackburn says: 'My Lords, in all cases of damages for a personal injury against railway companies, the plaintiff has to prove, first, that there was, on the part of the defendants, a neglect of that duty cast upon them under the circumstances; and second, that the damage he has sustained was the consequence of that neglect of duty. A third question, whether the plaintiff is himself to blame, comes more properly by way of defence.' The case of *Shepherd v. Midland Railway Company*, 25 L. T. 879, was the case of ice an inch thick allowed to remain upon a platform with the result that a passenger stepping upon it slipped and fell, and was severely injured, and the Court there held that the defendants were guilty of actionable negligence in allowing the ice to remain upon the platform.

"There is a case in Ireland, *Cannon v. Midland Great-Western Railway (Ireland) Company*, 1879, 6 L. R. (Irish) 199. That was the case of a harvester pushed off a platform by a sudden inrush of people on the platform already filled by a disorderly crowd. The railway company were found not liable, and it was there decided that a railway company is not bound to provide a staff sufficient to cope with the force and violence of a lawless crowd rushing through a station.

"Looking at all these judgments, it seems to me that no sufficient case has been made out against the present defenders. It can scarcely be said, because there was not an official to call out stand back, when the carriages were shunted into the platform, to a group of persons who were all orderly and quiet at the time, that therefore they are guilty of such negligence as to make them liable for the sudden rush of the crowd towards the carriages. In the whole circumstances, therefore, I am of opinion that the defenders are entitled to be assolized, with expenses."

Jan. 14, 1908. who made a rush for the three empty carriages which were in course of being added to the Bathgate train on the night in question. There was no necessity for such a rush at the time, nor was it to be expected, for some twenty minutes had to elapse before the train was timed to start; and as Lord Ardwall. no complaint was made at the time, it is impossible for the Railway Company to prove by their inspectors where they were at the particular moment of the accident. I agree with the Sheriff that it is proved that there was a sufficient staff for all ordinary purposes. Further, it is, I think, proved that the Railway Company did not allow an unreasonable number of people to get on to this platform; they had taken the very proper precaution of allowing nobody to go on to it except through the gates, where persons were stationed to check the tickets and to prevent too many people getting on to the platform. I accordingly hold that the pursuer has failed to prove that the accident complained of was due to the fault of the defenders.

THE COURT pronounced the following interlocutor:—"Dismiss the appeal, and adhere to the interlocutor appealed against: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor; therefore of new sustain the second plea in law for the defenders, assoilzie them from the conclusions of the action, and decern."

BRYSON & GRANT, S.S.C.—JAMES WATSON, S.S.C.—Agents.

No. 60.

THOMAS CONOLLY, Pursuer.—*Orr, K.C.—Lippe.*

NORTH BRITISH RAILWAY COMPANY, Defenders.—*Dickson, K.C.—G. G. Grierson.*

Jan. 15, 1908.

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Expenses—Jury Trial—New Trial—Expenses of first trial.—The pursuer of an action of damages obtained a verdict, which was set aside as being contrary to the evidence, and a new trial was ordered. At the second trial the pursuer again obtained a verdict. The defenders moved for a new trial. The Court refused to allow a new trial, and found the pursuer entitled to expenses "except the expenses of the first trial."

Held that the expenses incurred by the pursuer in resisting the motion to set aside the verdict obtained at the first trial were expenses of the first trial, and consequently that the pursuer was not entitled to these expenses.

Earl of Fife v. Duff, 5 S. 524, *followed*.

2D DIVISION.

THOMAS CONOLLY, labourer, Springburn, Glasgow, brought an action of damages for personal injury against the North British Railway Company.

On 21st July 1906 a jury returned a verdict for the pursuer, and assessed the damages at £160.

The defenders moved for a new trial on the ground that the verdict was contrary to the evidence, and obtained a rule on the pursuer to shew cause why the verdict should not be set aside. The Court thereafter set aside the verdict and allowed a new trial.

On 30th May 1907 a second jury returned a verdict for the pursuer, and assessed the damages at £75.

The defenders obtained a rule.

On 20th December 1907 the Court pronounced this interlocutor:—"The Lords having heard counsel for the parties on the rule granted by the previous interlocutor, refuse the said rule, of consent apply the verdict of the jury, and in terms thereof decern against the defenders

for payment to the pursuer of the sum of £75 sterling: Find him entitled to expenses, except the expenses of the first trial, and remit the same to the Auditor to tax and report." Jan. 15, 1908.
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The Auditor allowed the pursuer the expenses incurred by him in opposing the rule which resulted in the verdict at the first trial being set aside.

The defenders, in a note of objections, objected to the allowance of these expenses, and argued that they were part of the expenses of the first trial, and therefore that they fell within the exception in the interlocutor of 20th December.¹

The pursuer maintained that the Auditor was right.

LORD JUSTICE-CLERK.—I think that these expenses should not be allowed. They are expenses connected with the first trial, and although the word trial expresses generally the idea of going to a verdict, and getting the verdict of a jury, we all know that a verdict has no weight whatever except in so far as it is applied by the Court, the Court having power, if they see fit, not to apply it on certain grounds, they having a discretion to judge whether the jury have gone so far wrong in their verdict, either in fact or in law, that a new trial ought to be granted on the ground that the verdict was either contrary to evidence or contrary to law. I take that to be part of the proceedings of the first trial, and until that has been done nothing effective has been done in the original trial at all. To say that these expenses, which resulted in the pursuer being compelled to enter upon a new trial, are expenses connected with a new trial, seems to me to be out of the question. They are expenses connected with the trial in which the verdict was bad, and had to be set aside, and the pursuer is not allowed the expenses of that trial, and my own opinion, apart from authority, would be that he is not entitled to the expenses incurred by him in defending the verdict obtained in that abortive trial. But I hold that this view is strongly confirmed by the case quoted to us of the *Earl of Fife v. Duff*.¹

LORD LOW.—I have great doubts in this case, but I think it seems to have been decided in the *Earl of Fife v. Duff*¹ that the expenses of discussing a rule for a new trial are part of the expenses of the trial to which it relates. That being so, I do not think it would be expedient to disturb a decision upon a question of this sort pronounced so long ago. Therefore I agree in the result which your Lordship proposes.

LORD ARDWALL.—I have no doubt about this matter. I am of opinion that the expenses connected with the setting aside of the verdict in the first trial which has been allowed to the pursuer by the Auditor were really part of the expenses of the first trial. The proceedings in connection with the first trial never came to anything; the verdict was set aside and a new trial was granted. When the Court finds a party entitled or not entitled to certain expenses, that is not of necessity confined to the expenses of the specific piece of procedure mentioned in the finding, but includes expenses properly connected with such piece of procedure. When the Court says a party is to be entitled to the expenses of the first trial, or is not to be

¹ *Earl of Fife v. Duff*, March 3, 1827, 5 S. 524.

Jan. 15, 1908. entitled to the expenses of the first trial, these expenses consist not merely of the expenses of the proceedings before the Judge at the trial, but of everything properly connected with the first trial, including the expenses of the discussion in this Court in obtaining a new trial. That view is entirely in consonance with what was decided in the case of the *Earl of Fife*,¹ which has been quoted to us. That was a very clear case of this point coming up for decision, because there were in that case two jury trials, which in consequence of the judgment of the House of Lords were held to be absolutely useless, and one of the parties got the expenses of these trials, but no other expenses. Therefore it is a direct decision as to what falls and what does not fall within the expenses of a particular jury trial. On these grounds I am clearly of opinion that the judgment proposed by your Lordship is the right one.

LORD STORMONTH-DARLING was absent.

THE COURT sustained the objection.

ST CLAIR SWANSON & MANSON, W.S.—JAMES WATSON, S.S.C.—Agents.

No. 61. MARY WILHELMINA HAVERY, Pursuer (Respondent).—*R. S. Brown*.
 Jan. 15, 1908. ROBERT BROWNLEE, Defender (Appellant).—*M' Lennan, K.C.—Ingram*.

Havery v.
Brownlee.

Parent and Child—Illegitimate Children—Filiation—Admission by defender of intercourse subsequent to date of conception.—Where the defender in an action of filiation admits an act of connection prior in date to the alleged act on which the pursuer founds very little corroboration of the pursuer's evidence will be required; but where the act admitted by the defender is subsequent in date to the alleged act founded on by the pursuer the corroboration of her evidence must be substantial.

2D DIVISION.
 Sheriff of
 Roxburgh,
 Berwick, and
 Selkirk.

IN February 1907, Mary Wilhelmina Havery, dressmaker, 25 Paton Street, Galashiels, brought an action of filiation and aliment in the Sheriff Court at Selkirk, against Robert Brownlee, dyer, 2 Huddersfield Street, Galashiels.

The defender lodged defences, in which he denied that he was the father of the pursuer's child.

A proof was allowed and led.

The pursuer deposed that she had known the defender for a number of years, their families having been intimate for a long time; that she and her sister were allowed to dry their washing in a stove-house belonging to the defender's father, and that the defender often helped them there; that on an evening about the middle of March 1906, when she and the defender were alone in the stove-house, he had connection with her there against her will, and that in consequence she gave birth to an illegitimate child on 29th December 1906; and that the defender had had connection with her on other occasions in April, May, and July, when they were out cycling together.

The defender denied that he had had connection with the pursuer in March, but he admitted that he had had connection with her on 26th May and again on 12th July, when they were out cycling.

The import of the rest of the evidence, so far as material to the

purposes of the present report, sufficiently appears from the opinion of the Lord Justice-Clerk. Jan. 15, 1908.

On 29th April 1907 the Sheriff-substitute (Smith) pronounced this interlocutor:—"Finds in fact that the pursuer gave birth to a female illegitimate child on 29th December 1906; that she had connection with the defender in March 1906; and that the defender is the father of the said child; and, in law, that he is liable to pay the inlying expenses and aliment sued for: Therefore decerns against the defender in terms of the prayer of the petition." Havery v.
Brownlee.

The defender appealed.

The pursuer founded on *M'Donald v. Glass*.¹

LORD JUSTICE-CLERK.—These cases are very trying, I must say, but I cannot see that in deciding them we are entitled to go contrary to the rules of evidence under which it is necessary that the pursuer should have some reasonable and substantial corroboration of her evidence before she can be successful. No doubt, in many of these cases the defender in his conscience must know that a decision in his favour would be a wrong decision. With that we have nothing to do. Our business is to do justice by applying the rules of evidence to the evidence before us. In this particular case I look in vain for any reasonable and substantial corroboration of the evidence of the pursuer. It is true that the defender admits that he had connection with the pursuer about two months after the date on which she founds. That is a kind of admission which cuts both ways. In this case I think that it is rather in favour of the defender that he makes such an admission, because it is plain that the pursuer never could have proved the acts of connection which the defender admits, and the admission also goes to explain what took place between the families when the matter of the defender's marriage to the pursuer was mooted. I quite agree that where a defender admits an act of connection before the date on which the pursuer founds she requires very little corroboration to bring home to him the act which she alleges. It is different when the admission refers to a date after the date on which the pursuer founds. In that case she requires to bring forward substantial corroboration of her evidence, and this, I think, the pursuer here has failed to do. There is no evidence of any previous familiarities between the parties, and I have difficulty in holding that the stove-house in which the pursuer alleges the act of connection took place was a suspected place. Mr Brown founded on evidence to the effect that in September the pursuer told her sister about the connection which she alleges in the previous March. I think that that is not competent evidence, for it is evidence as to a statement made, as I gather it was made, outwith the presence of the defender, and later by several months than the date of the alleged occurrence. what had happened between them, the defender, when he was told pursuer's condition, was at first not prepared to deny the paternity, & willing to marry her. It was only on ascertaining that she was advanced in pregnancy that he repudiated the idea of marrying & denied the fact of paternity. On the whole matter I think that there is not any sufficient corroboration of the pursuer's story, and consequently she has failed to prove her case.

¹ Oct. 27, 1883, 11 R. 57.

Jan. 15, 1908. LORD LOW.—I am of the same opinion.

Havery v.
Brownlee. LORD ARDWALL.—I am also of the same opinion.

LORD STORMONTH-DARLING was absent.

THE COURT sustained the appeal, and recalled the interlocutor of the Sheriff-substitute: "Find that the pursuer gave birth to an illegitimate child on 29th December 1906, and has failed to prove that the defender is the father of that child: Therefore assoilzie the defender from the conclusions of the action, and decern."

S. F. SUTHERLAND, S.S.C.—J. FERGUSON REEKIE, Solicitor—Agents.

No. 62. JOSEPH CALDER AND OTHERS (Copland's Executors), First Parties.—
Munro.

Jan. 16, 1908.

Copland's
Executors v.
Milne.

MARY JANE MILNE AND OTHERS, Second Parties.—*Munro.*

MRS JANE ANNE FALCONER OR MACKENZIE AND OTHERS, Third
Parties.—*Chree.*

MRS JESSIE JOHNSTON OR FALCONER AND ANOTHER, Fourth Parties.—
Chree.

JOHN COPLAND, Fifth Party.—*Taylor Cameron.*

Succession—Testament—Construction—Object of Gift—"Cousins."—The word "cousins" in a testamentary deed means first cousins only, unless there is something in the context of the deed or in the circumstances of the case to shew that the word is used in a different sense.

Succession—Testament—Construction—Subject of Gift—Words importing gift of heritage—Titles to Land Consolidation (Scotland) Act, 1868 (31 and 32 Vict. cap. 101), sec. 20.—A testator by holograph will appointed executors, and instructed them after paying his debts to divide the income of "the balance" between his brother and sister equally, and on the death of either to pay the whole income to the survivor; on the death of both "I wish my whole estate realised and equally divided between my cousins on my mother's side."

The testator left about £3300 of moveable property, and also had a personal right to a share (valued at under £100) of a small heritable property.

Held that the heritable property was carried by the will.

2D DIVISION. THOMAS MILNE COPLAND, residing at Seaton of Usan, Montrose, died on 16th October 1905, leaving a holograph will dated 13th April 1904, and two holograph codicils thereto, in the following terms:—

"I, Thomas Milne Copland . . . hereby appoint as my Executors my Brother in Law Joseph Calder, farmer, Seaton of Usan, Montrose along with the Town Chamberlain of Montrose acting in the capacity at the time of my death. After paying all debts due by me at the time of my death I hereby instruct my Executors to divide the income of the balance half yearly between my sister Margaret Copland or Calder wife of the said Joseph Calder, and my brother John Copland residing at Scotston of Usan, Montrose. On the death of either my sister or brother the whole income to be paid to the survivor and on the death of the survivor the whole income to be paid to the said Joseph Calder during his life if he shall survive my sister and brother and on his death or on the death of the survivor of my sister and brother if my said brother in law be dead, I wish my

whole estate realised and equally divided between my cousins on my mother's side who shall be alive at the time of my death. Signed by me this Thirteenth day of April Nineteen hundred and four. Written by myself." Then followed the signatures of the testator and two witnesses. Jan. 16, 1908.
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"Codicil No. 1—28th April 1904.—I hereby instruct my Executors to sell at the time of my death sufficient of my investments to pay at once the following legacies to Edie Peach of 11 Bridge Avenue, Hammersmith, Two hundred pounds and to Nellie Goodman, Mogsden, Wallington, Fifty pounds." Signed by the testator and one witness.

"Codicil No. 2.—I hereby appoint as additional Executors my brother John Copland and my sister Mrs Margaret Copland or Calder." Signed by the testator and one witness.

Questions having arisen as to the meaning of the word "cousins" in the residuary clause of the will, and as to whether the will carried heritage, a special case was presented.

The case set forth as follows:—

The testator was survived by his brother and sister mentioned in the will, and by eight first cousins on his mother's side. The testator was also survived by thirteen first cousins once removed on his mother's side being children of two other first cousins, viz., George Johnston and William Falconer, who predeceased the testator. He was also survived by six first cousins twice removed, the issue of Alexander Johnston and James Falconer, two deceased children respectively of George Johnston and William Falconer.

In addition to moveable estate, amounting to about £3300, the deceased had a personal right to a one-third share (valued at under £100) of a small heritable property, a cottage in the parish of St Cyrus, Kincardineshire, the title to which was still in the name of his deceased father and was unrecorded.

The first parties were the executors under the will; the second parties were the eight first cousins of the testator; the third parties were the thirteen first cousins once removed; the fourth parties were Mrs Jessie Johnston or Falconer, widow of James Falconer, and Mrs Ann Winning or Johnston, widow of Alexander Johnston, as representing their respective pupil children, the six first cousins twice removed; and the fifth party was John Copland, the brother and heir-at-law of the testator.

The second parties contended that the expression "my cousins on my mother's side" taken along with the words "who shall be alive at the time of my death" excluded all except first cousins on the mother's side who survived the testator, and consequently, that the second parties were alone entitled to share in the estate. The second parties further contended that the will was habile to carry heritage, and that accordingly the testator's share of the heritable property referred to formed part of the executry estate.

The third and fourth parties contended that they were cousins of the testator on his mother's side within the meaning of the will, and that they were accordingly entitled to share in the estate.

The fifth party maintained that the will did not provide for the succession to the heritable estate, that so far as the heritage was concerned the testator died intestate, and that the fifth party being the heir *ab intestato* of the deceased, was entitled to the heritable estate.

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The following questions of law were, *inter alia*, stated :—“(1) Are the second parties alone entitled to the fee of the testator's moveable estate? (5) Are the terms of the testator's will habile to convey his heritage? (6) Is the fifth party, as the testator's heir *ab intestato*, entitled to the heritable estate?”

Argued for the second parties;—(1) The word “cousins” in a will meant first cousins only, unless there was something in the context of the deed or in the circumstances which shewed that a wider meaning was intended.¹ Here there was nothing in the context; and as for the circumstances it was improbable that the testator intended this comparatively small estate to be divided among all of an indefinite and, as it turned out, numerous class of persons to whom in a loose sense the term cousin was applicable. The *dictum* in the case of *Caldecott*² on which the third and fourth parties founded had been practically overruled.³ (2) The will carried the heritage. “Whole estate” meant estate both heritable and moveable, and that was sufficient under section 20 of the Titles to Land Consolidation (Scotland) Act, 1868.⁴ No doubt executors only were appointed, but since the Executors (Scotland) Act, 1900,⁵ the terms “executor” and “trustee” were practically convertible terms.

Argued for the third and fourth parties;—The word “cousins” included first cousins once removed and also first cousins twice removed, and was not confined to full first cousins.⁶ It was to be borne in mind that this was the holograph will of a Scotsman, and it was well known that according to popular usage “cousin” had a much wider application in Scotland than in England. On the question as to whether the will carried heritage, the third and fourth parties adopted the argument for the second parties.

Argued for the fifth party;—The will did not carry heritage. It was an appointment of executors only, and its language as a whole was apt if moveables only were intended to be carried, but was not apt if heritage was intended to be carried.⁷

LORD JUSTICE-CLERK.—The first question raised in this case is as to the sense in which the testator used the word “cousins” in his will. Did he by “cousins on my mother's side” mean first cousins only, *i.e.*, children of brothers or sisters of his mother, or did he also mean to include under the term everyone in any of the degrees of relationship to which the term is sometimes applied, *e.g.*, first cousins once or twice removed, or second cousins? I have no doubt whatever that by “cousins” he meant only first

¹ *Stoddart v. Nelson*, 1855, 6 De G. Macn. & Gord. 68; *Stevenson v. Abingdon*, 1862, 31 Beav. 305; *Burbey v. Burbey*, 1862, 9 Jur. (N. S.) 96.

² *Caldecott v. Harrison*, 1840, 9 Sim. 457.

³ *Jarman on Wills*, 6th edit., vol. ii., p. 1008. The second parties also cited *Drylie's Factor v. Robertson*, July 20, 1882, 9 R. 1178; *Thompson v. Robinson*, 1857, 27 Beav. 486; *In re Blower's Trusts*, 1871, L. R., 6 Ch. App. 351.

⁴ 31 and 32 Vict. cap. 101; *Aim's Trustees v. Aim*, Dec. 15, 1880, 8 R. 294; *M'Leod's Trustees v. M'Luckie*, June 28, 1883, 10 R. 1056.

⁵ 63 and 64 Vict. cap. 55, sec. 2.

⁶ *Caldecott v. Harrison*, 9 Sim. 457; *Williams on Executors*, 10th edit., vol. i., p. 864.

⁷ *Urquhart v. Dewar*, June 13, 1879, 6 R. 1026; *Grant v. Morren*, Feb. 22, 1893, 20 R. 404; *Bell v. Bell*, July 19, 1906, 14 S. L. T. 244.

cousins. That is the primary and normal use of the word, and the one in Jan. 16, 1908. which it must be presumed a testator used it, if in fact he had first cousins, Copland's and if there is nothing else in his settlement to indicate that he meant to Executors v. use it in a wider and looser sense. Such a wider use will generally be Milne. improbable, for in many cases, as here, the effect would be to multiply the Lord Justice-Clerk. number of recipients of the testator's bounty to a more or less indefinite extent.

The second question is whether the one-third share (valued at £100) of a small cottage in the parish of St Cyrus, Kincardineshire, is carried by the will. I have no doubt whatever that it is. One has only to read the will as a whole to see that the testator intended to deal with his whole estate. When he comes to the provision which deals with the ultimate division of the capital he uses the term "my whole estate," which I think is equivalent to my whole estate, heritable and moveable, and he further directs the estate to be "realised," which seems to me a suitable enough word to describe the turning into money of his share of the cottage. If that was the testator's intention, it ends the matter, for there is no doubt that the will is habile to carry heritage.

LORD LOW.—I am of the same opinion. In the English cases which were quoted to us by Mr Munro it was held that when the word "cousins" is used in a will or deed it must be construed as meaning first cousins, unless there is something in the context to shew that it is used in a different sense. These authorities seem to me to be practically conclusive of the present question, because there is no difference between the law of England and the law of Scotland in this matter, and the cases are of high authority, the leading case having been decided by so eminent a Judge as Lord Cranworth.

Without authority I should have come to the same conclusion, not only because I think that the primary meaning of the word "cousins" is limited to first cousins, but because I think there are circumstances here which make it most improbable that the testator used the word to denote more remote relations than cousins-german.

The settlement was executed in April 1904. The testator died in October 1905. At his death he had eight first cousins alive. If first cousins alone are included each beneficiary will receive a very substantial benefit. He had also no fewer than thirteen first cousins once removed and six first cousins twice removed—that is, nineteen cousins more remote than first cousins, so that if all these cousins were included this small estate would be divided among twenty-seven persons, making the benefit to each almost inappreciable. Again, the estate was to be realised and divided equally among the cousins. That is very intelligible if they are all in the same degree of relationship, but it is not so apposite where relations of different degrees are included. Therefore I have no doubt that the construction which I think to be sound in principle is also the construction which carries out the intention of the testator.

On the question as to whether the heritable estate is included, there is more room for difference of opinion. The question is one of intention, because the words of the will are quite sufficient to carry heritage if it was

Jan. 16, 1908. intended that heritage should be carried. The will is very simple. The income of the whole estate is to be divided between the brother and the sister of the testator, and failing them is to be paid to his brother-in-law, and on the termination of the liferents the whole estate is to be realised and divided. There can be no question that the testator intended to dispose of the whole estate which belonged to him at his death. There was no reason why this small heritable estate should be left out. The only circumstance which militates against that view is that the testator appointed the first parties executors but not trustees. There is some force in that consideration, but not, I think, enough to overcome the plain indications of intention to which I have alluded.

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Lord Low.

LORD ARDWALL.—This case raises a question of some interest, because it is the first case in which the term "cousins" has come up for construction in the Courts of Scotland. But there have been quoted to us decisions in the Courts of England which I regard as founded on a correct view of the construction of the term. In conformity with these decisions I am of opinion that the word "cousins" when occurring in a testamentary writing ought to be held to signify "first cousins," unless there is something in the context of the deed or in the circumstances of the case to shew that it was intended to designate more remote relatives. The principle of construing the term "cousins" by reference to the context of the deed is obvious enough. The principle of construction by reference to the circumstances of the case may be illustrated by the case of a testator who has no first cousins, but only more remote cousins, making bequests to his "cousins," when it would properly be held that he meant to designate cousins of such a degree as were actually in existence at the date of the deed. In the present case, as pointed out by my brother Lord Low, it would be out of the question to hold that the testator, who had eight first cousins, intended to divide his small estate among the whole body of his cousins of all degrees of relationship to the number of twenty-seven, with the result that the more remote relatives, by reason of their numbers, would carry off the bulk of the estate.

I accordingly am of opinion that *prima facie* the word "cousins" must be held to mean "first cousins," and that in the deed at present under consideration there is nothing to displace that meaning.

On the second question I have felt some difficulty, not because the will is not habile to convey heritage, but because I have difficulty in holding that heritable estate was in the contemplation of the testator when he made his will. The difficulty arises because executors only and not trustees are appointed, and because there are no words of conveyance of heritage. But I think it is settled that if a testator's intention is plain it must receive effect notwithstanding technical difficulties. As to intention, when the testator says "I wish my whole estate to be realised and equally divided," I think that the Court are entitled to hold that by the words "my whole estate" the testator meant his whole estate, heritable and moveable. That being so, when he directs that his whole estate shall be realised and divided, I think that may be viewed as a direct injunction to realise the whole estate without exception. The fact that the will contains a direction to realise

differentiates the present case from the case of *Bell*,¹ where there was no Jan. 16, 1908. direction to realise and the trustees had no powers of sale. Here there is a Copland's direction to realise, which applies to the testator's "whole" estate. I think Executors v. Milne. therefore, though with some hesitation, that the will may be held to dispose of the share of the insignificant heritable subject to which the testator had a personal right.

LORD STORMONTH-DARLING was absent.

THE COURT answered the first and fifth questions in the affirmative and the sixth in the negative.

MACKINTOSH & BOYD, W. S.—HARRY H. MACBEAN, W. S.—
ROXBURGH & HENDERSON, W. S.—Agents.

THE FIFE COAL COMPANY, LIMITED, Complainers (Reclaimers).—
Hunter, K.C.—R. S. Horne.

No. 63.

JAMES LINDSAY, Respondent.—*Watt, K.C.—Wilton.*

Jan. 17, 1908.

Master and Servant—Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), Second Schedule (8)—Memorandum of Agreement—Suspension of charge.—The employers of a workman who had been injured agreed to pay him 15s. 11d. per week, the statutory maximum, as compensation under the Workmen's Compensation Act, 1897, and the workman received payment of that sum from February 1904 to September 1905. A memorandum of the agreement was recorded under the Act. The workman having partially recovered returned to work, earned wages, and accepted payments first of 7s. 9d. and later of 5s. per week between October and December 1905. On 10th January 1906 he left the service of the employers, and thereafter intimated that he was totally incapacitated. The employers having refused to pay more than 5s. per week of compensation, the workman in March 1906 charged them under the recorded agreement for payment of 15s. 11d. per week from 10th January 1906.

Fife Coal Co.,
Limited, v.
Lindsay.

In a suspension the employers averred (1) that the agreement founded on had been superseded by subsequent agreements to accept first 7s. 9d. and then 5s. per week; (2) that the workman was not incapacitated for work; and asked for a proof of these averments.

The Court (*aff. judgment of Lord Dundas*) refused the suspension, upon the ground that it was contrary to the intention of the Act that such questions should be determined by proof in a suspension; and that the employers could have had a sufficient remedy by adopting proceedings under the Act either to have the payments under the original agreement reviewed, or to have the alleged subsequent agreement recorded.

THE FIFE COAL COMPANY, LIMITED, carrying on business at Lumphinnans, in the county of Fife, brought a note of suspension of a Lord Dundas charge given to them, in March 1906, by James Lindsay, miner, Cowdenbeath, in virtue of an extract registered memorandum of agreement under the Workmen's Compensation Act, 1897.

Execution was sisted on consignment. Thereafter the note was passed, and a record was made up and closed.

The averments and contentions of parties sufficiently appear from the opinion of the Lord Ordinary (Dundas), who, on 2d February 1907, after hearing counsel in the Procedure-roll, pronounced this interlocutor:—"Repels the reasons of suspension, finds the charge

Jan. 17, 1908. orderly proceeded, refuses the prayer of the note of suspension, and decerns."*

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* "OPINION.—The complainers, the Fife Coal Company, Limited, seek to suspend a charge at the instance of James Lindsay, miner, Cowdenbeath. It appears that, on 4th February 1904, the respondent, while in the course of his employment with the complainers, met with an accident, and claimed compensation under the Workmen's Compensation Act, 1897, in respect of his consequent incapacity for work. The parties agreed that the amount should be 15s. 11d. per week, which was the statutory maximum; and this was duly paid from 18th February 1904 to 26th September 1905. A memorandum of this agreement (No. 11 of pro.) was recorded in the special register in July 1905, and in the Sheriff Court books for preservation and execution in February 1906. The complainers go on to aver that, the respondent having partially recovered and returned to work, the parties on or about 23d October 1905 by agreement varied the weekly payment, and entered into a new agreement whereby the compensation was fixed at 7s. 9d. per week as from 26th September 1905; that this agreement superseded the prior recorded agreement; and that it was acted upon by the parties for the period between 26th September and 21st October. The complainers further say that on or about 6th November 1905 the parties by agreement again varied the weekly payment, and entered into a new agreement whereby the compensation was fixed at 5s. per week as from 21st October; that the agreement of 23d October was thereby superseded; and that this latest agreement was acted upon by the parties for the period between 21st October and 9th December 1905. At the latter date, the complainers proposed to reduce the compensation to 4s. 7d. per week; but the respondent declined to agree to this; and on 10th January 1906 he left their employment, and intimated to them that he was then totally incapacitated for any work whatever.

"The complainers admit liability to pay compensation at 5s. per week from 21st October 1905, till that rate shall be varied by agreement or review in terms of the Act. But the respondent has charged them for payment at the rate of 15s. 11d. from and after 10th January 1906, his charge being based upon the original agreement, which is the only one which has been recorded. Hence the present suspension. The parties are at issue upon two matters of fact, viz.: (1) the nature and constitution, if any, of the alleged 'agreements' in October and November 1905, and (2) the alleged incapacity of the respondent as at 10th January 1906.

"The complainers' counsel moved for a proof on these heads. For reasons which I shall state, I think that motion must be refused. It appears to me that the recent case of *Davidson*, 1907, S. C. 90, has a very material bearing here, and indeed, comes near to ruling,—though it does not absolutely and in terms rule,—the present case. The Court there laid down that a recorded agreement is not displaced as a warrant of charge by a subsequent unrecorded agreement. That pronouncement seems to carry one a long way towards refusing this suspension. But the complainers point to differences in fact which they say are sufficient to distinguish the two cases. In *Davidson*, the workman charged his employers, in virtue of a recorded agreement, for compensation at a reduced rate, fixed by a subsequent unrecorded agreement which he admitted to have been made by the parties; and it was not therefore decided that a charge would be good though it was for a sum greater than that which the charger had agreed to accept by an unrecorded agreement. But the decision and the *dicta* in *Davidson's* case appear to me to neutralise this suggested distinction. Then the complainers argued that the respondent, by having accepted the lesser rates for periods of weeks, is barred from now charging for payment at the higher rate originally agreed upon. But the respondent avers that his acceptance of these lesser rates was not in virtue of agreements to vary, as

The complainers reclaimed. The case was heard on 12th and 13th Jan. 17, 1908. December 1907.

Argued for the complainers and reclaimers;—The workman was barred from charging for the full amount in the recorded agreement by the subsequent agreements, although the latter were not recorded. The original agreement was for the maximum, and was therefore on the footing of total incapacity. By the subsequent agreements he in effect admitted that total incapacity had ceased, and therefore the original agreement was now superseded and not enforceable. The case of *Fife Coal Co., Limited, v. Davidson*¹ was distinguishable. Here the workman was charging for the full amount in the recorded agreement, ignoring the subsequent agreements, whereas there the workman charged only for the amount as modified by the subsequent agreement. If the workman here had charged for 5s. per week the reclaimers would not have objected. If the respondent was paid

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Lindsay.*

alleged by the complainers, but merely a matter of voluntary and temporary modification, and without prejudice to his right to demand the full amount originally agreed upon in the event—which he says has occurred—of his becoming once more totally incapacitated. Now, these, as already pointed out, are just the matters of fact upon which the parties are at issue, viz., the alleged agreements and the alleged incapacity. Now, I think that to allow a proof in this Court upon either of these heads would be to run plainly counter to the policy of the Workmen's Compensation Act, 1897, which aims at providing summary and inexpensive methods of inquiry, where parties do not agree on matters of fact. It is provided, section 1 (3), that 'if any question arises in any proceedings under this Act as to the liability to pay compensation under this Act, . . . or as to the amount or duration of compensation under this Act, the question if not settled by agreement shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration in accordance with the Second Schedule to this Act.' Now, all questions as to the alleged constitution of agreements to vary can, failing agreement, be brought to the sharp and speedy test afforded by Schedule II. (8), by the party interested presenting such agreement to be recorded. Similarly, all questions as to a workman's capacity or the reverse can be speedily determined, failing agreement, by the statutory machinery. The present suspension does not, of course, take the form of 'any proceedings under this Act.' But where the Act provides specific and effective machinery for determining the questions at issue, I do not think that one of the parties is at liberty to have these raised and expiscated in a process which might run its course through the Courts up to the House of Lords.

"The complainers say that hardship will result if the suspension is refused. But the truth, in my opinion, is that the complainers have, or had, the remedy in their own hands; and have themselves to blame, if, by not resorting to it, they are obliged to meet a claim which they could otherwise have defeated. There was nothing, so far as I see, to prevent them from recording the alleged subsequent agreements, if they were genuine, as provided by Schedule II. (8); or from setting afoot the machinery of Schedule I. (12), to have the payment reviewed. The former of these remedies was pointed out by Lord Ardwall in *Davidson's* case, in the last paragraph of his opinion; and I agree with and adopt his Lordship's observations. I may add that I think it is clear that the complainers, and not, as was suggested in argument, the respondent, are the 'party interested' within the meaning of Schedule II. (8). During the discussion the following cases were referred to:—*Colville*, 1905, 8 F. 179; *Steel*, 1902, 5 F. 244; *Cavaney*, 1903, 5 F. 963; *Morton*, 1902, 2 K. B. 276; *Binning*,

¹ 1907, S. C. 90.

Jan. 17, 1908. 15s. 11d. per week he would be paid full compensation after his incapacity had ceased, and, taking into account what he could now earn, he would be getting altogether more than he was earning before the accident. That was wholly contrary to the policy and intention of the Act,¹ and his demand was unconscionable. The common law remedies were open to the employers to prevent the Act being used to work injustice.² They were entitled to have the questions raised by them (a) as to the existence of the later agreements, and (b) as to the workman's alleged incapacity, determined in a suspension. The workman having seen fit to give a charge was not entitled to object to the employers establishing their defence to that charge in the ordinary way. But apart from that, a suspension was in this case the only remedy open to them. They could not have instituted arbitration proceedings for review under section (12) of the First Schedule of the Act, for their position was that the amount payable was fixed by the last of the subsequent agreements. They could not have successfully applied for registration of that agreement under section (8) of the Second Schedule, because it was only verbal, and would have been disputed.³ The proper course for the workman was to have applied for a review of the payment (viz., 5s.) fixed by the last agreement. Under section (12) of the First Schedule it was not necessary that the payment to be reviewed should have been fixed by a decree or recorded agreement. Any weekly payment actually being made might be reviewed.

Argued for the respondent;—The reclaimers were not entitled to suspend a charge under a recorded agreement on the mere allegation that there was a subsequent verbal agreement unrecorded.⁴ A recorded agreement was equivalent to a decree. An agreement to vary a decree could only be proved by writ or oath. An obligation could only be extinguished in the same way as it was contracted.⁵ Here it was not suggested that there was any written agreement to vary the recorded agreement. It was not really alleged that there was any agreement to do more than accept reduced payments for certain particular weeks. Such acceptance might bar the workman from charging for the full amount effeiring to any such week, but it could

1906, 8 F. 407; *Blake*, 1904, 1 K. B. 503; *Beath*, 1903, 6 F. 168; *Cammick*, 1901, 4 F. 198; and *Dunlop*, 1901, 4 F. 203. I do not think it necessary to analyse or to comment upon these cases—though some of them at least have a material bearing on the questions here raised—further than to say that *Blake's* case, decided in England, to which the complainers' counsel referred, seems to me to be adverse, and not favourable, to their argument. Upon the whole matter, I am of opinion that the complainers, in resorting to this procedure by way of suspension, have taken a course, which, however ingenious, is not in the circumstances open to them to adopt; and that the suspension must be refused."

¹ *Beath & Keay v. Ness*, 1903, 6 F. 168; *James Nimmo & Co., Limited, v. Fisher*, 1907, S. C. 890.

² *Hughes v. Thistle Chemical Co.*, 1907, S. C. 607; *Blake v. Midland Railway, L. R.*, [1904] 1 K. B. 503, *per Willa, J.*, at p. 506, and *Kennedy, J.*, at p. 508.

³ *Hughes v. Thistle Chemical Co.*, 1907, S. C. 607, *per Lord Salvesen*, at p. 616; *Binning v. Easton & Sons*, 1906, 8 F. 407.

⁴ *Fife Coal Co., Limited, v. Davidson*, 1907, S. C. 90; *Binning v. Easton & Sons*, 8 F. 407, *per Lord Kyllachy*, at p. 415; *Colville & Sons v. Tighe*, 1905, 8 F. 179, *per Lord Low*, at p. 189.

⁵ *Dickson on Evidence*, Vol. I, sec. 627.

not set aside the original recorded agreement as regards subsequent weeks. The proper course for the employers to have followed would have been to have had the workman examined by a doctor under section (11) of the First Schedule, and to have applied either (a) for review under section (12) of the First Schedule or (b) for the registration of a memorandum of the alleged new agreement under sections (8) and (14) (b) of the Second Schedule.¹ They had failed to avail themselves of these remedies which were open to them under the Act. The questions raised by them were questions which under the Act were appointed to be determined by arbitration under the Act.² They were questions as to the amount and duration of compensation. It would be *pessimi exempli* and contrary to the whole policy and intention of the Act to allow such questions to be determined by proof in a suspension brought by employers who had neglected to avail themselves of the remedies open to them under the Act. The cases of *Beath & Keay v. Ness*,³ and *James Nimmo & Co., Limited, v. Fisher*,⁴ were distinguishable. There it was practically admitted that the incapacity had ceased and the demand of the workman was unconscionable. In *Hughes v. Thistle Chemical Co.*⁵ the action was reluctantly sustained upon allegations of fraud and impetration, and because, in consequence of *Binning v. Easton & Sons*,⁶ no other remedy was open.

At advising on 17th January 1908,—

LORD JUSTICE-CLERK.—I concur with the view at which the Lord Ordinary has arrived in this case. There was a recorded agreement entered into between the complainers and the respondent by which his compensation was fixed at 15s. 11d., and it is for that sum that the complainers have received a charge. Their ground of suspension is that the charger agreed at various times to accept, and did accept, a less amount, and this is not disputed. But the only recorded agreement is that for 15s. 11d., and the charger alleges that he is again totally incapacitated, and therefore entitled to enforce the recorded agreement until it is either varied by the recording of another agreement, or by a decision in the tribunal appointed for varying or ending a payment fixed under the statute.

The complainers seek to prove facts in regard to the alleged subsequent agreements, and the present condition of the charger. I am of opinion that the Lord Ordinary has rightly refused to allow such proof. The Act contemplates that such matters shall be disposed of in a summary manner by the statutory tribunal, and when an agreement has been recorded, variation of that agreement is not to be sought in a suspension in the Supreme Court, but in an application under the Act (Schedule II., section 8). If the complainers had grounds for rendering nugatory the power to charge on the recorded agreement, they should have taken the simple steps offered to them

¹ *Cammick v. Glasgow Iron and Steel Co., Limited*, 1901, 4 F. 198; *Dunlop v. Rankin & Blackmore*, 1901, 4 F. 203; *Blake v. Midland Railway, L. R.*, [1904] 1 K. B. 503; *Binning v. Easton & Sons*, 8 F. 407, *per* Lord President Dunedin, at p. 416.

² Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), sec. 1 (3), and First Schedule (12); *Fielden v. Longden & Sons, L. R.*, [1902] 1 K. B. 47, *per* Collins, M. R., at p. 54.

³ 6 F. 168.

⁴ 1907, S. C. 890.

⁵ 1907, S. C. 607.

⁶ 8 F. 407.

Jan. 17, 1908. by the Act, by which, if they were right on the facts, they could have barred the charge of which they now complain. They were plainly the "party interested" in terms of the Schedule.

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I am, therefore, for adhering to the Lord Ordinary's interlocutor.

LORD LOW.—I have found the question raised in this unfortunate litigation to be attended with some difficulty, but in the end I have come to the conclusion that the judgment of the Lord Ordinary is right.

On 4th February 1904 the respondent, while in the employment of the complainers, sustained a fracture of the right ankle, and the compensation payable to him was fixed by agreement at 15s. 11d. per week, being the statutory maximum. A memorandum of the agreement was duly recorded in July 1905. In September 1905 the respondent had sufficiently recovered to be able to do light work. He appears to have been very willing to do any work which he was capable of performing, and the complainers seem to have been equally willing to give him work according to his capacity. The respondent was accordingly regularly employed by the complainers and earned considerable wages between 26th September and 9th December 1905. During that period the respondent agreed to accept, and the complainers agreed to pay, and did pay to him, in name of compensation, one-half of his net loss—that is to say, one-half of the difference between the amount which he was then earning and the amount which he was earning at the time of the accident. Calculated upon that basis the compensation paid to the respondent was 7s. 9d. per week from 26th September to 21st October 1905, and 5s. per week from the latter date until 9th December 1905.

Towards the end of December a difference arose between the respondent (who was represented by his law-agent) and the complainers in regard to the amount of compensation to which the former was entitled. The complainers at first proposed to reduce the amount to 4s. 7d. per week, but they ultimately offered to continue the amount which had been paid up to 9th December, namely, 5s. per week. The respondent, however, although he still intimated his willingness to accept one-half of his net loss, refused these offers—at first upon the ground that he was not able to work continuously even at light employment, and subsequently (in January 1906) upon the ground that the condition of his ankle had again totally incapacitated him. Both of these statements appear to have been supported by medical certificates which the respondent sent to the complainers.

In these circumstances, as the parties could not come to an agreement, the respondent, in March 1906, charged the complainers upon the registered agreement to make payment to him of 15s. 11d. per week from 10th January 1906, that being the date at which he alleges that he again became totally incapacitated.

The complainers seek to have the charge suspended, in the first place, upon the ground that the original agreement—that which was registered—was superseded by the agreements under which the respondent agreed to accept, and did accept, compensation at a reduced rate between 26th September and 9th December 1905. I am of opinion that that ground of suspension cannot be sustained. It is true that during that period the respondent agreed to accept, and did accept, a reduced amount of compensation

proportionate to the wages which he was then earning, but there is nothing Jan. 17, 1908. in such an agreement to imply, nor is there anything in the correspondence Fife Coal Co., to suggest, that the respondent ever agreed that in the event of his again Limited, v. becoming totally incapacitated, or of his incapacity increasing, he should not Lindsay. be entitled to full compensation or to a larger amount than he had been Lord Low. receiving between September and December 1905 as the case might be.

The complainers further argued that as the respondent had only right to claim the maximum amount of compensation, if and so long as he was totally incapacitated, the suspension could not be disposed of without inquiry into the facts, seeing that they (the complainers) denied that the respondent had again become totally incapacitated. They also maintained that inquiry was competent because the respondent having chosen to appeal to the common law by giving a charge upon the decree implied in the registered agreement, could not object to any defence which the complainers might have to his claim, whether under the statute or otherwise, being dealt with in a suspension—that being the appropriate common law remedy when a charge for payment is given. I am of opinion that that view cannot be sustained. The Act makes it plain that such questions as are raised in this case (namely, in regard to the amount or duration of compensation) must be settled by arbitration under the statute, and not by way of action in the Courts of law. The complainers had a remedy open to them under the statute, because when in the end of 1905 or the beginning of 1906 it became apparent that the amount to be paid to the respondent could not be settled by agreement, they might have applied for review of the weekly payments. The complainers argued that it was for the respondent to make such an application if he was not satisfied with their offer to continue payment at the rate which he had accepted between the 21st of October and the 9th of December 1905. I think that it would have been quite competent for the respondent to institute proceedings under this Act, but I do not think that he was bound to do so. He was, in my opinion, entitled to take his stand upon the recorded agreement, which, for the reasons which I have given, I cannot regard as having been superseded.

No doubt the result of refusing the suspension will, I imagine, almost certainly be that the complainers will be compelled to pay to the respondent a great deal more than the amount which, if everything had been done in terms of the statute, he would have been entitled to demand. But that is a result which, I am afraid, the Court is powerless to prevent, because the question is not one of common law or of equity, but of statutory enactments. The statute has armed the respondent with a decree against the complainers for payment to him of a certain amount weekly, and the complainers have not adopted the statutory procedure by which their liability to pay that amount might have been ended or restricted. I therefore agree with your Lordship that the interlocutor of the Lord Ordinary must be affirmed.

LORD ARDWALL.—The complainers in this case ask that a charge following upon a memorandum duly registered in the Sheriff Court at Dunfermline, under the provisions of section 8 of the Second Schedule of the Workmen's Compensation Act, 1897, should be suspended. Such a memorandum is declared by the same section, taken along with the interpretation clause, 14

Jan. 17, 1908, (a) of the same schedule, to be enforceable as a Sheriff Court decree. There is nothing incompetent in raising such a suspension, and a suspension of a charge on a registered memorandum was granted in the case of *Nimmo & Fife Coal Co., Limited, v. Lindsay*.¹ But such a suspension ought not readily to be entertained, Lord Ardwall. and to justify its being granted it ought to be shewn that without such suspension the complainer would suffer some manifest injustice, and further, that the end to be attained by such suspension could not be attained by proceedings under the said Act.

The facts in the present case are as follows:—On 4th February 1904 the respondent, while in the course of his employment, met with an accident and claimed compensation. The parties agreed that the amount should be 15s. 11d. a week, which was the statutory maximum, and that amount was paid from 18th February 1904 till 26th September 1905. A memorandum of this agreement was recorded in terms of the Act in the Special Register of the Sheriff Court of Fife, at Dunfermline. The complainers aver that the respondent having partially recovered and returned to work, the parties, on 23d October 1905, by agreement, varied the weekly payment to 7s. 9d. per week as from 26th September 1905, and that this agreement superseded the recorded agreement, and was acted on by the parties for the period between 26th September 1905 and 21st October. They further say that another agreement to vary was entered into on 6th November 1905, whereby the compensation was fixed at 5s. a week as from 21st October, and that this latest agreement was acted on for the period between 21st October and 9th December 1905. At that date the complainers proposed to reduce the compensation to 4s. 7d. a week, but the respondent declined to agree to this, and on 10th January 1906 he left their employment and intimated that he was totally incapacitated for any work whatever.

The complainers admit liability to pay compensation at the rate of 5s. a week from the 21st October 1905 till that rate shall be varied by agreement or review in terms of the Act. The respondent has charged them for payment at the rate of 15s. 11d. a week from and after 10th January 1906, in terms of the only registered agreement. The respondent took no steps of any kind between the cessation of payments on 9th December 1905 and the date of the charge on 8th March 1906. Accordingly, the complainers had plenty of time, if they so desired, either to record their alleged new agreement or to apply to the Sheriff for a variation of the rate of compensation set forth in the only recorded agreement. It cannot therefore be said that this suspension is rendered necessary by reason of any hurried action on the part of the respondent. The two grounds on which suspension is asked are—First, that the respondent had entered into an agreement in November 1905 to accept 5s. a week of compensation, and second, that on 10th January 1906 he was not suffering from such incapacity as to entitle him to receive 15s. 11d. a week, being the amount fixed by the registered memorandum of agreement. The complainers' counsel asks for a proof of these two grounds. I entirely agree with what the Lord Ordinary says in his opinion, "that to allow a proof in this Court upon either of these heads would be to run plainly counter to the policy of the Workmen's Compensation Act, 1897,

¹ 1907, S. C. 890.

which aims at providing summary and inexpensive methods of inquiry where parties do not agree on matters of fact." This being so, the next question is whether the complainers might have had the inquiries made and the remedies they seek granted by taking steps under the said Act. I have no doubt that they could.

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Lord Ardwall.

In the first place, in respect that they alleged that there was a new agreement they might have applied to have the memorandum of that agreement registered, and if that had been done it would then have lain upon the respondent if he wished an increase of weekly compensation to have applied to the Sheriff. If, on the other hand, the respondent had succeeded in convincing the Sheriff-Clerk or Sheriff that there was really no such agreement, or if the Sheriff-Clerk or Sheriff took the course suggested by Lord Salvesen in the case of *Hughes*,¹ and declined to order the memorandum to be recorded in respect that there was a *bona fide* dispute between the parties, then the course would have been clearly open to the complainers to apply for a diminution of the weekly payments under section 12 of Schedule 1 of the Act, which the Sheriff would have then heard, and would have decided the question in terms of the Act. At one point in the course of the argument for the complainers the crux of the case seemed to be this, which of the two parties—the respondent or the complainers—ought to have applied to the Sheriff in the circumstances which existed at January 10th, 1906? It seems to me that the complainers were the proper parties to apply, because if the respondent had taken up the position (which he has now taken up) that he had entered into no new agreement in October or November 1905, the way was open to them at once to apply to the Sheriff for review of the compensation payable under the only recorded agreement.

I accordingly arrive at the conclusion that there was no good reason for the complainers adopting the method they have done to have the rate of compensation settled, and I think it would be intolerable in the administration of the Workmen's Compensation Act if it were to be held competent by merely raising a suspension to have such questions determined in the Court of Session instead of by the proceedings prescribed by the Act.

I may add that it appears to me from the correspondence which is produced and printed by the complainers, and which may be read along with the record, that there was not at any time an agreement in the proper sense of the word for a reduction of the compensation from 15s. 11d. What happened was that the complainers provided work in the way of wood-cutting for the respondent, whose true occupation was that of a miner, that he worked at cutting wood, and in fact did everything he could to earn his wages, and that the arrangement was come to between the respondent and the complainers that as his wages rose his compensation should diminish to the effect of giving him 50 per cent of the difference between the wage he was receiving from time to time and the amount of his former wages. The whole matter was accordingly left in a state of uncertainty, varying from time to time according as the respondent might be able for more or less work and earn more or less wages. This case differs entirely from the cases of *Beath*,² and *Nimmo v. Fisher*,³ in both of which the

¹ 1907, S. C. 607, at p. 616.

² 6 F. 168.

³ 1907, S. C. 890.

Jan. 17, 1908. workman endeavoured to go back over a past period and to obtain more compensation than he could possibly be entitled to on a sound construction of the Act had the ordinary proceedings under the Act been adopted. In the present case all that the respondent gave a charge for was compensation at the rate fixed by the agreement from the time when the parties fell out, and if that was in the circumstances too high it was a very simple matter for the complainers to have gone before the Sheriff, as I have already explained, and got the rate varied, but this they failed to do.

On these grounds I think the note ought to be refused.

LORD STORMONTH-DARLING was absent.

THE COURT adhered.

W. & J. BURNES, W.S.—D. R. TULLO, S.S.C.—Agents.

No. 64. WILLIAM BAIRD & COMPANY, LIMITED, Complainers (Respondents).—
R. S. Horne—Strain.

Jan. 17, 1908. JOHN M'WHINNIE, Respondent (Reclaimer).—*Munro—A. M. Mackay.*

William Baird & Co., Limited, v. M'Whinnie. *Master and Servant—Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), First Schedule (1) (b), (2) and (12) and Second Schedule (8) and (14) (c)—Memorandum of Agreement—Suspension of Charge—Charge for period when earning wages.*—In July 1906 the employers of a workman, who had been injured, agreed to pay him 14s. 5d. per week, being half his former wage (the statutory maximum) as compensation under the Workmen's Compensation Act, 1897, and the workman received payment of that sum from July to September 1906. A memorandum of the agreement was recorded. The agreement did not refer to the workman's total incapacity, but he admitted that he received the weekly payment in respect of total incapacity. In September 1906 he returned to work with the same employers, and continued in their employment till May 1907, earning wages which averaged 23s. 2d. per week. In May 1907 he charged the employers on the recorded memorandum to pay him compensation at the full rate of 14s. 5d. per week for the period from September 1906 to May 1907. The sum charged for with the addition of the wages earned by him during that period gave an average sum per week considerably in excess of his average weekly earnings before the accident.

The employers brought a suspension, and tendered payment of the full difference between his earnings from September 1906 to May 1907 and his earnings for a like period before the accident.

The Court, in respect of the workman's refusal to accept the sum tendered, *suspended* the charge.

Beath & Keay v. Ness, 6 F. 168, and *James Nimmo & Co., Limited, v. Fisher*, 1907, S. C. 890, *followed*.

2D DIVISION.
Lord Mackenzie.

WILLIAM BAIRD & COMPANY, LIMITED, coal and iron masters, carrying on business at Kilsyth, in the county of Stirling, brought a suspension of a charge given to them at the instance of John M'Whinnie, miner, Kilsyth, in virtue of an extract registered memorandum of agreement under the Workmen's Compensation Act, 1897.

Execution was sisted on consignment. Thereafter the note was passed and a record made up and closed.

The facts and the contentions of parties sufficiently appear from the opinion of the Lord Ordinary (Mackenzie), who, on 5th November 1907, after hearing counsel in the Procedure-roll, pronounced this interlocutor:—"Finds that the compensation due to the respondent was payable only during his total incapacity; and further, in respect

of his refusal to accept the complainers' offer of £9, 10s. 3d., sustains the reasons of suspension, suspends the charge, warrants, and whole grounds thereof *simpliciter*, and decerns," &c.*

Jan. 17, 1908.
William Baird
& Co., Limited,
v. M'Whinnie.

* "OPINION.—The respondent is a miner who met with an accident to his eye on 29th March 1906 while in the employment of the complainers. He claimed compensation under the Workmen's Compensation Act, 1897, in respect of his total incapacity for work. On 12th April 1906 the parties agreed that the weekly amount of compensation, in respect of the respondent's total incapacity, was 14s. 5d. The respondent's average weekly earnings in the complainer's employment were 28s. 9½d. The sum of 14s. 5d. was the maximum rate under the statute for total incapacity.

"The respondent was paid 14s. 5d. a week of compensation from 12th April to 29th May 1906. On 29th May he returned to work at a wage of 18s. 4d. a week, which he continued to earn till 12th July 1906. During this period he was paid 5s. 3d. a week as partial compensation. On 13th July 1906 he again became totally incapacitated, and his total incapacity continued till 13th September 1906. On 21st July 1906 an agreement was entered into between the parties, under which the respondent was again paid compensation at the maximum rate of 14s. 5d. a week. A memorandum of the agreement of 21st July 1906 was recorded in terms of the Act. The agreement, which is produced, does not refer to the respondent's total incapacity, but in answer 5 he admits that he received the payment of 14s. 5d. a week from 13th July to 13th September 1906 in respect of his total incapacity. On 13th September 1906 the respondent returned to work with the complainers. He continued to work from that date till 6th May 1907 at wages which averaged 23s. 2d. a week.

"On 6th May 1907 the respondent charged the complainers on the memorandum of the agreement of 21st July 1906, to pay to him £35, 5s. 6d. being forty-two weeks' compensation at 14s. 5d. a week, from 21st July 1906 to 6th May 1907, under deduction of £6, 9s. 9d. being the amount received by him between 13th July and 13th September 1906. If the complainers pay the sum charged for, the respondent would receive, in respect of the period between 13th September 1906 and 6th May 1907, a sum considerably exceeding (the complainers say about 9s. a week) his average weekly earnings prior to the accident.

"The complainers maintain that the respondent is only entitled to compensation from 13th September 1906 to 6th May 1907 at the rate of the full difference between the average of his actual weekly earnings during that period, and the average of his weekly earnings prior to the accident. This, for the period between 13th September 1906 and 6th May 1907, amounts to £9, 10s. 3d. which complainers tender in the present suspension of the charge.

"The complainers argued that the present case was ruled by the principles laid down in *Beath & Keay v. Ness*, 6 F. 168, followed in *Nimmo & Company, Limited, v. Fisher*, 1907, S. C. 890, and I am of opinion that this argument is well founded. The respondent maintained that this was not so, because, under the Workmen's Compensation Act, Schedule I., sec. (1) (b), compensation at the rate of 14s. 5d. a week might be awarded in respect not only of total, but also of partial incapacity; he accordingly maintained that an application must be made to have the agreement reviewed. I am unable, looking to what I consider to have been decided by these cases, to hold that the respondent can found upon the agreement of 21st July 1906 so as to enable him to recover a sum in excess of his average weekly earnings prior to the date of the accident. In the present case either the respondent got wages on the implied agreement between him and the complainers that compensation at the rate of 14s. 5d. per week, the amount which had been fixed in respect of his total incapacity, was no longer due or claimable, because the total incapacity, in respect of which this sum of compensation was due, had ceased, and therefore the right to get, or obligation to pay

Jan. 17, 1908. The respondent reclaimed. The case was heard on 14th and 21st December 1907.

William Baird & Co., Limited, v. M^cWhinnie. Argued for the respondent and claimer;—The agreement here did not refer to incapacity or total incapacity. It was an agreement for payment of 14s. 5d. till that amount was varied by agreement or order of Court. The Act did not say that a workman was never to get more by way of compensation than the difference between his present earnings and his average earnings before the accident. The effect of the judgments in *Steel v. Oakbank Oil Co.*,¹ *Pumpherson Oil Co., Limited, v. Cavaney*,² and *Baird & Co., Limited, v. Stevenson*,³ was that the workman received more than his earnings previous to the accident. The employers were not entitled at their own hand to stop payment of the amount fixed by decree or recorded agreement unless the workman had completely recovered, and admitted that he had completely recovered. *Beath & Keay v. Ness*⁴ proceeded upon the view that the workman in effect admitted complete recovery. The workman here never earned the same wages as he did before the accident. His recovery was never more than partial. The principle of *Beath & Keay*⁴ did not apply to a case of partial recovery and return to work at lower wages. *James Nimmo & Co., Limited, v. Fisher*⁵ simply followed *Beath & Keay*,⁴ and was not intended to extend it further. The agreement there was different. The question now raised was not considered. The policy of the Act was that a sum should be fixed, which should remain enforceable until it was competently altered as provided by the Act. It was never intended that the amount payable should vary automatically from day to day according to the state of the workman's health. The amount of wages which a workman was in fact earning, as compared with his wages before the accident, was not a conclusive measure of his right to compensation. It was merely an element for consideration.⁶ The question was whether his earning capacity had been diminished. The fact that a workman had returned to work, even at higher wages, was not conclusive proof of an agreement to waive his rights under an agreement for compensation.⁷

compensation at that rate had come to an end, or the payment of wages at the average rate of 23s. 2d. a week was, in the first place, to be held to the extent of 14s. 5d. of that sum as payment of the compensation, and the balance as the remuneration given for such service as the respondent, in his partially disabled condition, was able to render. In *Nimmo's* case the complainers tendered a sum which represented the full difference between the respondent's average earnings prior to the accident and his actual earnings for the period in question. The Court, in respect of his refusal to accept this offer, sustained the reasons of suspension, and suspended the charge *simpliciter*.

"Accordingly, I am of opinion, in the present case, that there should be a finding that the compensation due to the respondent was payable only during his total incapacity, and further, in respect of his refusal to accept the complainers' offer of £9, 10s. 3d., that the reasons of suspension should be sustained and the charge suspended *simpliciter*, the complainers being found entitled to expenses."

¹ 1902, 5 F. 244.

² 1903, 5 F. 963.

³ 1907, S. C. 1259.

⁴ 1903, 6 F. 168.

⁵ 1907, S. C. 890.

⁶ *Clelland v. Singer Manufacturing Co.*, 1905, 7 F. 975; *Fraser v. Great North of Scotland Railway Co.*, 1901, 3 F. 908.

⁷ *Williams*, 23 T. L. R. 591.

Argued for the complainers and respondents;—The Lord Ordinary Jan. 17, 1908. was right. (1) The present case was ruled by *Beath & Keay v. Ness*,¹ and *James Nimmo & Co., Limited, v. Fisher*,² particularly the latter, which was indistinguishable. It was decided there that if the workman returned to work with the same employers at reduced wages an agreement on his part was implied that he was not to be entitled to more than the difference between his former wage and his new wage. In *Beath & Keay*¹ there was a decree for payment until further orders of Court. The most that a workman could get under the Act was the difference between his earnings after and before the accident. There was no necessity here for any inquiry as to the amount payable. The employers tendered the highest amount which could be awarded. The arbitrator under the Act could award a sum which with the wages earned made up as much as the previous wage, but not more.³ There was no case in which a workman had been found entitled to a sum which would give him altogether more than his previous wage. The cases referred to dealt with the question of ending compensation altogether. (2) There was no warrant for the charge. The memorandum must be taken along with the respondent's admission. He admitted that the agreement was for a payment during total incapacity. Total incapacity had ceased, and the agreement was therefore at an end.

At advising on 17th January 1908,—

LORD JUSTICE-CLERK.—The case of the respondent involves the somewhat startling proposition, that a workman who has been injured can be entitled under the Workmen's Compensation Act to receive compensation from his employer at a time when he is earning the full wages he received at the time of the accident—in other words, that he may be made better off pecuniarily from having had an accident than he could have been if no accident had happened, although it is the intention of the statute that the fullest pecuniary benefit he can take by it is one-half of his earnings.

Here the respondent was paid, after the accident, 14s. 5d. a week, which was the full amount he could properly demand under the Act. When he came back to work he earned 18s. 4d. a week, and received 5s. 3d. of compensation. He again became incapacitated, and, by agreement, he again received full compensation, the agreement being recorded. Later he returned to work, and got 23s. 2d. a week.

He now proposes to charge the complainers for a sum of £35, 5s. 6d. If this sum were paid to him, then it is not disputed that he will have been paid in wages and compensation, for a period from 13th September 1906 till May 1907, a weekly sum much in excess of his full average wages prior to the accident.

I agree with the Lord Ordinary in holding that the contention of the charger cannot be given effect to. It seems, on the face of it, to be contrary to reason and justice, and I also agree in thinking that the authority of the

¹ 6 F. 168.

² 1907, S. C. 890.

³ Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), First Schedule, sec. (2); *Geary v. William Dixon, Limited*, 1902, 4 F. 1143; *Parker v. William Dixon, Limited*, 1902, 4 F. 1147; *Irons v. Davis & Trimmings, Limited*, [1899] 2 Q. B. 330.

Jan. 17, 1908. cases of *Beath v. Keay*¹ and *Nimmo & Co. v. Fisher*² is conclusive against his contention.

William Baird
& Co., Limited,
v. M'Whinnie.

Lord Justice-
Clerk.

I am therefore of opinion that the Court must hold that the right to compensation could only subsist while the injured workman was incapacitated from earning wages up to the amount of his previous weekly earnings, and that as he has refused to accept compensation offered him which would give him his just right under the statute, the judgment suspending the charge should be adhered to.

LORD LOW concurred.

LORD ARDWALL.—I am of opinion that the Lord Ordinary's interlocutor is right, and ought to be affirmed.

I concur with the Lord Ordinary that the present case is ruled by the principles laid down in *Beath & Keay v. Ness*,¹ and followed in *Nimmo & Co. v. Fisher*.²

In the present case, as in these cases, the respondent endeavours, by making use of the machinery of the Workmen's Compensation Act, aided by certain judicial decisions and *dicta* of not unquestionable authority, to obtain for the period between 13th September 1906 and 6th May 1907 payment of a sum per week which added to his wages would bring up his weekly emoluments to a sum considerably exceeding his average weekly earnings prior to the accident. In short, he is endeavouring, under cover of the machinery of the Act, to obtain, not compensation for his injury, but something considerably over and above the largest amount of compensation to which the general provisions of the Act entitle him. It is quite clear that this is contrary to the main purpose and object of the Act, and that, accordingly, the Court is entitled to interfere for the purpose of preventing an injustice to the complainers, and an abuse of the machinery of the Act.

In my opinion the Lord Ordinary has taken the proper course in suspending the charge *simpliciter*.

This case presents a complete contrast to that which immediately preceded it in to-day's roll.³ I think it unnecessary to go into more detail, as I think the whole case has been admirably dealt with by the Lord Ordinary in his opinion, with which I concur.

LORD STORMONTH-DARLING was absent.

THE COURT adhered.

W. & J. BURNES, W.S.—ST CLAIR SWANSON & MANSON, W.S.—Agents.

No. 65. MRS ELLINOR WILSON OR BLACK AND OTHERS, Pursuers (Respondents).
—*Dickson, K.C.—Constable.*

Jan. 18, 1908. THE NORTH BRITISH RAILWAY COMPANY, Defenders (Reclaimers).—
Clyde, K.C.—Cooper, K.C.—Grierson.

Black v.
North British
Railway Co.

Reparation—Negligence—Solatium—Measure of Damages—Admission of liability—Relevancy of considering (1) sufferings of deceased, (2) grossness of negligence of defenders—Form of issue.—In an action of damages against

¹ 6 F. 168.

² 1907, S. C. 890.

³ Fife Coal Co. v. Lindsay, *ante*, p. 431.

a railway company, at the instance of the widow and children of a passenger who had died from injuries received in a railway accident, the defenders admitted liability for the injuries of the deceased. The pursuers proposed an issue in ordinary form, whether the deceased had been injured "through the fault of the defenders, to the loss, injury, and damage of the pursuers." The defenders objected to this form of issue, and proposed that the issue should contain a recital of the admission of liability, with the sole question,—“What is the amount of the loss, injury, and damage sustained by the pursuers?”

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The Court (with three consulted Judges), following the established practice in such cases, *approved* of the issue in ordinary form; but were of *opinion* that, in estimating the amount of damages, including *solatium*, due to the pursuers, the sufferings of the deceased would be a relevant consideration, but not the grossness of the fault of the defenders.

Form of issue approved in *Morton (Cooley's Factor) v. Edinburgh and Glasgow Railway Co.*, Dec. 13, 1845, 8 D. 288, *followed*; but opinions of the Judges in that case as to the admissibility of proof of negligence *commented on and doubted*.

Observed (*per* the Lord President), that the English doctrine of “exemplary damages,” which was founded on malice, could not apply to cases where the person sued is not the actual wrongdoer, but is only responsible on the ground of *respondet superior*.

ON 17th May 1907 Mrs Ellinor Wilson or Black, widow of Alexander William Black, W.S., and Member of Parliament for Banffshire, and her four children, brought an action against the North British Railway Company, in which they concluded for certain sums as damages on account of the death of the said Alexander William Black, who had been fatally injured in a railway accident at Elliot Junction, near Arbroath. The sums concluded for amounted in all to £21,000, being £5000 to the widow, and £4000 to each of the four children.

1st Division.
with three
consulted
Judges.
Lord Guthrie.

The pursuers averred that on 28th December 1906 the deceased travelled by train from Arbroath to Elliot Junction, where the train arrived about six minutes after leaving Arbroath, and where it remained standing for some time; that on that day a snow-storm of exceptional severity prevailed which prevented the signals from working properly, and owing to one of the lines in the neighbourhood being blocked the traffic was being worked on a single line; that about fifteen minutes after the said train had been despatched from Arbroath, and in the midst of a blinding snow-storm, another train was despatched southwards from Arbroath, travelling tender first, which did not slacken speed on approaching Elliot Junction, but, while travelling at a speed of about 30 miles an hour, dashed into the train in which the deceased was seated. They also set forth the serious and painful nature of the injuries which the deceased had suffered.

The pursuers further averred in Cond. 4:—“The said accident and consequent death of Mr Black were caused by the gross negligence of the defenders and their servants in, *inter alia*, the following respects”:—(a) That the defenders’ servants had started the train tender first, which in view of the state of the weather was a dangerous and unjustifiable method of travelling. (b) That the stationmaster at Arbroath, although he knew that the signals were not working properly and that one line was blocked, had started the second train in a dangerously short time after the first, and without warning the engine-driver to proceed with caution. (c) That the engine-driver of the second train had driven at excessive speed, had failed to observe the various signals,

Jan. 18, 1908. and had failed to draw up before passing the home signal at Elliot Junction. (d) That the stationmaster at Elliot Junction had failed to put fog signals on the line to the north of the Junction, as it was his duty in the state of the weather to do.

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The defenders' answer to Cond. 4 was as follows:— "Denied. Explained that the defenders for the purposes of the present action admit liability for the injuries sustained by the said Mr Black."

The pursuers also set forth the patrimonial loss they alleged that they had suffered, and further averred:—(Cond. 6) "The pursuers have further suffered greatly in their feelings through the sudden death of their husband and father, and the distressing circumstances under which the same occurred. Further, his widow has suffered the loss of his companionship and protection, and his children have suffered the loss of his guardianship and influence at an age when such guardianship and influence would have been of specially great importance to them. The loss, injury, and damage, including the sums they are entitled to receive as *solatium*, caused to the pursuers by the said death are moderately estimated at the sums respectively concluded for."

The pursuers pleaded, *inter alia*;—The pursuers having sustained loss, injury, and damage in respect of the death of the said Alexander William Black, as condescended on, through the fault of the defenders, are entitled to reparation therefor as concluded for.

The defenders' sole plea in law was;—The sums sued for are grossly excessive.

The pursuers proposed the following issue:—"Whether on or about the 28th day of December 1906, and at or near Elliot Junction, a station on the Dundee and Arbroath Joint Railway, the late Alexander William Black, Writer to the Signet, Member of Parliament, husband of the pursuer Mrs Ellinor Wilson or Black, and father of the other pursuers, received injuries to his person from which he subsequently died, through the fault of the defenders, to the loss, injury, and damage of the pursuers. Damages laid," &c.

The defenders proposed this issue:—"It being admitted that on or about the 28th December 1906 the late Alexander William Black, Writer to the Signet, Member of Parliament, husband of the pursuer Mrs Ellinor Wilson or Black, and father of the other pursuers, received injuries to his person at or near the railway station known as Elliot Junction, near Arbroath, from which he subsequently died, through the fault of the defenders: What is the amount of the loss, injury, and damage sustained by the pursuers? Damages laid," &c.

On 23d October 1907 the Lord Ordinary (Guthrie) approved of the issue proposed by the pursuers, and disallowed the issue proposed by the defenders.*

* "OPINION.—I approve the form of issue proposed by the pursuers in this case, as against the form of issue proposed by the defenders.

"In the case of *Morton (Cooley's Factor) v. Edinburgh and Glasgow Railway Company*, 13th December 1845, 8 D. 288, Lord Moncreiff stated that, prior to the date of that case, issues in both forms had been allowed by the Court, although it does not appear whether the question between the two forms of issues had ever been debated. But the point was carefully considered in *Cooley's case*, by a Court composed of the Judges of the First and Second Divisions; and by a majority of five (Lord President Boyle, Lord Justice-Clerk Hope, and Lords Fullerton, Jeffrey, and Moncreiff) to three (Lords Mackenzie, Medwyn, and Cockburn), the form of issue proposed by the pursuers in this case was preferred. In considering the case

The defenders reclaimed, and gave notice of a motion to vary the issue by bringing it into conformity with the issue which had been proposed by them. On 9th November 1907 the First Division sent the case to be argued before themselves, with three Judges of the Second Division. The hearing before the seven Judges took place on 19th November 1907.

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Argued for the defenders and reclaimers;—Where liability was admitted, as here, the only question for the jury was the amount of loss suffered by the pursuers. Admitting that the form of issue allowed by the Lord Ordinary was the issue approved in similar circumstances in the case of *Morton (Cooley's Factor)*,¹ and followed in practice ever since, yet that form of issue ought now to be reconsidered, for it permitted the whole circumstances of the accident to be gone into before the jury, including the sufferings of the deceased and the amount of fault on the part of the defenders, which might have a

of *Cooley*, it must be kept in view first that the action involved the element of assyhtment, which the present case does not at least bear to do; and second, that whereas in this case the defenders merely admit 'negligence,' the defenders in *Cooley's* case admitted 'culpable' negligence.

"After *Cooley's* case, the issue there approved seems to have been followed for ten years, without question, in cases of admitted liability. In 1856, the same point was again brought before the Court in *Dobie v. Aberdeen Railway Company*, 18 D. 862. None of the Judges of the First Division before whom *Dobie's* case came (Lord President M'Neill, and Lords Ivory, Curriehill, and Deas) sat on *Cooley's* case. They took the case to avizandum, and the Lord President delivered this opinion:—'We have looked into the case of *Morton* to see whether there was any distinction between it and the present case, and whether it disposed of the question on its merits and on principle, and we find that in no feature is it distinguishable from the present case on the point now before us, which was very fully considered there. We cannot disturb that judgment, and therefore we approve of the issue for the pursuer.'

"Since *Dobie's* case, the *Cooley* issue has been followed. See *Cunningham v. Duncan & Jamieson*, 1889, 16 R., per Lord Shand, p. 389, compared with Lord Adam, p. 390. I am informed that the point was again brought under the notice of the First Division in the recent case of *M'Bride v. Loudon & Inglis* (although the question was not fully debated), and an issue was approved in the same form. In these circumstances, it is obviously my duty, whatever my view on the merits, to approve the pursuers' issue.

"But as I heard an argument on the merits, and as the question is one of general importance (see Glegg on Reparation, 1905, p. 118, where a view favourable to the defenders is stated), it is right that I should express my opinion. During the discussion, my impression was with the defenders. I have now arrived at an opposite conclusion, and think that the decision of the majority in *Cooley's* case was right in principle.

"The real question underlying the point now at issue between the parties, is whether the *quantum* of the defenders' negligence is relevant for the jury to consider in estimating damages. Had the defenders admitted *simpliciter* the whole averments of the pursuers as to negligence, and had the case gone to trial on the defenders' issue, the same point would have arisen for the Judge's decision at the trial, when the pursuer's counsel proposed to read and found upon the defenders' admissions. In this case, the defenders make a bald admission of 'negligence,' and deny all the pursuers' averments relating to negligence, with the result that the case might be one of a merely

¹ *Morton (Cooley's Factor) v. Edinburgh and Glasgow Railway Co.*, Dec. 13, 1845, 8 D. 288.

Jan. 18, 1908. *Black v. North British Railway Co.* considered.¹ Although the form of issue allowed in *Morton's case*² was followed in *Dobie*³ and *Cunningham*,⁴ these cases were not in point, for the former was at the instance of the injured man, and the latter was an action of slander. (3) The practice in England was in support of the defenders' contention. The law on this matter was regulated there by Lord Campbell's Act,⁵ and the jury were confined to the pecuniary loss suffered. In the English case of *Blake*⁶ the Scots authorities were pressed on the Court, but the Court refused to extend the English practice. Further, the theory of awarding exemplary damages where there was gross fault, as known to the law of England, was not applicable to the circumstances here, as it could not apply where the wrongdoing was that of a servant.⁷

Argued for the pursuers and respondents;—The decision in *Morton's case*² ruled this case, both on the ground of practice and of principle. (1) *Practice*.—It was admitted that the unvarying practice was in favour of the pursuers' contention, and as this was an appeal on a point of procedure, viz., a variation of an issue, the established practice with regard to it was conclusive. Further, this form of action was introduced into Scots practice about 100 years ago, and was founded solely on custom,⁸ and being founded solely on custom all that could be appealed to was custom, and custom was in favour of the form of issue allowed. (2) *Principle*.—The decision in *Morton's case*² was also sound in principle. There were two grounds on which compensation could be awarded in such cases under the law of Scotland—damages for patrimonial loss, and *solatium* for wounded feelings. *Solatium* was fully recognised as a ground for damages in Scots law.⁹ Its origin was no doubt obscure. In the Digest¹⁰ it was referred to, but not in any technical sense, only as an equivalent to compensation. The references to Stair¹¹ and Erskine¹² were of no value, for these works were written at a date previous to the introduction of this form of action. It was not the case that *solatium* had been confused with the action of assythment. Assythment was based on criminal responsibility only,¹³ and did not really enter into the principle decided in *Morton*² and the other cases. *Morton*² was really decided on the same considerations as were applicable here. Into *solatium* as now recognised there entered, as a consideration in the assessment of damages, both the laceration of feelings caused by the sufferings of the deceased, and the grossness of the fault of the defenders. The distinction between *culpa lata* and *culpa levis* still existed, though *culpa levissima* had now

¹ Hillcoat v. Glasgow and South-Western Railway Co., Nov. 1, 1907, 15 S. L. T. 433—(See note *infra*, p. 454).

² 8 D. 288.

³ Dobie v. Aberdeen Railway Company, May 23, 1856, 18 D. 862.

⁴ Cunningham v. Duncan & Jamieson, Feb. 2, 1889, 16 R. 383.

⁵ 9 and 10 Vict. cap. 93.

⁶ Blake v. Midland Railway Co., 21 L. J., Q. B. 233.

⁷ Bevan on Negligence, 8th ed., 42-3.

⁸ Clarke v. Carlin Coal Co., July 27, 1891, 18 R. (H. L.) 63; Darling v. Gray & Sons, May 31, 1892, 19 R. (H. L.) 31.

⁹ Dow v. Brown, 6 D. 534; Horn v. North British Railway Co., July 13, 1878, 5 R. 1055; Neilson v. Rodger, Dec. 24, 1853, 16 D. 325; Clarke, *supra*; Darling, *supra*.

¹⁰ Dig. viii. 4, 13; xxvi. 7, 33.

¹¹ i. 9, 4; i. 9, 6; i. 9, 7.

¹² iii. 1, 14 (note).

¹³ Ball's Prin. 2029.

dropped out.¹ *Culpa lata* was a consideration for increased damages.² Jan. 18, 1908. The circumstances of the case as affecting the question of fault must therefore be inquired into.³ (3) The analogy from English law supported this view. Although the jury in England were limited to the consideration of the pecuniary loss suffered, the extent of fault of the defendant was considered relevant.⁴ Much more should it be so considered in Scotland, where lacerated feelings were a ground for damages. As to the analogy of an award of exemplary damages in England, the fact that the claim was against the master and not the servant made no distinction—*qui facit per alium facit per se*. Black v. North British Railway Co.

At advising on January 18, 1908,—

LORD PRESIDENT.—This is an action raised by the widow and children of the deceased Mr Black against the North British Railway Company. The deceased gentleman lost his life owing to injuries received in a collision while travelling as a passenger in a train of the defenders; and the summons concludes for very considerable sums of money to each of the pursuers. The condescendence sets forth that the collision in question was caused by the gross negligence of the defenders, the specification of said negligence consisting in setting forth alleged faults of the driver of the train which ran into the train in which Mr Black was seated, and of the station-masters at two stations. The sums concluded for are said to be due to them as reparation and *solatium* for the injury done to them by the death of Mr Black through the fault of the defenders. The defenders, while not admitting the particular fault condescended on, put in the following statement:—“Explained that the defenders, for the purposes of the present action, admit liability for the injuries sustained by Mr Black.”

Technically, the only question raised in the case is the form of the issue. But really the controversy between the parties goes deeper, and is concerned with the question of what are, if I may so express it, the true ingredients of the damage suffered by the pursuers; and the form of the issue is only material in so far as it lends itself to the proper or improper admission in evidence of circumstances which, according to the one view or the other, are relevant to the question of what the damage amounts to.

Viewed as upon authority I do not think we could, so far as form is concerned, go back on the case of *Morton*,⁵ followed by the case of *Dobie*.⁶ The defenders, however, have frankly stated that they wish to take the opinion of the House of Lords on the subject, and it therefore seems right that we should not send up the case without considered opinions. But besides that there is another reason why I think it desirable that we should state our views apart from authority. Though *Morton's* case⁵ has ruled

¹ Bell's Com. i. 483.

² Auld v. Shairp, Dec. 16, 1874, 2 R. 191, Lord Ordinary, at p. 196; Fraser, Husband and Wife, pp. 500, 505, 1204.

³ M'Master v. Caledonian Railway Co., 1885, 23 S. L. R. 181; Horn v. North British Railway Co., 5 R. 1055.

⁴ Phillips v. London and South-Western Railway Co., L. R., 5 Q. B. D. 78; Forsdike v. Stone, 1868, L. R., 3 C. P. 607; Bevan on Negligence, 8th ed., 42-3; Sedgwick on Damages, 7th ed., i. 53; ii. 330; Mayne on Damages, p. 47.

⁵ 8 D. 288.

⁶ 18 D. 862.

Jan. 18, 1908. the form of the issue, I cannot say that I think the opinions of the majority in *Morton's* case¹ have ruled the directions given by Judges to juries. Further, I think there has been the unfortunate effect that directions in the matter have varied according to the views of individual Judges. The Lord Ordinary has called attention to this by comparing what was said by Lord Shand and by Lord Adam in the case of *Cunningham*.² It seems expedient, therefore, that true principles should be laid down by the Court of highest resort, and that they should then be followed in all cases.

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There is no question as to the liability of the defenders to compensate for direct patrimonial loss which the widow and children have suffered by the death of the husband and father viewed as the breadwinner of the family. The question in dispute arises in considering what are the matters which it is relevant to consider in estimating what is due in name of *solatium*, and they really resolve into two points. First, are the pursuers entitled to enhanced damages if they shew that the deceased was subjected to pain and suffering before his death; second, are they entitled to enhanced damages if they shew that the negligence of the Company was gross negligence. If they are, then it is evident that the pursuers are entitled to insist on proving first, the circumstances of the collision so far as they affected Mr Black, and second, the circumstances of the collision so far as shewing the causes which led to it.

I cannot say that I have been able to find any authoritative pronouncement on what is the true definition of *solatium*. The word occurs in the Digest in two places—viii. 4, 13, and xxvi. 7, 33—but not in a sense which is in the slightest degree technical or calculated to throw any light on the subject. In the first passage it is used for the payment which must be made if one wishes to take stones out of another man's quarry; and it is used as an equivalent to "*solarium*," which in fact is the word in some of the MSS. There seems, therefore, little doubt that the word had not a technical origin, but was used, as was often the case, by the old Scottish lawyers as a convenient Latin tag to express what might have been expressed, but with less conciseness, in English. We were told at the Bar that the first time the word appears is in the case of *Brown v. M'Gregor*,³ the case which may be, I think, taken as the first instance of the modern "*actio injuriarum*,"—I quote the words of Lord President Inglis in *Eisten*,⁴—as contrasted with the older action of assythment. This is, however, not so. The word is used as far back as 1741 in a case of *Moodie v. Sir James Stuart*, reported by Monboddo, and to be found in 5 Brown's Supplement, p. 709. The report is so short and to the point as to be worth quoting:—"The question here was about the quantity of an assythment, whether it contained only the expenses laid out by the relations of the defunct in the prosecution of his death, together with an aliment to those of his relations who stood in need of being alimented, and whom the defunct would have been obliged to aliment; or whether it did not likewise contain something *in solatium* to the relations for the loss they had sustained. This last the Lords found." And the word is also used by Lord Kames in his law tracts discussing assythment.

¹ 8 D. 288.

² 16 R. 383.

³ Feb. 26, 1813, F. C.

⁴ 8 Macph. 980.

It seems, therefore, tolerably certain that it had its origin in the action of Jan. 18, 1908. assythment, and probably without very much consideration found its way ^{Black v.} into the action of damages. As to the modern action I do not think I can ^{North British} add to what is said by Lord President Inglis in the case of *Eisten*.¹ ^{Railway Co.} Originally I take it the two actions stood side by side—at least, that is what I ^{Ld. President.} should gather from the way in which Stair treats the subject in Book 1, Title 9, sections 4, 6, and 7. And probably the change from the old to the modern practice was not very well marked. The civil action could, of course, be in the Session alone, while assythment might be in Justiciary or modified in Exchequer or by action in the Session. But Justiciary and Exchequer came to be abandoned.—(See Lord Deas in *Greenhorn v. Addie*.²) The transition stage is, I think, well marked by comparing *Black v. Cadell*,³ which seems to go on assythment alone (and is accurately reported in Morrison under the heading of Assythment), with *Brown v. M'Gregor*,⁴ which although professedly based on *Black v. Cadell*,³ is clearly an *actio injuriarum* and not assythment. For the test I think is not doubtful, being that laid down in *Eisten*,¹ viz., was the act complained of a crime? In *Black's* case³ conceivably the defender might have been indicted for culpable homicide, though I infer that the chances of a conviction would have been remote. In *Brown's* case⁴ it would have been impossible. The end of it all is that I think *solatium*, borrowed from the action of assythment, has in the *actio injuriarum* come to mean reparation for feelings—in short all reparation which is not comprehended under the heading of actual patrimonial loss. And as such it is I think a legitimate ingredient to consider the laceration of the feelings of the widow and family in contemplating the pain and suffering to which the deceased was exposed before death actually supervened. This answers the first question put in the affirmative.

Turning now to the second question, I first inquire what are the supposed grounds on which the contention for enhanced damages rests, and I find they are two. Certain Judges in *Morton's* case⁵ countenanced the idea that damages are partly imposed *in pœnam*, and that consequently if the fault is gross the penalty ought to be great. I do not think this view will bear a moment's examination. Take an accident like the present where there were over a score of sufferers. What is to be the province of each particular jury? Are the rights of each set of pursuers to depend upon the accident whether the defenders have been already sufficiently mulcted by a former jury? The whole argument seems to me so faulty that, if it were not that it has had the sanction of very eminent men, I should have used the term absurd.

The other ground is that, where fault is great, damages ought to be what is termed "exemplary." I am bound to say I find no authority for any distinction between damages and "exemplary damages" in the law of Scotland. The very heading under which it is treated in our older books "Reparation" excludes the idea. There is, however, a great deal of authority in the law of England. I do not feel entitled, sitting in this Court, to review the English judgments. But I will permit myself two remarks. In

¹ 8 Macph. 980.⁴ Feb. 26, 1813, F. C.² 17 D. 862.⁵ 8 D. 288.³ M. 13,905.

Jan. 18, 1908. the first place, I will take as a specimen what is said in a well-known work,
 Black v. Mayne on Damages—"If then malice can render an innocent act wrongful,
 North British it must therefore render a wrongful act more wrongful, and therefore be
 Railway Co. provable in aggravation of damages." It seems to me that the basis of this

Ld. President. reasoning needs to be reconsidered in the light of the House of Lords decision in *Allan v. Flood*.¹ In the second place, it seems to me that malice is the foundation of the doctrine, and that its application to the present class of cases is because *culpa lata dolo equiparatur*. If then malice is the foundation, it surely cannot apply to cases where the person sued is not the actual wrongdoer, but is only held liable on the ground of *respondet superior*. In the present case there is no averment of fault of system which could be laid at the door of the directors of the Railway Company. The "gross negligence" as alleged is negligence of three separate officials, as to none of whom it is said that they were improperly selected for their posts.

I should like to add that I cannot agree with the Lord Ordinary when he says,—“It is, I imagine, a fact in human nature that grief may be aggravated and loss embittered by the knowledge that the slightest care on the part of those causing the injury would have prevented the accident. On the other hand, if the case is only by a technicality outside the category of inevitable accident, the situation is accepted with greater resignation and the mind sooner recovers calmness.” It seems to me that this all depends on the particular mind. To many it might be as the Lord Ordinary says. But to others it might be different. They would feel more acutely such a case as, *e.g.*, when a loosened brick from a bridge happened to fall on the head of a railway passenger at that moment looking out of the window. At anyrate I do not think there is any general consensus of feeling on which a rule for awarding increased damages could be founded.

I therefore come to the conclusion that it is not relevant to inquire whether the accident was caused by gross or by ordinary negligence—in other words, that if the defenders admit negligence no more proof on the subject of the cause of the accident should be allowed, as to do so would tend to confuse the jury. If this is clearly understood by the presiding Judge, I think the form of the issue immaterial—I mean as between the two competing forms before us. Were the slate absolutely blank I might perhaps prefer that tendered by the defenders, and the reasons for doing so are well stated in a note of Lord Johnston in reporting the case of *Hillcoat*.*

¹ L. R., [1898] A. C. 1.

* The case of *Hillcoat v. Glasgow and South-Western Railway Company* was reported by Lord Johnston (Ordinary) to the First Division, but was settled by joint minute, to which the Division interposed authority on 1st November 1907. His Lordship's note in reporting the case was as follows:—"This action is raised by Mrs Hillcoat against the Glasgow and South-Western Railway Company to recover compensation for the injury occasioned to her by an accident which occurred to one of their trains, in which she was travelling, at Saltcoats Station on 18th August 1906. The circumstances were that the train in which the pursuer was travelling was standing at Saltcoats Station when another train of the defenders' company ran into it from behind, causing a collision in which the pursuer was injured. I do not touch upon the allegations of fault which led to or caused the collision, because the defenders admit the

But, as I have already said, I think we are bound by authority to adopt Jan. 18, 1908. the form proposed by the pursuers, and that form will not prevent me, if I *Black v.* am trying the case, from giving effect to the views I have already expressed *North British Railway Co.* in the admission or rejection of evidence. It will be for the House of Lords to approve or disapprove of these views, and I need scarcely say I *Ld. President.* shall hold myself bound to follow what is laid down by them, whether it does or does not agree with the opinion I have just delivered.

LORD M'LAREN.—I agree with your Lordship's exposition of the principles upon which damages should be assessed in this case. With reference

occurrence of the collision and the pursuer's consequent injury, and accept liability for the accident which caused it. They cannot accept liability without, for the purposes of the action, admitting fault for which they are responsible.

"The nature of the injuries alleged are serious internal injuries occasioned by the twisting of the pursuer's body in the collision and shock to her nervous system.

"I am called upon to adjust issues for the trial of the case. The pursuer has proposed the ordinary issue in cases of personal injury, viz, whether on or about Saturday, 18th August 1906, at or near Saltcoats Railway Station, the pursuer while a passenger in a train of the defenders was injured in her person through the fault of the defenders, to her loss, injury, and damage.

"While on the authorities as they at present stand the pursuer is entitled to demand this form of issue, the propriety of granting it has been much canvassed in the profession, and the question has been brought into prominence by the recent serious accident to a North British Railway train at Elliot Junction in the county of Forfar. There have been several actions arising out of that accident, in one of which I myself and in another one of my brethren in the Outer-House had determined to report the point to the Inner-House. But these and other actions arising out of the same accident have been settled with the exception of that at the instance of *Black and Others v. North British Railway*, in which Lord Guthrie has after mature consideration granted the ordinary issue. That case, however, has been taken to the Inner-House, and will afford an opportunity of reconsidering the question should that Court think it proper to do so.

"In these circumstances I hesitate to adjust an issue, as I may well adopt one of which the Inner-House may be found to disapprove by their judgment in *Black's* case, and at the same time I think it doubtful whether I have any right to delay adjusting an issue. I therefore report the case to the Inner-House that they may have it before them along with that of *Black*. I do so the more readily as *Black's* case is one in which the death of a father occurred, giving rise to an action at the instance of his widow and dependants, while in the present case there was nothing but a personal injury not resulting in death, and the action is directly at the instance of the injured party. The Court will therefore have the matter before them from both points of view.

"I must add that had *Black's* case not occurred I should have taken the course of reporting this question, because I could not take upon me to disregard a practice founded, as after mentioned, on an Inner-House decision, however I might think that it ought to be altered. Where a matter of practice is a matter upon which parties in their dealings have come to rely and pecuniary interests are affected, though the practice may be a bad one, every Court would hesitate to disturb it. But where, as here, the practice is not one upon which any person has relied to the affecting of patrimonial interest, if the practice is now seen to be wrong, I conceive that the Court will not hesitate to reconsider it, and it is in that view that I should have

Jan. 18, 1908. to the form of the issue if we were not bound by precedent I should be disposed to prefer the form suggested by the defenders—what is the damage Black v. North British Railway Co. —on this ground that I think that in our system of sending a question for the consideration of the jury it is always an advantage if the form of the issue comes as near as possible to the actual question which the jury have to try, first because the form of the issue itself fixes the attention of the jury upon the precise question submitted to them, and also because it may have a restraining effect in preventing the jury from taking into account any extraneous considerations which they might imagine to be covered by an issue of a more general form. But I agree with your Lordship that the practice has been in favour of the issue proposed by the pursuers, and that the advantage of altering the form would not be sufficient to outweigh the general objection to altering forms that are well established.

LORD KINNEAR.—I concur.

ventured respectfully to submit it for the reconsideration of the Inner-House. I should have done so because I think the practice to be founded on unsound principle, and liable to be unfair and dangerous in result. The question was first considered in 1845 in the case of *Cooley v. Edinburgh and Glasgow Railway Co.*, 8 D. 288, where, in a consulted judgment of the two Divisions, it was determined, in an action of assythment and damages by the children of a party killed in a railway accident, that though the defenders admitted the death, and that it was caused by fault, negligence, or want of skill on the part of their employees, for whom they were responsible, and that there was consequent loss, injury, and damage to the pursuers, yet the pursuers were entitled to put all these matters in issue just as if there had been no admission.

"The matter came again before the Court in the case of *Dobie v. Aberdeen Railway Company*, 18 D. 862, when the First Division had come to be entirely differently constituted, and the Court found that they could not distinguish *Cooley's* case from the one before them, and refused to disturb that judgment. There is, therefore, no indication of whether they approved it in principle or not.

"These two cases have regulated the practice in adjusting such issues down to the present day. But although the form of issue has remained the same, I have very grave doubts whether the principle upon which the majority of the Inner-House in *Cooley's* case determined it has been allowed, at anyrate for a considerable time, to influence the presiding Judge in admitting evidence and directing the jury. If I am right in this, it is manifest that a false issue has been in use to be presented to juries, the continuance of which ought not to be perpetuated.

"For the principle on which the issue was adopted and must now be defended there is no support but the case of *Cooley* already referred to. If the opinions in that case be examined it will be found that while there was manifest doubt in the minds of some of the Judges, those who were clearly in favour of the issue as allowed based their judgment entirely upon the principle that in arriving at the measure of damages the degree of negligence is a material matter for the consideration of the jury. With very great respect for the learned Judges who held this opinion, I conceive that principle to be unsound when applied to cases of personal injury. It would justify the same verdict for the loss of a finger under circumstances of gross negligence and for the loss of a hand under circumstances of very slight negligence. I think that the error in adopting it arose from allowing the somewhat scholastic distinction between *culpa lata* and *culpa levis* to intrude itself into the consideration of a class of cases to which it is

LORD LOW.—I had the advantage of considering the opinion which has Jan. 18, 1908.
been read by your Lordship in the chair, and I entirely concur.

Black v.
North British
Railway Co.

LORD ARDWALL.—I concur in the judgment delivered by the Lord President, and have little to add.

I think that the degree of negligence or fault in cases of the class presently under consideration ought not to form an element in arriving at the amount of damages. It would be considered wrong that any Judge should direct a jury, who are trying an action of damages in respect of the death of a man killed in a railway accident, to the effect that they should find small damages because the fault which led to the accident was a slight one; and I think it would be equally wrong if, on the other hand, the Judge should direct the jury that because there had been gross negligence on the part of the Railway Company's servants the amount of damages to be awarded ought to be

inapposite. It is true that there are cases arising out of contract in which the degree of negligence affects the liability, but that is no justification for maintaining that in these or any other class of cases the degree of negligence is to affect not the liability but the measure of damages. In the case of injury from negligence where no question of contract is concerned, liability depends upon negligence, and where negligence is established liability follows independently of the degree of negligence, and it is not the negligence but the liability to compensate which determines the damages. In such cases Lord Cranworth's *dictum* in *Wilson v. Brett*, 1843, 11 M. & W. 113, that 'gross negligence is ordinary negligence with a vituperative epithet' holds good, and Lord Willes's further *dictum* in *Lord v. Midland Railway Company*, L. R., 2 C. P. 339, that 'any negligence is gross in one who undertakes a duty and fails to perform it,' is equally applicable.

"I think that the judgment in *Cooley's* case is also open to this criticism, that it is inconsistent with itself. It accepts the position that the jury may not give vindictive damages, and that it is the duty of the presiding Judge so to direct. If by vindictive is meant the satisfaction of the legal analogue of the natural vendetta, the statement may be justified in relation to the principle adopted. But if, as I think it must be, the expression means punitive or exemplary, I do not see how it is possible to avoid giving such damages if the jury are entitled, and if entitled bound, to take into consideration the degree of negligence.

"When I say above that I think the issue has become a false issue, because presiding Judges, or many of them, do not subscribe and give effect to the principle which underlies it, I have the support of Lord Shand and Lord Adam in the case of *Cunningham v. Duncan & Jamieson*, 16 R. 383, where Lord Shand says, at page 389—'I do not for myself say that I should recommend a jury to make the nature and extent of the company's fault an element in determining the amount of damages to be awarded'; and Lord Adam adds (page 391),—'No doubt the question of fault is laid before the jury, but in my experience a jury is never asked to enlarge or diminish the amount of damages on the ground of the extent of fault on the part of the defender. That has not been, in my experience, the nature of the inquiry in actions of damages for fault or negligence.'

"If Lord Adam is right the customary issue is a false issue. It is liable to hamper the Judge and to mislead the jury. The issue which I should, but for the practice following on *Cooley's* case, have approved is—It being admitted that on or about 18th August 1906, and at or near Saltcoats Railway Station on the line of the defenders, the pursuer, while travelling in a train belonging to the defenders, was injured in her person through the fault of the defenders or those for whom they are responsible, to her loss,

Jan. 18, 1908. increased. But, while this is my opinion, I do not think it necessary or expedient to change the form of issue which has been found to work well in *Black v. North British Railway Co.* practice since 1845.

Lord Ardwall. I may be allowed to add that in the course of thirty-five years' practice at the Bar it so happened that I was engaged at first as junior and latterly as senior counsel in a large number of actions of damages for injuries or death caused by alleged fault on the part of the defenders in such actions; in the great majority of these cases I acted for the defenders, and I cannot recall any case where an admission of liability having been made on record, but not in the issue, time was wasted in the leading of unnecessary evidence. The usual course in such trials where the liability was admitted was that the narrative of how the accident occurred—which I think the jury are always entitled to hear so as to enable them to know the circumstances out of which the action arose—was allowed to be taken from one, or, if necessary, more witnesses, and thereafter the Judge stopped all further examination on the matter. If this be recognised as the proper practice, I think the want of an admission in the issue will not lead to any unnecessary prolongation of trials or waste of time in their conduct.

Further, I cannot recall any trial where the Judge, if it was suggested by the pursuer's counsel that the jury should take into consideration, in fixing the amount of damage, the gravity of the fault on the part of the defenders or their servants, did not direct the jury that that was not a matter for them, but that what they had to assess was simply the loss, injury, and damage caused to the pursuer. It may be that the experience of others may have been less fortunate than mine, but if that has been so, and if there has hitherto been any dubiety as to the Judge's duty in this matter, that will be set at rest by the judgment in this case.

Further, I may point out that it is by no means impossible that if a rule such as the defenders contend for regarding admissions being inserted in issues were adopted, it might lead to some undesirable consequences. I may illustrate this from the present case. The issue proposed by the defen-

injury, and damage—What is the amount of compensation to which the pursuer is entitled in respect thereof? Damages laid at £1500.

"If the pleas in law are examined it is found, as might be expected, that it is compensation for injury which is the subject of the action, and that what the parties have joined issue about is whether the compensation sued for is reasonable or excessive. These pleas are consistent with the right and the liability that arise out of the circumstances.

"I am not apprehensive that the form of issue which I would adopt would exclude any relevant matter from proof. There are (1) circumstances relating to the position of the individual party injured, as, for instance, occupation and prospects in life; (2) circumstances surrounding the accident to the individual injured—where shock must always be a factor in the consideration it is an essential to know the circumstances surrounding the occasion of the injury to him or her; (3) circumstances surrounding the cause of the occurrence which occasions the injury. To establish liability proof on the last two heads is relevant and necessary. But where liability is admitted proof on the first two is all that is required. And it would be admissible though fault is not formally put in issue. Whereas if it is formally put in issue, I do not see how the presiding Judge can either exclude or restrict proof on the last head."

ders contains an ample admission of fault, but as I read their answers on Jan. 18, 1908, record there is no such admission of fault on record, but only an admission of liability for the purposes of the present action, and I would not approve of an issue consisting of a mere admission to the effect that the defenders admitted liability for the purposes of the action, followed by the bald question of amount of damages, being sent to a jury, and it is possible that if the rule as to admissions proposed by the defenders were adopted there might be frequent disputes and discussions as to the form that the admission should take. In the next place, I think that an issue in the form proposed by the defenders might have the effect of leading to captious objections to the admissibility of evidence which might be led for the legitimate purpose of putting the jury in possession of the facts out of which the action arose, and that the time of the Court and of the jury might thereby be wasted. I prefer that the issue should be kept in the established form, and that the Judge presiding at the trial should, whenever necessary, direct the jury in the manner pointed out in the opinion just delivered by the Lord President.

The Lord President intimated that LORD STORMONTH-DARLING and LORD PEARSON, who were absent at advising, also concurred.

THE COURT adhered.

CADELL, WILSON, & MORTON, W.S.—JAMES WATSON, S.S.C.—Agents.

THE RIGHT HONOURABLE ALAN DAVID EARL OF MANSFIELD,
Petitioner.—*Cullen, K.C.—Chree.*

No. 66.

J. C. FENTON (Tutor *ad litem* to the Right Honourable Mungo David Malcolm Murray, commonly called Lord Scone), Respondent.—
D.-F. Campbell—Christie.

Jan. 18, 1908.

Earl of
Mansfield v.
Lord Scone's
Tutor.

Entail—Disentail—Consents—Date of Entail—Trust to entail lands—Failure of trustees to carry out trust—Lands in Scotland subsequently entailed in terms of the trust—Option to settle lands either in England or Scotland—Entail Amendment Act, 1848 (11 and 12 Vict. cap. 36), secs. 2, 27, 28.—By his testamentary writings a testator bequeathed £150,000 to certain trustees for the purpose of purchasing lands in England or Scotland, and settling them on a certain series of heirs in such terms as would have imported, with regard to lands in Scotland, a strict entail. The testator died in 1840, and the trustees never accepted office or took any steps to carry out the purposes of the trust. In 1866 the general representative of the testator executed a disposition and deed of entail of a Scotch estate that he had purchased at a price exceeding £150,000. The disposition and deed of entail proceeded on the narrative of the trust created by the testator, was in favour of the series of heirs specified therein, and declared that the present deed was executed in fulfilment of that trust. In 1907 the heir of entail in possession of the estate, who was born in 1864, presented a petition to disentail, in which he claimed the right to do so without the consent of the next heir, on the ground that the date of the entail must be taken to be the date of the coming into operation of the trust, viz., the testator's death in 1840.

Held (by a Court of Seven Judges, *diss.* Lord M'Laren and Lord Pearson) (1) that the entail was an entail in execution of the trust; (2) that although there was an option to settle lands either in England or Scotland, the lands actually settled being lands in Scotland the provisions of the Entail Amendment Act, 1848, were applicable; (3) that in virtue of sec. 28

Jan. 18, 1903. of that Act the date of the entail must be taken to be the testator's death, and therefore, in virtue of sec. 2 of the Act, the Earl of Mansfield v. Lord Scone's Tutor. was entitled to disentail without consents; and (4) that could be drawn with regard to the portion of the estate that exceeded £150,000 in value.

Black v. Auld, Nov. 5, 1873, 1 R. 133, *followed*.

Lord Advocate v. Stewart, May 15, 1902, 4 F. (H. L.) 11.

Bill Chamber. ON 27th February 1907 Alan David sixth Earl of Mansfield presented a petition to the Court under the Entail Acts 1848 and 1850 for the disentail of the estate of Logiealmond in Perthshire. The circumstances under which the petition was presented were as follows:—

1st DIVISION. with three consulted Judges. Junior Lord Ordinary. On 11th June 1838 William third Earl of Mansfield by a codicil to his testamentary writings, by which codicil he bequeathed to Sir George Clerk, Baronet, William John Cuthbert Ellison, the sum of £150,000 in trust, that the survivors or survivor of them, or the executors or administrators or survivor, should, as soon as a proper and convenient purchases could be found, lay out and invest the money in the purchase of hereditaments in England or Scotland, of a clear and free estate or inheritance in fee-simple, either freehold or leasehold, or both, and settle and assure the same or cause the same to be conveyed, settled and assured so and in such manner as they might go along with and be holden and enjoyed by such persons as for the time being should, as heirs-male of the body of the said Earl, be entitled to the peerage, honour and title of Earl of Mansfield of the county of Middlesex, which he then had, and was entitled to, and to be unalienable and inseparable therefrom so far as the law or equity would permit, with certain remainders to be taken care that no son then *in esse* or issue male then living or to be born so far as the rules of law or equity would permit should have a greater estate or interest in possession in such hereditaments than he held in his life without impeachment of waste, and that proper provisions were inserted in such settlement to trustees for preserving the said remainders thereby to be limited. The codicil further directed Sir George Clerk, William John Law, and Cuthbert Ellison, the survivors or survivor of them, or the executors or administrators or such survivor, should invest the money or such part as was then in their hands, and declared that any profits arising from the investments should be added to the capital sum directed to be invested, and that the dividends, interest, and annual proceeds arising therefrom should be paid to the person or persons as would be entitled for the time being to the rents, issues, and profits of the land and hereditaments so to be purchased, in case the same were purchased and settled as aforesaid.

The third Earl died on 18th February 1840.

The trustees nominated in the said codicil never acted, and nor did they at any time take any steps to carry out the trust.

The third Earl was succeeded in the title, and also as executor and general representative, by his son William David sixth Earl. In 1846 the fourth Earl purchased the estate of Logiealmond in Perthshire at the price of £203,000. On 2d February 1847 the fourth Earl executed a disposition and deed of entail of Logiealmond, settling the same on the series of heirs special.

above-mentioned codicil to his father's will. That disposition and deed of entail, after reciting the said codicil, proceeded on the following narrative:—"Considering further that the said William Earl of Mansfield, my father, having died on or about the 18th day of February 1840, and his said last will and testament having been duly proved in the Prerogative Court of Canterbury on the 28th day of March thereafter, I, as sole executor thereby appointed, proceeded to realise the personal estate of my said deceased father, and in that character acquired and became possessed of funds to an amount exceeding the said sum of £150,000 given and bequeathed by the before-recited codicil to the said Sir George Clerk, William John Law, and Cuthbert Ellison, as trustees for the purchase and settlement of lands and heritages as therein directed, and whereas the said trustees did never accept or act in the execution of the said trust, and I did not pay over to them the said sum of £150,000, but have retained that sum and have been in the enjoyment of the interests and annual proceeds thereof since the time when the same came into my hands, and I am still a debtor to the said trustees therefor; and whereas at the term of Martinmas 1846 I purchased and acquired in fee-simple the lands, baronies, and others hereinafter described and disposed, commonly called the lands and barony of Logiealmond and others, at the price of £203,000, conform to disposition in my favour by James Brown, accountant in Edinburgh, and James Condie, writer in Perth, factors, commissioners, and attornies nominated and appointed by Sir William Drummond Stewart of Grandtully and Logiealmond, Baronet, dated the 15th day of May 1847 and the 3d day of August 1848, and instrument of sasine following thereon, registered in the General Register of Sasines, at Edinburgh, on the 21st day of May 1852, and that I have been in possession of the said lands, baronies, and others, since the said term of Martinmas 1846, but no conveyance thereof in favour of the said trustees, nor deed of settlement or entail, in terms of the said codicil, has yet been executed by me, and now seeing that I am willing and desirous to carry the trust committed to the said Sir George Clerk, William John Law, and Cuthbert Ellison, trustees foresaid by the codicil before narrated, into execution, in so far as the same relates to the application of the said sum of £150,000 in the purchase of lands and heritages to be settled and entailed as aforesaid, by conveying and settling or entailing the said lands, baronies, and others, in manner herein underwritten, and whereas the said Cuthbert Ellison, one of the trustees named in the before-recited codicil, died on the of , and the said Sir George Clerk and William John Law, being now the only surviving trustees, have declined to accept of or act in the said trust, and have devolved the whole purposes of the said trust and of the execution of the same, and of the whole powers and instructions specified and contained in the said codicil, upon me, conform to their declination and devolution of trust, dated the 30th day of July and 3d day of August, both in the year 1863; therefore, in implement of the trust created by the said codicil, I have assigned, disposed, and conveyed, as I by these presents assign, dispose, and convey. . . ."

The petitioner, the sixth Earl, who was born in 1864, succeeded under the destination in that entail to the estate of Logiealmond. The next heir under the entail was his only son, Lord Scone, who was a pupil, being born in 1900.

The petitioner averred, *inter alia*:—"By the Act 11 and 12 Vict.

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of the trust in pursuance of which the entail was executed. (1) The trust here was a trust to which sec. 28 applied, and that was not negatived by the circumstance that there was an option to purchase and settle land in England. All that was necessary was that the entail should have been made "in execution of the trust," and this entail was made "in execution of the trust," namely, that part of it which directed the purchase and settlement of land in Scotland. To hold otherwise would be to open the door to evasions of the purpose of the Act,¹ for all that would be necessary to avoid it would be to insert after a direction to entail lands in Scotland the words "or elsewhere." *Black v. Auld*² was a direct authority for this view, for there the option had existed. The *Lord Advocate v. Stewart*³ did not apply, for the trust there had not been executed, and the option to purchase and settle lands in England instead of Scotland could still have been adopted.⁴ (2) The disposition and deed of entail by the fourth Earl was a valid execution of the trust created by the third Earl. There was no doubt that *de facto* it was a carrying out of the trust purposes, for this estate was worth at least £150,000 and had been entailed on the prescribed series of heirs. The fourth Earl had really acted as a trustee in place of the nominated trustees who had declined to act, and there was no invalidity in that arising out of the doctrine of *delectus personarum*, for the executors of the original trustees had been included in the nomination. The original trustees could have assumed the fourth Earl as a co-trustee and then resigned, and they had practically done the same thing, though in an unusual manner, by devolving the trust on him. Nor was the question affected by the fact that Logiealmond was said to be worth more than £150,000. There was nothing to shew what the surplus value really was, and in any event if the fourth Earl chose to give it as an equivalent for the £150,000 he was entitled to do so.

Argued for Lord Scone's tutor *ad litem*;—(1) The option to purchase lands in England prevented sec. 28 of the Act of 1848 from applying here, for that Act only applied to Scotland, and so that section could only apply to a trust fund indefeasibly dedicated to the purchase and entailing of land in Scotland. That had been settled in *Lord Advocate v. Stewart*,⁵ where the distinction between money which must be entailed and money which may be entailed was clearly pointed out. *Black v. Auld*² was not an authority to the contrary, for the point had not been raised there, and the decision could not have been as it was if that point had been taken. Further, the expression "such money" in sec. 28 referred back to the definition of it in sec. 27, and was incomplete without it, and therefore, unless the definition in sec. 27 applied to the fund in question here, sec. 28 could not come into effect. But sec. 27 could have no application at all to this fund, for there never could be under this trust anyone who would be in a position to present a petition under that section. There never could be any nominal "heir in possession" until the option had been exercised by entailing land in Scotland, and as soon as that was done the opportunity for presenting a peti-

¹ Entail Amendment Act, 1848, sec. 47.

² 1 R. 133.

³ 4 F. (H. L.) 11.

⁴ The Entail Amendment (Scotland) Act, 1868 (31 and 32 Vict. cap. 84), sec. 17, was also referred to.

⁵ 4 F. (H. L.) 11, Lord Robertson, at p. 18, Lord Lindley, at p. 19.

Jan. 18, 1908. tion was gone. Therefore sec. 28 did not apply, and t
 Earl of be taken to be the actual date of the entail, viz., 1866.
 Mansfield v. the deed in question here a valid execution of the t
 Lord Scone's the supposed act of devolution on the part of the tr
 Tutor, unheard of method in Scots law, and was incompetent
 if the fourth Earl was really acting as a trustee, it wa
 for him to buy lands from himself and then entail th
 it was not a valid carrying out of the trust to make him
 he should have been a liferenter.¹ Fourthly, the esta
 the value of £150,000, as it should have been under th
 trust, but of a much greater value. *Quoad* the excess,
 was impossible to contend that it was entailed "in exe
 trust." In fact this deed of entail was not an executio
 at all, but a surrogatum for it.

At advising on 18th January 1908,—

LORD PRESIDENT.—William third Earl of Mansfield died i
 of his testamentary writings consisted of a codicil by which
 of £150,000 to trustees whom he named. The trust purp
 land in England or in Scotland, and settle it as therein pre
 series of persons who may be described as in the first instan
 entitled in their order to succeed to the Earldom of M
 phraseology used is technical and appropriate to English con
 it may be taken, in accordance with the decision of the Hou
Studd's case,¹ that, had the trustees bought land in Scotlan
 have appropriately complied with the direction by executing
 of strict entail.

William third Earl was succeeded in the title by his son W
 fourth Earl, who was also his general representative. The
 sion greatly exceeded £150,000. The trustees named in the
 accept office, and nothing was done. So matters stood till 1
 year the fourth Earl of Mansfield executed a deed of entail o
 Logiealmond, which he at that time held in fee-simple, havin
 for a sum exceeding £150,000. The narrative of that
 follows:—(His Lordship read the narrative, quoted *supra*).

By this time the state of the family was that the fourt
 only son, Lord Stormont, who had three sons, of whom the t
 in 1864, is the present and sixth Earl. As such he has su
 the destination in the said entail, and he presents this petitio
 the said estate. His only son Lord Scone, born in 1900, is a
 represented in this petition by his curator *ad litem*. Th
 apparent under the entail. The point, therefore, to be decie
 the date of the entail. If the date is the date of the execu
 then, as the petitioner was born before that date, he can on
 having his son's consent valued and dispensed with; but
 the entail is the date when the trust-deed first came into o
 1840, then the petitioner being born after 1st August 1848
 without consents.

The petitioner relies on the 28th section of the Rutherford

¹ *Studd v. Cook*, May 8, 1883, 10 R. (H. L.) 53

as follows :—" And be it enacted, that for the purposes of this Act the date Jan. 18, 1908. at which the Act of Parliament, deed, or writing placing such money or other property under trust, or directing such land to be entailed, first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail." The expression "such money . . . such land" refers us back to the 27th section, the opening words of which are :—" Where any money . . . has been or shall be invested in trust for the purpose of purchasing land to be entailed, or where any land is or shall be directed to be entailed, but the direction has not been carried into effect," &c.

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The first objection that is made to the petition is that in this case the entail was not made in execution of any trust. I do not think this view is correct. It is true that the actual trustees did not accept and proceed to entail. But what was the position in 1866? The fourth Earl was still debtor in the sum of £150,000. It seems to me that at any time from 1840 till the expiry of the period of the long prescription the machinery of the trust could have been reconstituted, the fourth Earl, or his representatives if he had died, been made to pay the £150,000, and the lands been bought and the deed executed. If, then, the fourth Earl, knowing all this, chose as he did to execute the entail himself, he being proprietor of the land to be entailed, and the value being admittedly over £150,000, I do not think that the transaction altered its quality because of that fact. Suppose the trustees had accepted, been paid the £150,000, and bought land of a third party. It would have been a perfectly competent form of conveyancing to execute the entail in the form of a disposition and deed of entail by that third party, leaving out altogether any conveyance to the trustees. That being so, can it be said to alter the matter because Lord Mansfield, the debtor in the £150,000, does the whole thing himself without going through the form of going to the Court to appoint trustees who would then merely ask him to execute precisely the deed which he did execute. And, further, that Lord Mansfield thought that the entail was being made in execution of the trust is clearly shewn by the narrative of the deed itself. Another test is this, if the entail is not in execution of the trust-deed, then up till 1880 the trust-deed could still have been made available. Suppose the trustees, if alive, had tardily accepted, or if new trustees had been appointed by the Court, could they after 1866 have sued Lord Mansfield for £150,000? Surely the execution of the entail would inevitably have furnished a sufficient defence.

The second argument for the respondent raises a more general point. They call attention to the fact that the expression "the trust" in section 28 refers you back to section 27, and they say that "in trust for the purpose of purchasing land to be entailed" must necessarily mean Scotch land, for that alone can be "entailed"; and that, inasmuch as this trust permitted of the purchase of English land, it cannot be a trust of the kind contemplated; and they rely on the case of *The Lord Advocate v. Stewart*.¹

¹ 4 F. (H. L.) 11.

Jan. 18, 1908. So far as decision goes this case seems ruled in terms by
 Earl of Mansfield v. Lord Scone's Tutor. *Black v. Auld*.¹ A reference to the report will shew that in
 that case there was an option to buy either English or Scotch land.
 But we must face the fact that, first, this point does not seem
 argued; and, second, the judgment of the House of Lords in
*Advocate v. Stewart*² had not yet been pronounced. I am of
 opinion that *Black v. Auld*¹ was rightly decided, and that it
 there laid down rule in this case.

The question in *The Lord Advocate v. Stewart*² was whether
 in trust did or did not answer the description of "entailed
 Finance Act, and was or was not liable to settlement-duty. Now
 as money is not land, it could only become "entailed land" by
 statutory definition. The House of Lords held that what was
 destined by trust purpose for the purchase of land to be
 entailed land or not—as to which there was a difference of opinion
 the Judges of the Court of Session and certain of the noble
 Lords—that could never be predicated of money which under the
 trust might never purchase lands which could be entailed, but
 purchase lands in a country other than Scotland to be settled in
 forms than those of Scottish entail; and, in accordance with the
 limitation of all taxing statutes, unless the property was specified
 under the tax, it must go free.

But the question here is what is the date of the entail for the
 requirements of the Entail Statutes, and I think that section
 entails as it finds them and fixes an artificial date. And what
*Black's case*¹ comes in as an authority is not because it is an
 example of a trust-deed where land other than Scotch might be
 bought (for as I said that point was not argued), but because in
 the entail once having been made, in a case where antecedent
 have been truly said that there was no certainty that the entail
 be made. In *Black's case*¹ the entail was not to be made until
 Black reached at least the age of twenty-five; it was to be made
 was thirty. Antecedently, therefore, it was not certain till Captain
 became twenty-five that the entail ever would be made. Never
 time having come when it ought to have been made—i.e., Captain
 having passed the age of thirty—it was held that the date was
 the trust-deed and not the date when Captain Black became twenty-
 five or thirty. I refer especially to the remarks of Lord Pres.
 which are too long to quote in full, but which shew clearly the
 difficulties of the situation were present to his mind. I quote
 his conclusion³:—"The words in the section which probably
 greatest difficulty are those which enact that that date shall be
 the date at which the lands should have been entailed in terms of the
 deed; and it does seem a little startling at first sight that what
 to the directions of the truster, it is not possible that lands should
 been entailed in terms of the trust for a long period after the trust
 came into operation as a trust-deed, yet still that the date of the

¹ 1 R. 133.² 4 F. (H. L.) 11.³ 1 R. 133.

is to be held to be the date at which the lands ought to have been entailed. Jan. 18, 1908. It seems as if in a case like this it was a provision of the statute that the direct contrary of what the truster provided shall be carried into effect. But that is really not so, because it is a mere artificial date that is here created, and created for a special purpose—for the purpose of securing the full and effectual operation of the disentailing clauses of the statute. And it was a provision of a very necessary kind, because if this clause were to be read otherwise, a man might succeed by means of trust directions in keeping up the money or the land for so long a period before it was actually entailed, that there should be parties in the enjoyment of the money or the land substantially under all the restrictions and fetters of an entail, although the entail has not been executed down to a very late period, it may be for two or three generations. The consequence of that, in regard to such a trust-deed, would be to defeat the leading object of the statute, and to enable a truster to bind a succession of persons not born at the date of his trust-deed. Now, that, I think, is a conclusive argument against the construction of the 28th section contended for by the respondents; and upon that ground I am for adhering to the Lord Ordinary's interlocutor."

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—
Ld. President.

Upon that I make two remarks. First, that in one sense *Black's case*¹ was *a fortiori* so far as difficulty was concerned, because while there was impossibility during the period up to the vesting of the entail to be executed, here there is only uncertainty; and, second, that so far as defeating the statute is in the truster's mind, it would indeed be an easy way to defeat it by inserting a power in a trust-deed to make it optional to buy foreign land. Put in its simplest form my opinion comes to this, that section 28 applies to all entails as it finds them; and that if an entail has been *de facto* made in virtue of the directions of a trust, then section 28 settles the date as the date of the trust first coming into operation, even although there may have been contingencies which, if they had operated, would have prevented an entail ever being executed at all.

Last of all, the respondents argue that in so far as the estate of Logiealmond exceeds £150,000 in value, it must be held to be entailed for the first time in 1866. I do not think we can inquire into that matter. It seems to me that by the narrative of the deed the fourth Earl was content, so to speak, to give up Logiealmond as in exchange for the discharge of his debt of £150,000; and that we cannot go into the question of the exact value as at that date.

I am, therefore, for granting the prayer of the petition.

LORD M'LAREN.—I am afraid I am unable to concur with the majority of the Court in this case. The case has been reported by the Lord Ordinary to this Division of the Court on the question whether the petitioner, the Earl of Mansfield, is entitled to disentail the estate of Logiealmond without consents, or whether he is in the position of being unable to disentail without the consent of the nearest heir, in which case, as the nearest heir is a pupil, the required consent can only be given by his tutor *ad litem*,

Jan. 18, 1908. after the value of his interest has been fixed and provided for.
 Earl of tion again depends on the date, actual or constructive, of the
 Mansfield v. which the lands are held. The estate is held under a dispositi
 Lord Soane's of entail made by William David fourth Earl of Mansfield,
 Tutor. 2d February 1866, and registered in the Register of Entails 16
 Lord M'Laren. If the date of the deed of entail (1866) is to be taken as the
 date of the entail, then the petitioner, who was born on 25th C
 is not in a position to disentail without consent. But the t
 petition is that the deed of entail was executed in fulfilment o
 stituted by the testamentary writings of William third Earl,
 the year 1840, which we were asked to hold to be the date o
 If it is so determined, Lord Mansfield would be entitled to
 estate without his son's consent, because he was born after
 1848.

The question arises in this way: By a codicil to the last
 third Earl, the testator gave and bequeathed to three trustees (w
 accept the trust) the sum of £150,000, in trust, to lay out and
 sum of money in the purchase of lands and estate in England
 and to cause the same to be settled and assured so as to be
 enjoyed by such person or persons as, for the time being, should
 to the peerage, honour, and title of Earl of Mansfield. The
 scribed certain further limitations which it is not necessary to
 directed that the annual proceeds of the invested money should
 the persons who would be entitled to the rents of the lands to b
 in case the same had been purchased and settled as aforesaid.

The testator made another codicil, dated 11th June 1838; I
 stand that, in the events which have happened, this codicil d
 upon the question under consideration.

It appears from the narrative clause of the deed of entail
 the grantor, the fourth Earl, was his father's sole executor, and
 character he had acquired and become possessed of funds to
 exceeding the prescribed sum of £150,000; that, as the enta
 "the trustees did never accept or act in the execution of the s
 I did not pay over to them the said sum of £150,000, but I
 that sum and have been in the enjoyment of the interests and
 ceeds thereof since the time when the same came into my hand
 still a debtor to the said trustees therefor." It is then narr
 1846 Lord Mansfield had purchased Logiealmond at the price
 and that he was desirous to carry the trust into execution b
 and settling or entailing this estate in manner underwritten. H
 assigned and disposed Logiealmond in terms of his father's t
 tion, and under the fetters of a strict entail.

The determination of the date of the entail for the pur
 Entail Amendment Act (11 and 12 Vict. cap. 36), depends on
 but the 27th section has also to be considered. The effective
 ing to the 28th section, is "the date at which the Act of Parli
 or writing, placing such money or other property under trust
 such land to be entailed, first came into operation." The part
 which bears on the construction is the introductory expression,

money or other property, real or personal, has been or shall be invested in Jan. 18, 1908. trust for the purpose of purchasing land to be entailed"; in the case there defined the party who would be the heir in possession of the lands may get payment of the money in question under the same conditions as would apply to the acquisition of lands in fee-simple.

As affecting the legal date of the entail under consideration three questions arise—(1) Considering that under the codicil which directed the settlement of landed estate, the trustees had an option to purchase lands either in England or in Scotland, can it be held that a trust for the execution of a Scottish entail came into operation until an election was made as between English and Scottish estate? (2) Can it be held that there was in any true sense an investment in trust for the purposes of the codicil until the estate of Logiealmond was settled by a deed of entail? (3) If these questions are answered in favour of the petitioner, is not 1866 the true as well as the actual date of the settlement as regards the excess of the value of the lands over £150,000?

On the first question my opinion is that it ought to be answered in the negative. The hypothesis of the 28th section is that there is a deed or writing placing money under trust, and by referring back to the 27th section we see that the trust in contemplation is a trust "for the purpose of purchasing land to be entailed." No other species of trust are contemplated except a trust of purchase money, or a trust of lands to be entailed. I think it is also clear that the entail considered in section 28 is an entail of Scottish estate, because the provisions of the statute have exclusive reference to Scotland. On this hypothesis the 28th section provides that the date when the deed or writing "first came into operation" shall be held to be the date of any entail to be made thereafter in execution of the trust. Now, to put the case most favourably for the argument of the petitioner, let it be supposed that Lord Mansfield's trustees had accepted the trust, that the money had been paid over to them, and that in the year 1866 the entail of Logiealmond was executed by the trustees. At any time before 1866 it would have been open to the trustees to purchase and settle a landed estate in England, and I do not see how in the case supposed the codicil could be said to have come into operation as a trust for the purchase and entailing of lands in Scotland until the trustees had made their election. At most it was only a power or an alternative direction. But then the alternative direction only comes into operation as a Scottish trust, when the trustees have elected between the two members of the alternative. This brings the case within the principle of the case of *Lord Advocate v. Stewart (Sprot's Trustee)*,¹ where it was held by the House of Lords that an alternative direction of this nature did not bring the money into the category of "entailed estate." The fact that the second alternative is the purchase and settlement of lands in England does not seem to be very material to the question. The case would be just the same if the alternative had been to establish a picture gallery or to make provisions for the family of the heir. Again, I think that it makes no difference in this question that the money was never paid to trustees. The fourth Lord

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¹ 4 F. (H. L.) 11.

Jan. 18, 1908. Mansfield took it upon himself to administer the trust, and his action has been accepted. But if it is granted that he was a viceroy, then he had an election as between English and Scottish law. If he was not a trustee, then the entail is his own act, and the date of the deed is the date of the entail.

Lord M'Laren. It is necessary, however, to attend to the principle of the decision in *Black v. Auld*,¹ because there the testator had directed an entail, which could not come into operation so as to confer a benefit on any person until the institute of entail (the testator's second son) had attained the age of five, and yet it was held that the date of the testator's death was the date when the trust first came into operation. This is a decision of seven Judges, and the leading opinion, that of Lord President Inglis, proceeds largely on the policy of the Entail Amendment Act, and the motive of the 27th and subsequent sections, which was to put an end to the enactments restricting the duration of entails by the insertion of trusts, liferents in succession, or other limitations in perpetuity. Then I think the determining element in *Black v. Auld*¹ was that at the death of the testator it was irrevocably fixed that there was to be an entail, if there were heirs to take, though the benefit to be conferred by the institute was postponed. As it happened, the institute was then in existence taking benefit under the trust, and he was thus enabled successfully to claim the fund, but that circumstance was not allowed to affect the construction of the Act of Parliament, and the entail was held to come into operation when according to the conception of the testator there was an unqualified, though postponed, trust purpose for constituting an entail. In the present case there was not an unqualified purpose of constituting the entailing of land in Scotland, and while it is easily seen that in the case of alternative directions the duration of a proposed entail may be postponed to an extent somewhat exceeding the contemplation of the Entail Amendment Act, yet, if this result follows, it is only because the Act has not explicitly dealt with this particular mode of prolonging an entail. The statutory provisions are altogether within the domain of positive law, and I do not think we can be guided by analogy or can hold that a trust purpose had come into operation at a time when consistently with the wishes his money might have been diverted into a different investment.

If my opinion is well founded, the date of the entail is the date of the death of the testator. The petitioner will be under the necessity of purchasing the consent of the heir. But it is proper that I should also answer the other question which may arise. On the second of these questions, and reading the 27th and 28th sections together, I think the 28th section presupposes that the land was invested in trust for the purpose of purchasing land to be entailed. The words I am quoting are in the 27th section, but I think that in the construction they must be read into the 28th, because the 28th section is to some extent of the nature of a proviso to the 27th, and does not repeat in words at length all the conditions of the cases with which the 27th deals. Now, in the present case, there never was any specific invest-

¹ 1 R. 133.

for the purpose of providing an entailed estate in favour of the Earls of Jan. 18, 1908. Mansfield in their order. On the declinature of the appointed trustees it would have been open to any of the prospective heirs of entail to have the trust constituted by the appointment of new trustees or a judicial factor. Or again, the fourth Lord Mansfield might have voluntarily put the sum of £150,000 beyond his control so as to impress it with a trust for the purposes of the codicil. But neither of these things was done, and until the year 1866 the money, or its equivalent in land, remained subject to the order and disposition of Lord Mansfield. I consider, therefore, that there was no effective trust in the sense of the statute during the period antecedent to 1866.

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On the third of the questions I have stated, I think it is perfectly clear that in so far as the value of the estate of Logiealmond exceeded the sum of £150,000 plus any profits derived from investments of that sum before the purchase, the surplus value of the entailed estate must be taken to be property settled by the fourth Lord Mansfield. To the extent of such surplus value the entail is not an instrument in execution of any antecedent trust, and in any view of the case this value would not be acquired in fee-simple by the present Earl except on the basis of the consent of the next heir.

LORD KINNEAR.—I agree with the Lord President. The question really is whether the petitioner holds the estate of Logiealmond under an entail executed in terms of a trust for the purchase of land to be entailed. If he does, then, upon the plain terms of the 27th and 28th sections taken together, the date of the entail under which he holds must be the date of the deed which put the money in trust. It is beyond all question that the third Earl by his will, which came into force in 1840, did put a sum of £150,000 in trust in order that it might be applied either in the purchase of land in Scotland to be entailed according to the law of Scotland, or else in the purchase of land in England to be entailed on the same series of people according to the law of that country; and it is beyond question that the deed upon which the present Earl holds purports in terms to be executed by the fourth Earl in performance of the trust created by his father's will. If that is a true recital, then the question is plainly answered in favour of the present Earl.

But then it is said that that is not a correct recital, and that in truth the estate of Logiealmond was not entailed in execution of any trust, but for some other cause, which I understand to be the mere will and pleasure of the fourth Earl to settle his own estate upon a series of heirs of his own selection. There are two points taken by the respondent in support of his contention. In the first place, it is said that the trust undoubtedly created by the third Earl's will never came into operation. The trustees declined to act, nothing was done in execution of the trust, and the fourth Earl, who made the deed of entail, was not acting in the execution of a trust, because, although he was the heir and executor of the truster, no trust had been committed to him. It is quite true that the trustees declined to accept, but then it is elementary and fundamental that the failure of trustees to accept does not affect the beneficial interest of the objects of the

Chancellor, I think, puts it quite clearly that nobody can call money entailed Jan. 18, 1908. estate except by the application of some interpretation clause in the Finance Act which the House of Lords was then considering. But apart from verbal criticism I think it clear enough upon the authority of the *Lord Advocate v. Stewart*,¹ and for my own part I should say that it was clear upon the plain construction of the statute, even if we had no authority to guide us, that so long as money remains, subject to a discretion vested in trustees to buy land in Scotland or to buy land in England, it cannot be treated as if it were already converted into entailed land in Scotland, so as to support a demand for immediate payment under the 27th section of the Entail Act, because such a claim would be completely defeated by a resolution of the trustees to buy land in England. So long then as the destination of the money is in suspense, the right given to a future heir of entail by the 27th section cannot be put in force. I think this follows from the judgment of the House of Lords in the *Lord Advocate v. Stewart*.¹ But the moment the suspense is determined by the purchase of land and the execution of a deed of entail it is ascertained at the same time that land has been purchased and entailed in the due performance of a trust. It is nothing to the purpose that an alternative course might have been followed. The trustees have none the less executed a trust by which money was put into their hands for the purchase and entail of land in Scotland. If this be so, the fact that during the interval while the final destination of the money was uncertain, the person who ultimately became heir of entail could not require immediate payment to himself, does not create the slightest difficulty to my mind in referring the terms of the 28th section to the terms of the 27th section for the mere purpose of ascertaining what is meant by "the deed placing such money under trust." Any difficulty which might have arisen in the construction of the 28th section itself is removed by the decision in *Black v. Auld*,² which I agree with the Lord President is directly in point. It must be kept in view that the artificial date which is created by the 28th section is not the date of the performance of the particular trust. It is the date when the deed itself comes to be operative, and therefore there can be no difficulty in the application of that enactment owing to any lapse of time, or any contingency which might postpone the specific performance of the trust to buy and entail land. It is just because such purchase and entail may be indefinitely postponed that the statute creates an artificial date for determining the conditions of disentail. The date to which the statute refers is the date when the deed came into operation, and I apprehend that the deed comes into operation, when it is a testamentary deed, on the death of the testator, and that nothing which happens afterwards can alter that condition of things.

I cannot say that I think much difficulty arises from the phrase "the date at which the land should have been entailed in terms of the trust." I do not say that I have no difficulty in fixing the exact meaning of that phrase. But I take it to be clear that it does not refer to any date at which it can be found that the trustees ought in fact, and in the due execution of their duty, to have made a deed of entail, because that time never can by any

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¹ 4 F. (H. L.) 11.

² 1 R. 133.

Jan. 18, 1908. possibility coincide with the date when the deed creating into operation. There must always in the nature of things be time, less or more, between the coming into force of a trust time when the trustees proceed to carry out their trust, and obvious that the contingency for which the enactment provides an undue delay by trustees to perform their duty, but also postponement contemplated by the trustor himself. The of the words seems to be that we are to assume that instead land or his money in trust for the purpose of an entail, the have made the entail himself. But any practical difficulty removed by the subsequent part of the clause, which really of more than one construction, and it is that the date of coming into operation shall be held to be the date of any entail hereafter in execution of the trust, whatever be the actual entail. The true answer to all the criticisms which have been the 28th section seems to me to be that of Lord President statute for its own purposes has imposed an artificial date upon of a certain class, and it is of no consequence that this artificial not square with the facts which have determined the actual particular deed of entail. I therefore agree with your Lordships that the petition must be granted.

LORD LOW.—I concur with your Lordship in the chair Kinnear. Your Lordships have so fully expressed my views that I do not think I could usefully add anything to what has

LORD ARDWALL.—I also concur in the opinion expressed by your Lordship and Lord Kinnear.

The Lord President intimated that LORD STORMONTH-DALRYMPLE, absent at advising, concurred in his opinion, and that LORD M'LAREN was also absent, concurred in the opinion of Lord M'Laren.

THE COURT remitted to the Lord Ordinary to grant or refuse the petition.

F. J. MARTIN, W.S., Agent.

No. 67.

Jan. 18, 1908.

Harvie v.
Smith.

MARION HARVIE, Pursuer (Respondent).—*D. P. M.*
WILLIAM SMITH, Defender (Appellant).—*Lip.*

Bankruptcy—Notour Bankruptcy—Constitution of notour where imprisonment for debt incompetent—Expired charges expenses—Small-Debt (Scotland) Act, 1835 (5 and 6 Will. IV. c. 39) sec. 1—Debtors (Scotland) Act, 1880 (43 and 44 Vict. cap. 21) sec. 1. The Debtors Act of 1880 by sec. 4 enacted that no person should be imprisoned on account of any civil debt (excepting taxes, rates, and tithes), and by sec. 6 enacted that "in any case in which the provisions of this Act imprisonment is rendered incompetent by bankruptcy shall be constituted by insolvency concurring with imprisonment on account of debt." The petition was granted on the charge without payment.

Held that sec. 6 of the Debtors Act, 1880, applied to imprisonment under that Act incompetent, even though the imprisonment was incompetent under a previous Act.

Black v. Watson, Nov. 29, 1881, 9 R. 167, *commented on and explained*. Jan. 18, 1908.

Observed that sec. 1 of the Small-Debt Act, 1835, which enacted that it should not be lawful to imprison any person on account of any civil debt which shall not exceed the sum of £8, 6s. 8d., "exclusive of interest and expenses thereon," had not the effect of rendering imprisonment incompetent in the case of a debt of £40, although that debt consisted of expenses only, where the expenses had been awarded in an action in which the principal sum decerned for exceeded £8, 6s. 8d.

On 9th May 1906 Marion Harvie, of Little Auchengree, Ayrshire, obtained decree in the Sheriff Court of Ayrshire at Kilmarnock against her tenant, William Smith, farmer, Little Auchengree, in which the Sheriff decerned in her favour for (1) the sum of £12, (2) the sum of £35, and also for the sum of £40, 3s. of modified expenses. On 19th July 1906 the said William Smith was charged at the instance of the said Marion Harvie for payment of the sum of £40, 3s. of modified expenses contained in the foresaid decree.

The days of charge having expired without payment, Marion Harvie presented a petition for cessio against William Smith in the Sheriff Court of Ayrshire at Kilmarnock. In the petition the petitioner referred to the foresaid charge and averred:—"The said charge has expired without payment having been made, and the defender is notour bankrupt."

A caveat having been lodged by the defender, the Sheriff-substitute (D. J. Mackenzie) heard parties thereon, and on 5th August 1907 pronounced an interlocutor holding that there was *prima facie* evidence of the notour bankruptcy of the defender, and on 2d September 1907 granted decree of cessio as craved.

The defender appealed to the Sheriff (Brand), who adhered, and the defender appealed to the Court of Session. The case was heard before the First Division on 18th January 1908.

Argued for the appellant;—The petition for cessio should have been dismissed, as the appellant had not been legally rendered notour bankrupt. The charge which had been delivered here was for a sum of expenses only, and not for any principal sum, and that being so, it could not be maintained that the debt to which the expenses were attached exceeded £8, 6s. 8d. On the face of the proceedings there was no principal debt due at all, much less a debt exceeding £8, 6s. 8d. The claim for expenses, therefore, fell under the provisions of the Small-Debt (Scotland) Act, 1835,* being a claim for expenses on a sum of less than £8, 6s. 8d., and therefore it could not be enforced by imprisonment. The Small-Debt Act of 1835,* though now repealed, was still in force at the date of the Debtors Act, 1880,†

* The Small-Debt (Scotland) Act, 1835 (5 and 6 Will. IV. cap. 70) [since repealed by the Statute Law Revision Act, 1891 (54 and 55 Vict. cap. 67)] provided, by sec. 1, that it shall not be lawful to imprison any person "on account of any civil debt which shall not exceed the sum of £8, 6s. 8d., exclusive of interest and expenses thereon. . . ."

† The Debtors (Scotland) Act, 1880 (43 and 44 Vict. cap. 34), which abolished imprisonment for debt, except in certain specified cases, enacts, sec. 6,—“In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment, or where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening prior to

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and therefore imprisonment for this claim could not be rendered incompetent by the Act of 1880, as it was incompetent at the date of that Act. The provisions of the Act of 1880 were therefore not applicable here,¹ and the only method of making the appellant notour bankrupt was by following the provisions of the Bankruptcy (Scotland) Act of 1856,² which had not been amended. Counsel for the respondent was not called on.

LORD PRESIDENT.—The point which we have to decide is one, namely, whether there was here good evidence of notour bankruptcy on which a petition for cessio might be granted.

Now, the evidence of notour bankruptcy on which the petition was granted was an expired charge for a sum of £40, 3s. of modified expenses which the defender was charged to pay under an extract of a decree *in foro*. On comparing the decree with the execution of it, it appears that the sum of £40, 3s. of modified expenses is the amount contained in the decree.

The point raised by the appellants is that the provisions of section 6 of the Debtors Act, 1880 (43 and 44 Vict. c. 34), which rendered imprisonment incompetent, applied to this case. The heading of that section is "*New Mode of constituting notour bankruptcy*," and the section says,—“In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a charge for payment, followed by expiry of the days of charge without payment, or where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the days intervening prior to execution without payment having been made.” And then the section proceeds,—“Nothing in this section contained shall affect the provisions of section seven of the Bankruptcy (Scotland) Act, 1856.”²

The appellant says that the section I have just read is not applicable to this case, because this is not a case in which imprisonment by its provisions was rendered incompetent, inasmuch as imprisonment was already incompetent at the date of the Act of 1880. In other words, he seeks to put a gloss on the expression “*rendered incompetent*” to the effect that it really means “*rendered for the first time incompetent*.” I do not think the appellant has any right to put such a gloss on these words. There were other ways of constituting notour bankruptcy than imprisonment, and the case of *Black v. Watson*¹ cited by the Lord President really points to that, though Mr Lippe's argument at first sight is supported by the form of expression used by the Lord President in his judgment in that case that the 6th section of the Act of 1880 provides, not for the first time, that previous to that Act imprisonment was incompetent but to the effect that previous to that Act imprisonment was rendered incompetent, by the provisions of that Act itself. That form of expression, however, is not applicable to the case at hand.

execution without payment having been made. Nothing in this section contained shall affect the provisions of section 7 of the Bankruptcy (Scotland) Act, 1856.”

¹ *Black v. Watson*, Nov. 29, 1881, 9 R. 167. [*Vide* *St. John v. Salvesen & Co.*, 1900, 2 F. 983, not cited.—Ed.]

² 19 and 20 Vict. cap. 79, sec. 7.

went, I think, beyond the requirements of the case. The point really decided by the case was that the grounds of constituting notour bankruptcy detailed in the Act of 1856 stand on their own basis apart from the Act of 1880. But when imprisonment for debt was abolished practically *in toto*, it became necessary to provide a new method of constituting notour bankruptcy in those cases in which under the old law imprisonment was required, but it was not necessary to interfere with the other methods of constituting notour bankruptcy, which still stand. Accordingly I do not think the appellant has any right to put on the words of the 6th section the gloss he proposes. The Act applies to all cases in which by its provisions imprisonment is incompetent. The matter can be very well tested by supposing that the respondent had attempted to imprison the appellant. I think in that case he would at once have been met by the Act of 1880.

Apart from that, however, it is necessary that for the argument of the appellant he could have been met by the Act of 5 and 6 Will. IV. c. 70, also, which provides that imprisonment shall not be competent in respect of debts less in amount than £8, 6s. 8d., exclusive of interest and expenses. That is, it says that such debts shall not be swollen by interest and expenses. Now, the objection here is that the sum charged for consists solely of expenses. But if we look at the decree here we see that the principal sums decreed for were each of them greater than £8, 6s. 8d. It is no answer for the appellant to say that you can only find that out by looking at the decree. It is for the person objecting to the notour bankruptcy to shew that it was wrongly constituted on the ground that the principal sum to which the expenses related was a sum less in amount than £8, 6s. 8d. He cannot shew that here, and I am therefore of opinion that on both grounds the appellant has failed.

LORD M'LAREN.—It is not surprising that the Bankruptcy Act of 1856 does not make provision for rendering a person notour bankrupt under a decree for expenses of a small-debt action, for sequestration under that statute could only proceed on the application of a creditor whose debt amounted to not less than £50—or in the case of more than one creditor to £70 or £100, as the case might be—and it was not to be expected that the expenses of a small-debt action would amount to such a sum. Accordingly, when imprisonment for debt was abolished by the Debtors Act of 1880—except in the case of alimentary debts and debts due to the Crown—it became necessary to have some mode of constituting notour bankruptcy in cases where under the older law diligence by imprisonment was competent.

Now, the appellant contends that the provisions of the 6th section of the Debtors Act regarding the constitution of notour bankruptcy in such cases do not apply, inasmuch as imprisonment was not, in the present circumstances, rendered incompetent by that enactment. I do not think it is a good objection to the applicability of the Debtors Act to say that it did not for the first time render imprisonment incompetent in cases where at the date of the Act it was already incompetent under the prior Act of 1835 (5 and 6 Will. IV. c. 70). The two Acts are to be read concurrently.

I also agree with your Lordship in thinking that no question under 5 and 6 Will. IV. cap. 70, arises, for if you suspend a charge, or bring an action

Jan. 18, 1908. to enforce payment of a debt, we are always entitled to look on which the decree is founded. Doing so here, one sees
 Harvie v. principal sums in the decree are each of them greater than
 Smith. viz., £12 and £35, and it has not been shewn that the sum
 Lord M'Laren. of modified expenses is a sum of the nature described in the
 Will. IV. c. 70.

LORD KINNEAR.—I am entirely of the same opinion. The Act of 1880 provides that, with certain exceptions, “no person at the commencement of this Act, be apprehended or imprisoned for any civil debt.” There is no question that the appellant is entitled to the benefit of that general enactment. Then it goes on to say, in effect, that where, under the provisions of this Act, imprisonment is competent, notour bankruptcy shall be constituted by certain proceedings and procedure which do not involve imprisonment. I think that procedure applies to cases where a debtor might have escaped imprisonment even if the Act of 1880 had not been passed. The intention was to provide a new method for creating notour bankruptcy in place of the method which the Act had abolished; and if the debt is one within the provisions of the Act, cannot be enforced by imprisonment, then for bringing about notour bankruptcy in a different way will avail nothing, and the debtor may be protected from imprisonment by an earlier enactment than as by the Act of 1880.

I am not satisfied, however, that the appellant's construction of the Act of 1835 (5 and 6 Will. IV. c. 70) is correct. What is there said is that imprisonment shall not be competent in respect of debts of less amount than £8, 6s. 8d., “exclusive of interest and expenses.” This is not a general enactment that no person is to be imprisoned for a debt consisting merely of interest or expenses. What the statute does say is that there is to be no imprisonment for any lesser sum than £8, 6s. 8d. Debts of a smaller amount shall not be brought up to the statutory sum by adding interest or expenses to the principal. If the debt amounting to more than that sum I see nothing to prevent the creditor recovering the principal, interest and expenses, in any way known to the law at that time. I am not satisfied therefore that the charge in question for £40, 3s. 6d. is outside the scope of the Act 5 and 6 Will. IV. c. 70. But that is merely a technical question, for whether the debtor would have been protected by the Act or not, it is certain that he is protected by the Act of 1880. The Act prevents his being imprisoned for the debt in question, and therefore he cannot be made notour bankrupt by such imprisonment.

LORD PEARSON was absent.

THE COURT refused the appeal.

LAING & MOTHERWELL, W.S.—GARDINER & MACFIE, S.S.C.—

MRS MARY ANN MULLEN OR MALONE, Claimant (Appellant).—
Morison, K.C.—J. A. Christie.

No. 68.

CAYZER, IRVINE, & COMPANY (Clan Line Steamers, Limited),
 Respondents.—*Hunter, K.C.—R. S. Horne.*

Jan. 23, 1908.

Malone v.
 Cayzer,
 Irvine, & Co.

Master and Servant—Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), Schedule I., sec. 1—“Where death results from the injury”—Suicide of workman who had become insane in consequence of accident.—The widow of a workman, John Malone, who had committed suicide, brought a claim against his employers for compensation for his death. She averred:—The deceased, who had already lost the sight of his left eye in the course of his employment, received an injury to his right eye by a splinter of iron penetrating it. As a result of the injury the sight of that eye began to fail, and eventually he became almost blind. “Owing to the gradual loss of sight in his right eye and consequent blindness, the said John Malone's mind became affected and he became insane, and on 20th August 1907 he committed suicide in his house at 401 Rutherglen Road. The death of the said John Malone was due to the foresaid accident.”

The arbiter having dismissed the claim as irrelevant, the Court recalled his determination and remitted to him to allow a proof.

Opinion of Collins, M. R., in *Dunham v. Clare*, L. R., [1902] 2 K. B. 292 approved.

MRS MARY ANN MULLEN OR MALONE, widow of John Malone, 1st Division, hammerman, residing at Rutherglen Road, Glasgow, having claimed compensation under the Workmen's Compensation Act, against Cayzer, Irvine, & Company, shipowners, Glasgow, for the death of her husband, the matter was referred to the arbitration of one of the Sheriff-substitutes of Lanarkshire, at Glasgow (Davidson), who dismissed the application as irrelevant, and at the request of the claimant stated a case for appeal.

The case set forth that the claimant had made, *inter alia*, the following averments:—“(2) On or about 25th May 1907, and for some months prior thereto, the said deceased John Malone was in the employment of the respondents at their said repairing shop in Finnieston Street as a hammerman. Said repairing shop is a factory within the meaning of the Workmen's Compensation Act, 1897. (3) On said date, about 7.30 A.M., the said deceased John Malone was engaged in the course of his employment in said repairing shop cutting an iron ladder. Another of respondents' workmen was holding a chisel against said ladder and the deceased was striking the chisel with his hammer when a piece of said iron ladder flew off, penetrating his right eye. (4) The said deceased John Malone was taken to the Eye Infirmary, where his eye was treated and he was then sent home. About twenty years before the date of said accident the said deceased John Malone had met with an accident which caused him to lose the sight of his left eye, and when he was injured on 25th May 1907 the sight of his right eye immediately began to fail, and became gradually worse until he was rendered almost blind. (5) In consequence of the said injury the said John Malone received a severe shock, and his nervous system completely broke down. Owing to the gradual loss of sight in his right eye and consequent blindness, the said John Malone's mind became affected and he became insane, and on 20th August 1907 he committed suicide in his house at 401 Rutherglen Road. (6) The death of the said John Malone was due to the fore-

Jan. 23, 1908. said accident, which arose out of and in the course of his
 Malone v. Cayzer, Irvine, & Co. with the respondents in their said factory at Finnieston
 The case further set forth that the respondents had

alia, that the application was irrelevant;* that the arb-
 tained that plea, and had dismissed the application, with

The question of law for the opinion of the Court was
 in the circumstances set forth in the case, the application
 dismissed?"

The appeal was heard on 16th January 1908.

Argued for the appellant;—The appellant averred that
 was the result of the accident, and she was entitled to
 her averments. Her contention was that the loss of sight
 the insanity which resulted in death. There was not
 dently impossible in that proposition, for insanity
 tendency, supervening on loss of sight, was well recognised
 science and by leading alienists as a natural sequence
 no suggestion here of the intervention of a responsible
 proximate cause of the death. If, in fact, death resulted
 injury that was all that was necessary, and it was immaterial
 the death was a probable consequence of the accident or
 was a pure question of fact, and should be remitted to the
 Even if it were a mixed question of fact and law, the facts
 ascertained before the matter could be disposed of.

Argued for the respondents;—On the claimant's own aver-
 death here was due to Malone's own act, namely, his suicide
 therefore no inquiry should be allowed. The suicide was
actus interveniens, in the words of Collins, M. R., in *Dunham v. Clare*
 and cut off all connection between the original accident and the
 The chain of causation averred here was far too weak to
 to go to proof, but even if it could be made out, it would be
 impossible to deny that the blindness was just as much a
 the former accident, by which he lost one eye, as the death.
 Further, death by suicide could never be an "accident"
 of the Workmen's Compensation Act.³

At advising on 23d January 1908,—

LORD PRESIDENT.—The facts which give rise to the controversy
 certainly somewhat out of the common. It is an arbitration under the
 Workmen's Compensation Act, the claimant in it being the
 workman called Malone, who was in the employment of the
 Cayzer, Irvine, & Company. The averments of the claimant
 set forth that while Malone was at his work in May a splinter
 into his right eye. That, of course, was an ordinary accident
 of his employment, which, had he survived, would have enabled him
 make a claim for compensation in the ordinary way. It seems

* The Workmen's Compensation Act, 1897 (60 and 61 V. c. 39) Schedule I., sec. 1, enacts:—"The amount of compensation shall be—(a) where death results from the injury. . . ."

¹ *Dunham v. Clare*, L. R., [1902] 2 K. B. 292, per Collins, M. R., 296; *Golder v. Caledonian Railway Co.*, Nov. 14, 1902, 5 F. 100.

² L. R., [1902] 2 K. B. at p. 296.

³ *Hensley v. White*, L. R., [1900] 1 Q. B. 481; contrasted *Sugg & Co.*, L. R., [1900] 1 Q. B. 486.

re lost the sight of his other eye, and the injury was such his remaining eye, according to the averments, immediately and became gradually worse until he was rendered almost continues the claimant—I now read textually,—“In consequence of the injury, the said John Malone received a severe shock, and he became completely broke down. Owing to the gradual loss of sight and consequent blindness, the said John Malone’s health was affected and he became insane, and on 20th August 1907 he died in his house at 401 Rutherglen Road. The death of the said John Malone was due to the foresaid accident, which arose out of and in connection with his employment with the respondents.”

That statement of the facts the learned Sheriff-substitute, in this case came as arbiter, dismissed the application as irrelevant. The claimant has appealed to your Lordships, and the motion before your Lordships is to send the case back to the Sheriff and tell him to allow a proof of the facts which I have read. Of course there can be no question, if the accident having actually happened,—that is to say, the injury to his eye, but what happened afterwards is evidently a question on which there may be controversy.

The rule in the statute is that the death must be the result of the injury. The views which I hold have been so extremely well expressed by Lord Collins, when he was Master of the Rolls, that I prefer to follow his lead and has said rather than try to re-express them myself. The case which I am going to cite is taken from the case of *Dunham v. Clare*.¹ The facts in that case was that a man was carrying some heavy goods which slipped and fell on his foot, inflicting a wound in his foot which he took into an hospital, and a disease called phlegmonous erysipelas. The evidence was that erysipelas of this description was the consequence of a wound of the kind, and that, according to the medical authorities at present obtains, was caused by the introduction somehow of a germ. Lord Collins says this—“The applicant for damages, therefore, has to shew an accident causing injury, and death resulting from the injury. In the present case there was an accident causing injury, and the only question is whether death resulted from the injury. If death in fact resulted from the injury, it is irrelevant to say that death was not the natural or probable consequence of the injury. The question whether death resulted from the injury is a question which involves an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and is substituted for it, that is a new act which gives a fresh set of consequences. In dealing with an obligation created by contract, or in dealing with a case of contract or tort or with a liability in tort. In the case of contract, a person who commits a breach of contract is liable for the consequences which naturally follow from the breach. In cases of tort, when the question arises whether a person is liable for a breach of some duty imposed upon him, he probably, and certainly, comes under a somewhat larger liability than

¹ L. R., [1902] 2 K. B. 292.

Jan. 29, 1908. would be the case if it were a breach of contract, but still measured by what are the reasonable and probable consequences of a breach of duty. That lets in the consideration of reasonableness. The question of reasonableness comes into the present discussion.

Malone v. Cayzer, Irvine, & Co.
Ld. President. imposed the liability irrespective of any error of judgment on the part of the employer. The only question to be considered is whether death or incapacity in fact result from the injury? That is, in my opinion, and, if that is so, I think that the Sheriff-substitute is quick here in dismissing this case as irrelevant upon the face of the pleadings.

I do not think I ought to say much more, except to explain that I am very far from saying that upon the face of this pleading there is no case made out, because the question is whether causation is proved or not, and it may be a somewhat uphill matter for the claimant to make out a case. I should like to say that she will have to do something more than say simply that there was a possibility of death arising from the injury in such a way; she must shew that it was in fact the result of the injury. I have some doubts as to whether the state of knowledge of the facts and the logic is so fixed as, in circumstances like this, to enable one to draw a definite conclusion, but I do not think we could try the matter from the facts on such subjects. Therefore, I am of opinion that we should dismiss the case to the Sheriff-substitute, and order him to allow an inquiry in the case to be averred.

LORD M'LAREN.—If we were to criticise the statements of fact made in this case with the same strictness which we do in questions of relevance in this Court, there is a great deal, I think, to be said against the averments, because I cannot gather from the Sheriff-substitute's statement anything more than this, that the man committed suicide in consequence of the depression of mind brought on by his blindness. The averment of insanity in the physiological sense of a result of injury to the brain, but merely that a man has committed suicide and is supposed to have done so under some insane impulse. It seems to me that in construing the Act of Parliament, and particularly the beginning of the First Section, we must hold that when the Act prescribes as a condition of compensation that death results from the injury, what is within the contemplation of the statute is a bodily or material injury with death materially resulting therefrom. To explain what I mean regarding insanity—if a person, being sane, were to receive a blow or a wound on the head which set up inflammation in the brain, and a medical expert came to the conclusion that the inflammation of the brain was the result of the blow on the head, and if the inflammation continued and left the man in an insane condition, from which, eventually, he died, then I should not for a moment doubt that the man's death was the result of the accident. But, on the other hand, it is easy to figure out a case where death resulting only from the moral effect of an accident. If, for example, a man in consequence of the loss of his sight took to drinking and led a dissipated life by intemperance, that would be a very clear case for not granting compensation; because, although in a sense his death was the result of the accident, it was not a material but a moral result. Now, in this case I am not disposed, any more than your Lordship, to construe the statute in that way.

e, which is merely an echo of the averments of the party
ness. I think there ought to be a proof; and as the parties
ring the case before us again, I hope the Sheriff-substitute
attention to the point whether this is insanity that would be
ical evidence of the symptoms, or whether it is anything
mode of stating the supposed cause, because there must be
be suicide. I agree that it is desirable to have the facts
as, and I notice that in the case of *Dunham*,¹ which you
there had been an inquiry, and the judgment of the Court
a statement of the facts proved in the case.

AR.—The question whether death has resulted from an
ys a question of fact. Therefore, I think it is indispensable
or should have the facts ascertained before he decides it. I
hat the case should go back to the learned Sheriff in order
er may have an opportunity of proving her case if she can
think the less one says about the *prima facie* aspect of the
facts probably the better; but one cannot help seeing that
difficulty in connecting the accident with the alleged result
chain of connection. The exact point where the difficulty
ot know, but, speaking for myself, I do not think I have
edge of the pathology of insanity to form even a provisional
e with your Lordships that the facts must be ascertained.

er was absent.

ER answered the question in the negative; recalled
mination of the arbiter; and remitted to the Sheriff-
te as arbiter to allow parties a proof of their averments.

N & MANSON, W.S.—ANDERSON & CHISHOLM, Solicitors—Agents.

ART CAMPBELL (Mrs Thomson's Trustee), Pursuer and
Raiser (Respondent).—*Chree*—J. D. Millar.

CHAN ALLAN, Claimant (Reclaimant).—*Cullen, K.C.*—
A. M. Mackay.

ULAY AND ANOTHER (John Sharp Thomson's Trustees)
S, Claimants (Respondents).—*Chree*—J. D. Millar.

Testament—*Conditio si institutus sine liberis decesserit*—
Nieces—*Conditional Institution*—*Specific Legacy*.—By her
position and settlement a testatrix, who had no children,
ts of nephews and nieces, directed her trustees, *inter alia*,
for behoof of her niece Christina Black in liferent and her
and failing such children to pay it as follows:—To her own
Black £1000, to her niece Jane Black £750, and to her
Boswell Black £750: "Declaring that if the said Chris-
predecease me the said sum of £2500 shall form part of
my estate." The Blacks mentioned were the whole family
e testatrix. To each of the testatrix's nephews and nieces
a share of the residue. Christina Black survived the testa-

¹ L. R., [1902] 2 K. B. 292.

d in the sixth purpose formed the whole of the Black residuary legatees under the eighth purpose were the nephews and nieces of the testatrix, and a brother of her husband.

Her niece Christina Black, mentioned in the sixth purpose, died on 7th November 1905. She had never been married. Her niece Jane Black, to whom £750 was bequeathed under the eighth purpose of the settlement, was married to Alexander Black and died on 7th January 1879, thus predeceasing the testatrix and leaving one child, Stephen Strachan Allan.

In 1892 Alexander Milne Allan, as tutor of his pupil Stephen Strachan Allan, brought an action against the trustees, in which he claimed the payment of the legacy bequeathed to the pupil's mother under the eighth purpose, and of the estimated amount of her share of the residue of the eighth purpose. It was decided by the Court that the *conditio si institutus sine liberis decesserit* did not apply to the legacies to the nephews and nieces under the fourth purpose, but that it did apply to the residuary legatees under the eighth purpose—*Allan v. Thomson's Trustees* 20 R. 733.

The issue was whether the *conditio si institutus sine liberis decesserit* applied to the sum of £750 contingently bequeathed to Jane Black or whether consequently it was payable to her son Stephen Strachan Allan or fell into residue.

The surviving trustee of Mrs Thomson thereupon, as pursuer, brought a multiplepinding for the determination of the following claims:—(1) the surviving residuary legatees and representatives of deceased residuary legatees other than the testatrix's niece Mrs Compton; (2) Stephen Strachan Allan. No claim was lodged for the children of Mrs Thomson.

The compearing residuary legatees and representatives of deceased residuary legatees claimed to be ranked and preferred *in medio* to the extent of $8\frac{2}{3}$ eleventh shares thereof to each of the five children of the testatrix's husband, to the trustees of her brother-in-law, and $1\frac{1}{3}$ shares to the testatrix's nephews, Charles Boswell Black and George Black, each claiming in addition to their share a third of a share as one of the next of kin of Miss Black.

Stephen Strachan Allan claimed to be ranked and preferred to the whole fund *in medio*, or alternatively, to one-eleventh share of the fund.

His first above mentioned plea was;—(1) The fund is the residue of the deceased's estate, the claimant is entitled to be ranked and preferred thereon in terms of the will, on a sound construction of the trust-disposition and the circumstances in consequence of Jane Black's having predeceased the testatrix, the sum destined to her fell into residue, and the claimant is entitled to be ranked and preferred in terms of the will.

His second plea was;—(1) The fund having fallen into residue, but having been carried to the credit of the testatrix, the claimant is entitled to be ranked and preferred in terms of the will, by virtue of the implied *conditio si sine liberis decesserit*.

Jan. 24, 1908.

—
Allan v.
Thomson's
Trustees.

was against the application of the *conditio*, and, taken along with the other circumstances present here, was sufficient to shew that the *conditio* did not apply in this case. The cases of *Roughley v. Trustees*,¹ and *Taylor*,² were all cases in which the gift was not a family provision, and the result of holding that the *conditio* did not apply would have been intestacy. These cases were special, and depended upon the recognition of any general rule, but upon their facts and circumstances.

At advising on 24th January 1908,—

LORD JUSTICE-CLERK.—I am very clearly of opinion that the decision of the Lord Ordinary in this case is right and ought to be affirmed. The question whether a bequest in this case was considered in a former case by this Court, and it was decided that a bequest under it of a share of a fund was under the *conditio si sine*, but it was also held that a specific legacy being a personal bequest for an individual described as "memento of me," was not of the nature of a family provision, and the doctrine could be held to apply.

In my opinion it would be inconsistent with that judgment to hold that the sums bequeathed to certain individuals by a destination other than the original disposal went to other people altogether were family provisions. The sum in dispute here was not a share of a fund to be equally shared by the other members of the family. It was a specific sum directed to be paid to an individual. The bequest had all the characteristics of an ordinary legacy as distinguished from the disposal of the residue, which was expressly ordered to be divided among a class.

There is here no ground for presuming that the testator intended to provide for the possible contingency of the person instituted legatee dying before the testator, and in the absence of such ground there is no reason for applying the *conditio* and applying it to the gift. Here the testator, having provided for the possibility of a sum of £2500 not being taken by those named in the will, intended primarily to favour, gave specific directions that it was to be paid with by paying specific sums of varying amount to individuals named in the will, in a mode of disposal in marked contrast to a family provision for the benefit of persons.

On these grounds I would move your Lordships to adhere to the decision of the Lord Ordinary.

I may add that I have had an opportunity of considering the opinion prepared by Lord Stormonth-Darling, which goes more fully into the details of the case, and in which I entirely concur.

LORD STORMONTH-DARLING.—The fund in question in this matter consists of the balance of residue, so far as undistributed by the testator and acting trustee, of the estate of the late Mrs Christina Stephenson, widow of Mr Charles Duirs Thomson, solicitor in M.

¹ 1794, Mor. Dict. 6403.

² 1862, 11 R. 423.

³ 1862, 24 D.

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 —
 Aitken,
 Campbell, &
 Co., Limited,
 v. Boullen &
 Gatenby.

viz., £76, 1s. 9d.; (4) that on or about 20th June following made a complete examination of said goods, and that thereof were not conform to sample; (5) that of the pursuers intimated the disconformity to the defenders and that of 69 pieces of the said goods—64 being now agreed to be returned—intended—and the said 69 pieces were sent back to the pursuers at Manchester; (6) that the pursuers at the same time intimated to the defenders their acceptance of the balance of the goods, and that a portion of the said goods returned to the defenders had been received in July 1905, and are now, by agreement of parties, again in the pursuers' hands; (7) that the defenders refused to agree to the attempted rejection, and have refused to accept re-delivery of the goods; they have never recognised or acquiesced in any distinction of the contract of sale in relation to goods accepted and goods rejected. Finds in law (1) that the intimation of rejection was not valid, that in respect it related only to a rejection of part of the goods delivered under one contract of sale there was no valid rejection required by the Sale of Goods Act, section 11 (2); (2) that the acceptance or retention of the balance of the goods was a valid retention under the said section of the said Act, and that although the said attempted partial rejection was invalid, the pursuers cannot now claim to retain all the goods and sue for the balance. Therefore assoilzies the defenders from the conclusions sought and decerna."

The pursuers appealed to the Sheriff (Guthrie), who, by his decision dated 6th December 1906 and 24th January 1907, recalled the defender's appeal, found that the pursuers were entitled to reject the defective pieces and retain those that were conform to sample,* that they were entitled to repayment of the price paid for them for the defective pieces, and to payment of a sum in name of damages, and therefore decerned against the defenders the sum of £45 sterling under the first alternative of the petition.

The defenders appealed to the Court of Session, where the appeal was heard before the Second Division on 13th and 17th January 1907.

It was agreed between the parties that if any sum was awarded under the second alternative prayer of the petition, the same was payable as £26, 18s. 3d.

Argued for the defenders and appellants;—By the counsel for the defenders, as it stood prior to the Sale of Goods Act, 1893, the pursuers were competent for a buyer under a contract of sale to reject

* The Sheriff based his judgment on sec. 30 (3) of the Sale of Goods Act, 1893.

The Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), section 11 (2). "In Scotland failure by the seller to perform a part of a contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the seller as in breach, and to claim compensation or damages."

Sec. 30 (3). "Where the seller delivers to the buyer the goods contracted to sell mixed with goods of a different description, the buyer may accept the goods which are in conformity with the contract, the buyer may accept the goods which are in conformity with the contract and reject the rest, or he may reject the whole."

tain part.¹ He had to reject all or none. The reason the seller had not delivered goods of the quality contracted for was to rescind the contract. If the contract was rescinded, the buyer could not retain part of the goods. Under sec. 11 of the Sale of Goods Act, 1893, the buyer was entitled either to reject the goods or to retain them and claim damages. But that subsection gave him no right to reject part of the goods and retain the rest. He was merely given an alternative to his common law remedy of rejection, and he was bound to choose between the alternatives: he must take one or the other, and could only take one.² The Sale of Goods Act, 1893, did not apply to such a case. The word "description" related only to *genus* or *quality*. The defective goods here were defective in *kind*. They were not different in kind. Although inferior "maroon twills." Further, the heading of section 30 was "wrong quantity," and the section was really intended for cases where the whole of the goods ordered had been delivered with, and in addition to them, goods of a different kind had been ordered.³ Examples of the sort of case to which section 30 was to be found in *Levy v. Green*,⁴ and *Nicholson v. Little*.⁵ The case of *Jaffé v. Ritchie*,⁶ upon which the decision was in the defenders' favour. There the whole of the goods were rejected, and the difference was a difference of a kind, and not of a quality.⁷ The pursuers' rejection of part of the goods and their election to retain the remainder was therefore incompetent and invalid. If they had not exercised their right to reject validly, they could not now elect the remedy of rejection, and could not now claim damages. Under sec. 11 (2) of the Sale of Goods Act, 1893, the buyer must elect one or other of the remedies given to him. He cannot have both. He must either affirm the contract or disaffirm it. The application to this class of case of the principle of election was simply the application to this class of case of the principle of election. Once he had repudiated the contract, he could not go back upon his repudiation, readopt the contract, and claim damages. He must elect either to repudiate the contract and by it, and his election once made was irrevocable. It was that even if he exercised his right of rejection and consequently ineffectually, he could not thereafter elect to affirm the contract for he had elected to repudiate the contract.⁸ The pursuers had elected to repudiate the contract, and therefore could not claim damages. The ground of decision in *Paton &*

Emerson & Co. v. Chapham, 1872, 10 Macph. (H. L.) 74, Lord at p. 81.

Construction Co., Limited, v. Hurry & Young, 1897, 24 R. 312, Lord at p. 323; *Croom & Arthur v. Stewart & Co.*, 1905, 7 F. 1118; *Stewart & Co. v. Schultze & Co.*, 1900, 2 F. 1118.

the Sale of Goods Act, p. 72.

Levy v. Green, Q. B. 319.

Nicholson v. Little, Q. B. 620, *per* Blackburn, J., at p. 625.

1872

p. 243.

Justice-Clerk Inglis, 23 D. at pp. 248-9.

Construction Co., Limited, v. Hurry & Young, 1897, 24 R. 312; *Croom & Arthur v. Stewart & Co.*, 1905, 7 F. 563; *Lupton & Co. v. Lupton*, 1900, 2 F. 1118.

Jan. 24, 1908. *Sons v. Payne & Co., Limited*,¹ was that the buyers had elected to retain the goods, and not to reject them.

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Argued for pursuers and respondents;—(1) Not more than three courses were open to the pursuers here, viz.:—(a) rejection of the whole of the goods; (b) retention of the whole of the goods and a claim for damages; (c) rejection of part of the goods and retention of the balance. Sec. 30 (3) of the Sale of Goods Act, 1893, applied here. The word “description” referred to quality, and not to *genus* or kind. Difference of description might refer (a) to difference of *genus*, e.g., chalk and cheese; (b) to difference of species, e.g., stilton and cheddar; (c) difference of quality of the same species, e.g., different qualities of cheddar. If the word “description” only applied to difference of *genus*, then it was superfluous. A buyer was required to entitle a buyer to reject such of the goods as were of a different *genus* from the goods ordered. The kind of case referred to by Lord Justice-Clerk Inglis in sections (1) and (2) of section 30 exhausted the possibilities of rejection of quantity. Subsection (3) applied to quality. The pursuers were therefore entitled to reject the defective part of the goods and retain the balance even if the defect was only one of quality. Here the defective goods were goods of a different species from the samples sent. “Tender” goods were goods of a distinct class from goods which were merely “slightly defective.” But if the pursuers were not entitled to reject the goods and retain the balance, they were now entitled to retain the goods and claim damages as for breach of contract. If rejection was invalid, then the goods were really retained. A defective attempt to reject partially did not prevent the pursuers from electing to claim damages.² The case of *Electric Co. v. British Electric Co., Limited*,³ was the decision of a majority only, and although it was followed in *Croom & Arthur*,⁴ its soundness had been questioned. In view, both these cases were distinguishable. The ground on which there was that by keeping and using the goods the buyers were precluded from exercising their right to reject, and that having elected to retain they could not afterwards claim damages. Here the pursuers had made any final election. They had merely made an attempt to reject in part, which had not been consented to. The case of *Thorn & Co.*⁵ was also distinguishable. The claim negative of the right to really both to reject and to retain, which, of course was not possible. All these cases were cases of personal bar. There was no personal bar here. The defender had suffered no prejudice from the attempted partial rejection.

At advising on 24th January 1908,—

LORD LOW.—I am of opinion that this is not a case to which section 30 of the Sale of Goods Act, 1893, applies. That enactment applies to a case of a seller delivering to a buyer “the goods he contracted for” with goods of a different description not included in the contract.

¹ 1897, 35 S. L. R. 112.

² 1860, 23 D. 24.

³ *Paton & Sons v. Payne & Co., Limited*, 1897, 35 S. L. R. 112.

⁴ 1897, 24 R. 312.

⁵ 1905, 7 F. 563.

⁶ *Croom & Arthur v. Stewart & Co.*, 1905, 7 F. 563, per Lord Low at p. 567.

⁷ 1900, 2 F. 1118.

"description" is there plainly used to denote the kind of J. for, and that the right of partial rejection conferred upon A only to cases where goods of the kind contracted for are C of a different kind, and not to cases where all the goods C contracted for, but part of them is not of such good quality G bound to supply. Here the goods contracted for were L and the goods delivered were "maroon twills," but 64 out re not of such good quality as the samples which formed contract. I am accordingly of opinion that the pursuers to reject the 64 pieces and to retain the remaining 69, and interlocutor of the learned Sheriff must be recalled.

Question is whether the pursuers are barred by having attempted pieces from retaining the whole goods and claiming damages at the defenders have failed to perform a material part of What happened was that the pursuers actually returned the defenders, but the latter sent them back, and they are now of the pursuers awaiting the issue of the present action. As regards the pursuers' claim for damages the defenders way prejudiced by the attempt to reject the 64 pieces, but maintain, and the Sheriff-substitute has given effect to the the pursuers, having elected to follow one course, cannot to adopt another. The authority mainly relied upon is *Instruction Co. v. Hurry & Young*.¹ The pursuers in that a dynamo to the defenders which was disconform to con- siderers intimated to the pursuers that they rejected the urtherless they continued to use it for several months. The ought an action for the contract price, in answer to which ntained that they were entitled to retain the machine, and of damages against the price. It was held by a majority e having elected to reject, were not entitled to fall back ive of retaining the machine and claiming damages.

It is that that judgment has no application to the present d of judgment was that the statute having specified two which the buyer might adopt, he was bound to make up f the two he would follow, and could not be allowed first e seller that he was to take one course, and then, when he ore to his advantage to do so, to adopt the other course. t what happened in this case. No doubt the pursuers which they could not insist upon taking as a matter of nders might have consented to the course proposed, but o so, and they were quite entitled to refuse. I can find in that position of matters to debar the pursuers from ng either of the courses open to them under the statute, eir attempt to reject part of the goods had not put the rse position than they would have been in if the pursuers ed to proceed in conformity with the statute. As I have , nothing of that sort is suggested.

¹ 24 R. 312.

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Lord Low.

Suppose that when the defenders refused to take back the pursuers had at once also returned the remaining 69 pieces. I am not entitled to say that they repudiated the contract and rejected the goods. I cannot imagine any ground upon which it could have been said that they were not entitled to follow that course. But I think they are entitled to say to the defenders,—“I have taken back the goods which are disconform to sample, we shall keep along with the goods which are conform to sample, but we claim damages in respect that you have failed to perform a material contract.”

I am therefore of opinion that the Sheriff-substitute was wrong in his decree that “although the partial rejection was invalid, the pursuers are entitled to claim to retain all the goods and sue for damages.”

It appears that the pursuers paid the contract price of the goods. They discovered that part of them was not conform to contract. Their claim is for repayment of the amount of the loss they have sustained in respect of part of the goods not being conform to sample. I understand that the parties have adjusted the amount to £26, 18s. 3d., and accordingly I am of opinion that decree should be pronounced for that sum.

LORD ARDWALL.—In April 1905 the defenders sold to the pursuers 133 pieces of maroon twills, and delivered them to the pursuers on 6th May following. On 22d May the pursuers paid to the defenders £76, 1s. 9d. as the price of the goods. On 20th June following the pursuers, having made a complete examination of the goods, discovered that certain pieces were not conform to sample, and they intimated to the defenders of these pieces, and returned to them 64 pieces which were not conform to sample. At the same time they intimated to the defenders their acceptance of the balance of the goods. The defenders refused the attempted partial rejection, and have never accepted the goods, nor otherwise acquiesced in the said rejection. The pursuers, however, have now in their hands the rejected goods, and also those which were kept as being conform to sample.

In these circumstances the present action is raised for £50, 19s., being the price of the rejected goods, or, alternatively, for £25, 16s., being the loss and damage sustained by the pursuers in footing of their retaining the whole goods.

The Sheriff-substitute held that the pursuers were not entitled to reject part of the goods, and, that having attempted to reject part of the goods, they are barred from now keeping the whole of the goods and claiming damages. He accordingly absolved the defenders. The Sheriff-substitute, on the ground that the pursuers were entitled to reject part of the goods in virtue of the provisions of section 30 (3) of the Goods Act, 1893. He accordingly has given decree for £36, 10s., the price of the defective pieces which were rejected, and a sum of £8, 7s. 9d. in name of damages.

I propose to deal first with the question whether the provisions of section 30 (3) of the said Act apply to the circumstances of the

the following terms:—"Where the seller delivers to the buyer goods which he contracted to sell mixed with goods of a different description included in the contract, the buyer may accept the goods in accordance with the contract and reject the rest."

In the present case what was sold was maroon twills equal to samples proved that 64 of the 133 pieces sent were not equal to the sample, but that they were more "tender," as it is called, than the sample. "Tenderness" in goods of this kind, it is explained, is an effect of softness or weakness in the goods, and there is some effect that when goods of this description are of such quality as to be called "tender" it is usual to sell them by the pound and not by the yard, and on the strength of this practice of the trade it is the pursuance of the Act that "tender" goods are goods of a description which were conform to the sample within the meaning of the Act. I confess I cannot accept of this. I am of opinion that the whole of the goods sent in fulfilment of the contract were goods of the same "description," namely, maroon twills, and their conformity or disconformity to sample fell to be determined by the varying degrees of strength on the one hand and softness on the other; and from the proof I think it sufficient to show that the gradation in the texture of the goods varied greatly, and that at any point in the variation from strong to tender it could be predicated that goods at any one part of the variation were of a different "description" from the goods immediately next to them on either side of strength or of "tenderness."

I do not think that the subsection in question applies, and I think it can be said that any part of the goods delivered was of a different description. I am of opinion that the words "different description" implies a difference of kind, not merely of quality, and the cases which were cited as illustrations of cases to which the section applied were all cases where there was a difference of kind and not merely of quality in the goods.

In *Levy v. Green*¹ crockery of a different pattern and contents than the articles from those ordered was sent in a crate containing only the articles which had been ordered. In *Nicholson v. Bradfield Union*,² in the sale of coal, the sellers put in a lot of coal from a different source than that ordered, which got mixed with the first delivery; and in *Leitch v. Ritchie*³ a seller of yarns, which were described as containing several spindles containing yarns composed of a mixture of flax and jute, and it was there held that this did not answer to the contract for "flax yarns," and that accordingly they were properly rejected. No case was cited in which a mere difference in quality was sufficient to divide goods into goods of different "descriptions."

Thus I am of opinion that the said subsection does not apply, and that the pursuance of the Sheriff, which proceeded upon the application of the pursuers, must be recalled.

¹ 8 E. & B. 575, (1859) 28 L. J., Q. B. 319.

² L. R., 1 Q. B. 620.

³ 23 D. 242.

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Lord Ardwall.

The next question for consideration is whether the pur rejected part of the goods sent, are now barred from retain along with the goods which they had not rejected and claimin respect of defective fulfilment of the contract. I confess I ha to be a question of some difficulty. The cases of the *Electric Company v. Hurry & Young*,¹ and *Croom & Arthur v. Stewart* were cited as authorities for the proposition that after intima rejection of goods as disconform to contract a buyer is not e back on the alternative remedy provided by the Sale of retaining the goods and claiming damages for the seller's failu a material part of the contract. I may notice in passing tha two cases together the above proposition as one of universal a questioned in the first case by Lords Kinnear and Low, and by Lord Kyllachy, and it is possible that in some other ci may deserve reconsideration. But accepting the views of t each of these cases as absolutely sound, I am of opinion tha case is capable of being differentiated from them. In both t whole of the subject sold was rejected, and in both of them was complicated by the buyers, after intimating rejection of t taining to use them for considerable periods of time. Now, i case the pursuers did not reject the whole of the subject of did they, by keeping possession of the rejected portion, in any so far as that portion was concerned, the interests of the sellen accordingly not in the position of having elected to take one o provided by the Act, and therefore by implication of having the other. What they did was to adopt neither the one alter other, but to make a partial rejection which they were not ent and which they did make in a mistaken view of their own matter. In other words, they attempted to do what they wer to do either under the Act or at common law. But the fact o made this mistake does not involve them in the dilemma Court considered the sellers had placed themselves in the tw referred to, and I am of opinion that nothing else has occurre from now adopting the alternative remedy provided by sectio tion (2), of the said Act by retaining the whole goods and clai for breach of contract.

On these grounds I think the Sheriff-substitute's interlocutor 1906, with the exception of its findings in fact, ought to be decree given for the alternative sum of £26, 18s. 3d. cla pursuers.

LORD JUSTICE-CLERK.—I concur with your Lordships in hol tion 30 (3) of the Sale of Goods Act does not apply to this case the grounds so clearly stated by Lord Low. I am therefore of the interlocutor of the Sheriff must be recalled. Further, I a opinion expressed by both your Lordships that in the circumst case the purchaser of the goods has the right still, retaining the

damages for the disconformity of a portion of the goods to a by the sample upon which the purchase was made. The *Electric Company*,¹ which was founded on at the debate, was of a different character from the present. The sale in that case was of a specific article—a machine for developing and transmitting electrical transmutation. The party in that case did not return the machine, they intimated that they rejected it, but kept the machine for months. The decision in that case, which seems somewhat doubtful as to its soundness, has no bearing on this case, which is one of disconformity in respect of some part of the goods being of a different kind. The sellers suffered no damage by the course which was taken, a mistaken course under the Act. The Sheriff-substitute, in the *Electric Company* case,¹ held that the buyer was not entitled to claim damages for that part of the goods which was not of the kind described. I concur with your Lordships in holding that the goods were "of a different kind" in the sense of the Act, and that the section applies to a difference of kind and not of quality—such as in the crockery case, where different articles were sent among those which had been ordered. The case of yarn and flax yarn² was similar. I therefore agree with the majority of the judges as decided by Lord Low.

MR. JUSTICE DARLING was absent.

The Lord pronounced this interlocutor:—"The Lords having heard the counsel for the parties on the appeal for the defenders and the interlocutors of the Sheriff-substitute and the Sheriff of Lanark, dated 14th May and 6th December 1906, and the Lord's judgment of 14th January 1907, sustain the appeal, and recall the interlocutors appealed against: Find in fact in terms of the findings in fact in the said interlocutor dated 14th May 1906, but omitting from the seventh of said findings the twenty-six words following the word 're-delivery': Find in law in terms of the first two findings in law in said interlocutor of 14th May 1906: And further find in law (3) that the said attempted partial rejection was invalid, the pursuers are entitled to retain all the goods and sue for the value thereof, the defenders having been in no way prejudiced by the partial rejection of the goods, the value of which has been ascertained at the sum of £26, 18s. 3d.: Therefore ordain the defenders to make payment to the pursuers of the said sum of £26, 18s. 3d., with interest thereon at the rate of 5 per cent per annum from the date of citation till payment, and Find the pursuers entitled to expenses in this and in the inferior Court, which modify to one-half the taxed amount."

MR. WATT, W.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

¹ *Levy v. Green*, 28 L. J., Q. B. 319.

² *Jaffé v. Ritchie*, 23 D. 242.

No. 71. THE AMERICAN MORTGAGE COMPANY OF SCOTLAND, LIMITED
(Respondents).—*Lorimer, K.C.—R. S. Horn*
Jan. 31, 1908. LEVERETT BARKER SIDWAY AND ANOTHER, Defenders (Re)
Morison, K.C.—Hon. W. Watson.

American
Mortgage
Company of
Scotland,
Limited, v.
Sidway.

*Arrestment—Arrestment ad fundandam jurisdictionem—
Shares in Limited Company.*—The shares of a limited company
in Scotland are subject to arrestment, and the arrestment
in the hands of the company *ad fundandam jurisdictionem*
shareholder liable to the jurisdiction of the Court of Session.
Sinclair v. Staples, Jan. 27, 1860, 22 D. 600, *followed*.

1st Division.
Lord Guthrie.

THE AMERICAN MORTGAGE COMPANY OF SCOTLAND, LIMITED,
their registered office at 36 Castle Street, Edinburgh, raise
for payment against Leverett Barker Sidway and Henry
way, of the firm of L. B. Sidway & Company of Chicago,
United States of America, and of 5300 Armour Avenue,

In order to found jurisdiction the pursuers, on 21st August
used arrestments in the hands of the Missouri Land and
Company, Limited, incorporated under the Companies Act,
having its registered office at 16 Castle Street, Edinburgh,
as the pursuers averred, they attached 755 shares of
belonging to L. B. Sidway and 22 shares belonging to H.

The pursuers pleaded;—(1) The defenders are subject to
jurisdiction of the Court of Session in Scotland by reason of
arrestment to found jurisdiction executed against them.

The defenders pleaded;—(1) No jurisdiction.

The Lord Ordinary (Guthrie) allowed a proof on the
jurisdiction, which was taken on 6th March 1907, and found
appeared that at the date of the arrestments the defenders
registered holders of the shares above mentioned. It further
that at the same date no dividend or other sum was payable
Missouri Company to the defenders.

On 26th December 1907 the Lord Ordinary pronounced
locutor:—"Finds that by the arrestments used by the
Mortgage Company of Scotland, Limited, the defenders
liable to the jurisdiction of the Court in the present action
repels the defenders' first plea in law, and appoints the case
to the roll for further procedure; and grants leave to re-

* "OPINION.—The pursuers allege they have founded jurisdiction
the defenders, residents in the United States, by the arrestment
shares belonging to the defenders in the Missouri Land and
Company, Limited, which has its registered office in Edinburgh.
defenders are admitted to have been proprietors of these shares
August 1903, the date of the alleged arrestment. But the defenders
tain that, by the law of Scotland, shares in limited joint stock
are not arrestable, and, therefore, there is no warrant for process
them in Scotland. At the date of arrestment, although dividends
to have been earned, no sum was actually payable to the defenders
the shape of dividend or return of capital.

"The general rule is thus enunciated by Lord Deas in *Livingston
and North-Western Railway Company*, 1860, 22 D. 571, at p. 574, that
moveable and heritable property in Scotland is attachable by
other. We have no power to attach what is in a man's personal
arrestment to attach personal estate in the hands of another."

Jan. 31, 1903.

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Mortgage
Company of
Scotland,
Limited, v.
Sidway.

account between the partners,¹ but there was no su between a company and its shareholders. The appropri to attach shares and such property as was not arrestabl cation.² The cases of *Lindsay v. London and North-W Company*³ and *Sinclair v. Staples*,⁴ which were appar authorities, were distinguishable; in each case the que shares were arrestable was assumed, and was neithe decided.

Counsel for the respondents was not called upon.

LORD PRESIDENT.—In this case jurisdiction is alleged to hav against the defenders by the arrestment of certain shares bel in a limited company registered in Scotland under the Compe and the subsequent Acts; and the objection made is, that, i the case of this particular Company no dividend was at tha

and by the case of *Sinclair v. Staples*, 1860, 22 D. 600, Division. No doubt in *Lindsay's* case, as the defenders poi were dividends payable on the shares, and also other mov which would of themselves, apart from the shares, have fo ground for the arrestment, but each of the First Division Ju President M'Neill, Lord Ivory, Lord Curriehill, and Lord affirm the arrestability of shares in a joint stock company. case, where only shares were involved, the defenders argued turned on whether the proper diligence was arrestment or rather than on the question of whether either was competent, but the pursuer in that case maintained that arrestment was applicable to a species of moveable property like shares in company, and this argument was negatived by the Second D

"The defenders contended that these cases were not a because they were decided in regard to shares in companies u Stock Companies Act, 1856, and the Missouri Land and Liv pany, Limited, was established under the Companies Act second, because the Missouri Company is a limited company. the first point, I was not referred to any differences between which would affect the question now under consideration. T disappears when it is observed that the shares of the comp in *Sinclair's* case were limited in liability.

"It appears to me to be sufficient warrant for arrestment i there are here shares in a joint stock company, of present o belonging to the defenders, whose interest in them is not not specially appropriated, which shares give the defenders interest in the company and its assets, and can be turned at money.

"The defenders also contended that it had not been p shares possessed any value. The proof does not contain a ment on this point, but I think I am bound to assume t company which is regularly paying large dividends, and i have been periodical returns of capital to the shareholders substantial pecuniary value."

¹ *Douglas v. Jones*, June 30, 1831, 9 S. 856; *Baines & pagnie Générale des Mines d'Asphalte*, March 15, 1879, 6 R Shanks, & *Bell v. Halvorsen*, Jan. 29, 1892, 19 R. 412.

² *Barbour v. M'Minn*, July 7, 1826, 4 S. 806; *Stair*, iii. Notes, cccix.; *Ersk. Inst.* ii. 12, 48; *Parker on Adjudicat* p. 16.

³ Jan. 27, 1860, 22 D. 571.

⁴ Jan. 27, 1860, 2

Jan. 31, 1908. Justice Lindley, as to which I take it there is no doubt w
 American must be remembered that Lord Justice Lindley was speaking
 Mortgage lawyer, and naturally had before his mind the fact that ac
 Company of English law of partnership what one might call the part
 Scotland, Limited, v. really belong, in a way which we should call *pro indiviso* p
 Sidway. partners.

Ld. President. There will be found a learned judgment of my brother L
 the case of *Parnell v. Walter*,¹ which describes the nature of
 a partner in England has in the assets of the partnership.
 Lindley points out that that is altered when you come to a
 company, where the property in any particular asset does not
 shareholders of the company but belongs to the company.
 land, is a very familiar notion, because in our law, in an ord
 law partnership the partnership has always been consider
persona. Accordingly the doctrine that the partnership
 belong to the partners but belong to the partnership has
 held quite consistent with our well-established Scottish
 a share of a common law partnership is perfectly well a
 seems to me that the point put by Mr Bell is the true cr
 the obligation to account which is the subject of attachm
 obligation to account does not mean that there is then
 debt due in the sense of something due and payable. Tha
 upon circumstances, and the circumstances will vary acc
 particular deed of partnership, or according to the particul
 deed which makes the limited company. I am aware that th
 shareholder to have a payment made to him (in proportion t
 profits that have been earned in the limited company is not
 because, before he can get it, these profits have to be declared
 and the declaring as dividend is an operation which rests on
 properly constituted authorities of the company according to
 deeds—that is to say, its memorandum and articles of associ
 same way in a private partnership the particular time at w
 might say,—“Now, you have made profits, give me my share
 entirely upon the provisions of the partnership deed. The
 partnership deed in which it was covenanted between the part
 should not draw any profits until the expiry of the partne
 might, on the other hand, be a stipulation, and it is a very
 that the drawings during the currency of the partnership sho
 to a certain amount, and there would be no objection to a
 stipulation that the payment of the certain amount should onl
 seasons of the year. So that it would be perfectly possibl
 finger upon a date in a private partnership when it would be
 a partner to say “pay me something,” and yet, notwithstand
 never been any doubt in our law that the obligation to accoun
 able subject.

The truth is that any difficulty which exists is really a met
 and is, I think, satisfactorily dealt with by Lord Cowan i

¹ 16 R. 917.

COURT C

as,¹ and the met
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orated company.
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Clair v. Staples,¹
ught, I think, to
Lord Ordinary

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Jan. 31, 1908.

American
Mortgage
Company of
Scotland,
Limited, v.
Sidway.

LORD KINNEAR.—I agree with your Lordships. The question of diligence, is highly technical, and therefore more bound to follow the decisions which have stood for years and have fixed the practice. Nobody disputes that a stock company is attachable for the debt of a shareholder. The question is whether the proper diligence to attach it is arrestment. I say that is the only question, because it has not been held that it can be reached by poinding, or that it is protected from arrest altogether. Now, I think there is a series of decisions which establish this case even apart from the decision in *Sinclair v. Staples*.¹ There are many decisions to the effect that the interest of a partner in an ordinary business is attachable by arrestment, even although it may be said that the money due at that moment to the partner, and although upon a balance it might be found that there was no balance in his favour. I have thought these cases in point; but any doubt I should have been removed by the decision in *Sinclair v. Staples*,¹ which is a decision directly in point, and which I think we are bound to follow.

LORD PEARSON was absent.

THE COURT adhered.

WEBSTER, WILL, & Co., S.S.C.—J. K. & W. P. LINDSAY, W.S.

No. 72.

THE CROWN STEAMSHIP COMPANY, LIMITED, Pursuers (Appellants) v. *R. S. Horne—Spens.*

Jan. 31, 1908.

JOHN LEITCH, Defender (Respondent).—*Hunter, K.C.*

Crown S.S.
Co., Limited,
v. Leitch.

Ship—Affreightment—Bill of Lading—Unloading of cargo—Steamer can deliver—Charges necessary for quick dispatch to consignee.—A bill of lading for sugar shipped from the ship at Greenock contained this provision:—"The goods to be received by the consignee from the ship's tackle as fast as the steamer can deliver at the port to the contrary notwithstanding, and all charges being discharged necessary for the steamer's quick dispatch of the goods to the owner or consignee of the goods."

Held (diss. Lord Stormonth-Darling) that under this contract the ship was entitled to put the cargo out on to the quay as fast as she could, and the consignees, provided they had fair notice of the intention to discharge, were bound, whatever might be the custom of the port, to make arrangements for having the cargo removed from the quay as fast as it was put out; and that if they failed to do so, and so caused the ship to remain at the quay, which interrupted the discharge, the ship was entitled to employ men to clear the block, and to recover the expense of so doing from the consignee.

2d DIVISION.
Sheriff of Ren-
frew and Bute.

JOHN LEITCH, sugarbroker, Greenock, was the consignee of 100 hogsheads and 19,000 bags of sugar shipped from the ship at Greenock on the s.s. "Crown of Granada," belonging to the Crown Steamship Company, Limited, Glasgow, under a bill of lading dated 5th June 1906, which provided, *inter alia*, as follows:—"The goods to be delivered from the ship's tackle, when required, to the owner or consignee of the goods."

COURT OF SESSION, &

shall cease, in the like good order
of Greenock . . . freight &
gold . . . at the rate of
d . . . The goods to be rece
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the contrary notwithstanding, and
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owner or consignee of the goods.
arrival of the "Crown of Gra
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n of Granada" had four hato
the consignee of her whole carg
r amounting in all to 689 hogs
signed to other consignees. In
cels of sugar consigned to Leitch
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of Granada" arrived at Greenoc
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Greenock gave the consignees no
mence discharging at 7 A.M. on 2^d.
custom of the port of Greenoc
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ine 1906 the managing owner wrote
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veral of our steamers this summer
ideration of the rapid dispatch bo
exact terms of the bill of lading affe
is to be taken from ship's tackle
custom of the port to the contrary
give you the sugar from at least four
hogsheads and 300 bags per hour
to give you ample notice, so tha
receiving the sugar accordingly .
as it is tendered to you, it will be n
es to each derrick."

1906 the managing owner wrote t
s.s. "Crown of Granada":—" .
the same as in the case of the 'Serr
his steamer we shall be tendering y
e bags each, with each delivery of
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approximately as fast as we can put
e 1906 the ship's agent at Green
of Granada.'— . . . The shed
of your working double scales at al
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receiving the sugar as fast as the shi
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s of the B/Lading."

Jan. 31, 1908.
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times, although it was the exception to the general rule, run into the sheds as it was put out of the ship, and into the sheds. That was an exceptional course to follow, sometimes done, and was quite lawful. The consignee followed the course of weighing on the quay at the ship.

The "Crown of Granada" commenced to discharge on the morning of the 28th of June 1906. The ship had men to discharge the cargo at each of the four main hatches, enabled the derricks to be kept constantly at work, and the cargo to be discharged as fast as it could be delivered from the ship. The consignees on the other hand had only one gang of men and one weighing machine at each hatch. The result was that the men could not weigh the sugar and remove it to the sheds, so it was put out of the ship, and the consequence was that in time the quay became blocked with bags of sugar which the consignees' men were unable to deal. When that happened the employment of the ship cleared the quay by running the loaded bags into the sheds without being weighed. If this had been done it would have been necessary to stop the discharge until the block occurred until the consignees' men were able to remove the bags which had accumulated.

The discharge proceeded continuously on Thursday 29th, and Saturday 30th June, and finished on Monday 3rd July.

The owners of the "Crown of Granada" claimed from the consignee the sum of £40, 19s., "for expenses incurred in removing cargo consequent on failure to take delivery of the ship's tackles as fast as steamer delivered it. 4476 bags weighing 468 tons at 1s. 9d." This sum was claimed as Leitch's share of the total sum paid by them to their stevedores for the removal of the cargo to prevent a block as above mentioned.

Leitch having refused to pay this claim the Crown S.S. Co., Limited, as owners of the "Crown of Granada" brought an action against him in the Sheriff Court at Greenock, for the sum claimed by them.

The pursuers pleaded, *inter alia* ;—(2) The said expenses were necessarily incurred for the steamer's quick dispatch, the consignee of the said sugar, is liable therefor, in accordance with the terms of the bill of lading.

The defender pleaded, *inter alia* ;—(3) The expense was not incurred through the fault of the defender, nor in accordance with the terms of the bill of lading, the defender is entitled to a decree *Separatim*, the sum sued for is excessive.

The facts regarding the question raised by the defender sufficiently appear from the opinions of the Judges *infra*.

By interlocutor dated 21st December 1906 the Sheriff (Neish), after a proof, assolized the defender.

The pursuers appealed to the Court of Session. The appeal was heard before the Second Division on 15th and 20th December 1907.

Argued for the pursuers and appellants ;—Under this clause the obligation of the consignee was to take delivery as fast as it could put out the goods, no matter what might be the circumstances at the port. The clause was unambiguous and imperative. It was absolute, and the consignee could not excuse himself by shewing it according to its terms by shewing that there were circumstances beyond his control, or that he had done

Jan. 31, 1908. in. Running in before weighing (a) was not a reasonable
 Crown S.S. (b) was inconsistent with the provisions of the bill of
 Co., Limited, doubt here the custom of the port was excluded, and
 v. Leitch. *Postlethwaite*,¹ *Good & Company*,² and *J. & A. Wyllie*
 distinguishable. The consignees were not entitled to
 custom of the port as an excuse for delay. But there was
 of the port which had any bearing upon this case, and
 clause excluding the custom of the port did not affect the
 issue. But, further, a consignee could not be made liable
 clause in the bill of lading unless the expense sought to be
 from him was proved to be necessary for the steamer's quick
 dispatch. The expense sought to be recovered here was not proved
 necessary for the steamer's quick dispatch. Quick dispatch
 equivalent to as fast as the steamer could put out the
 pursuers must prove that the defender prevented quick
 dispatch was not responsible for delay caused by any other cause,
 even although the case was treated as if the defender was the
 sole consignee, it was not proved that this expense was
 necessary to give quick dispatch. The pursuers must prove, that but for
 whom they employed, the steamer would not have got quick
 dispatch. They had not done so. It was not proved that the steamer
 would not have been as quick if these men had never been employed.
 The delay that occurred was due to the waste of time on the
 ship before beginning to discharge, and to the confusion of
 the method of discharge adopted. In the case of *Macdonald*³
 the expression used was "discharge," not "deliver," and the
 consignee was only held liable because he had caused undue delay of
 the steamer. *Macdonald*⁴ the consignee was taken bound to receive "quick
 dispatch." In any view the sum sued for was excessive.

At advising on 31st January 1908,—

LORD JUSTICE-CLERK.—The pursuers claim from the defender
 of providing labour to facilitate the discharge of a cargo of sugar
 from a vessel. They make this claim in respect of a clause in the bill of
 lading under which the consignees were bound to take "from the steamer
 as fast as the steamer can deliver, any custom of the port to the contrary
 notwithstanding." The consignees were taken bound to pay all expenses
 necessary for the steamer's "quick dispatch."

It is the fact that the defender was only consignee of the cargo,
 but it does not appear to me that this fact in any way affected the
 decision of the question in this case.

It cannot be disputed that the arrangements made by the defender
 did not admit of the cargo being cleared from the quay as quickly as
 the steamer could deliver, for it is quite certain that with one set of scales
 and one hatch—which was all that the defender provided—the bagging
 of the hold could not be weighed fast enough to keep the steamer
 waiting for further discharge. To prevent the blocking of the discharge
 by the provided gangs of men, who, when there was a tendency to accumulate
 goods back into the shed behind, so as to clear a space for the
 steamer to move forward.

¹ 1880, L. R., 5 App. Cas. 599, 4 Ex. Div. 155.

² L. R., [1892] 2 Q. B. 555.

³ 1885, 13 R. 1110.

⁴ 1885, 13 R. 1110.

⁵ 1901, 6 Com. 1110.

cargo. Such a removal before weighing was not according to the rules, but it was a procedure which was sometimes followed. The question is, What is the meaning to be put upon the clause in

It is, I think, very definite and clear, and there is no error. All custom is excluded ; the bargain sharply is for as the ship can bring the goods forward to the ship's side. It is to be vain to contend that in the words excluding the port custom the practice of weighing at the ship's side is excluded. They exclude everything that can hamper the ship's speed. It is not undoubted weighing at the ship's side may do, if the scales are not sufficient to weigh as rapidly as is necessary to the ship's tackle, the ship delivering by her ordinary method in the case here.

However, maintains that the latter part of the clause, in "quick dispatch" are used, has a less extensive meaning than the earlier part of the clause, and must be read to mean dispatch according to the circumstances existing at the time. It seems to me to be here in a dilemma. If by "the circumstances" means general circumstances, then I think it hopeless to escape from the application of the clause as one clause, "quick dispatch" referring to the concrete phrase "as fast as can deliver." If, on the other hand, by "circumstances" means particular circumstances, his contention is expressly excluded by the words "notwithstanding." As I read the second part of the clause, it gives nothing more than a right to the ship, if dispatch is required, to claim the expenses she is put to in clearing away the obstruction which is causing the hindrance, and exempt her from any penalty of the consignee for any unusual expense he may be put to in the reception of the goods in such order that the ship shall not be forced to discharge more slowly than her appliances when she is free to do full work.

er it necessary to notice the argument of the defender
sion of the House of Lords in the case of *Hulthen v.*
o say that the question in that case related to demurrage,
sense a case for demurrage. The sole question is whether
d to give the ship the dispatch stipulated for, and whether
ng taken steps to obviate the delay caused by that failure,
ntain that the cost incurred in doing so is exigible from
as I think is the case, the only difficulty in fast delivery
the defender to weigh at the quay, he cannot, as I think,
except as being a port custom, and this ground is expressly
rms of the bill of lading. I am therefore of opinion that
entitled, when the defender failed to receive cargo and
the ship's tackles delivered, to provide force to effect this
expense of the defender, seeing that the rate of delivery
d to them, and it was pointed out to them that if they
t the quay, extra scales would be necessary.

¹ [1903] A. C. 369.

Jan. 31, 1908.

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Lord Justice-
Clerk.

As regards the charge made by the pursuers, I do not think it is held just. There is evidence that the 1s. 9d. they charge is in excess of what such work is usually contracted for by the gangs for quay work, and there is no counter evidence. The pursuers' charge is in fact the result of the pursuers bringing a large gang all day to Glasgow daily. In my opinion the pursuers' charge should be reduced to the sum represented by 6d. per ton, which comes out at 4s. 6d.

LORD LOW (whose opinion was, in his Lordship's absence, delivered by Lord Justice-Clerk).—The question in this case depends upon the construction of a clause in the bill of lading of a cargo of sugar brought by the pursuers' s.s. "Crown of Granada" from Greenock. The clause is in the following terms:—"The consignee to receive the goods as fast as they can be delivered by the ship's tackles as fast as they can deliver, any custom of the port to the contrary notwithstanding, and to pay the charges incurred after being discharged necessary for the dispatch to be paid by the owner or consignee of the goods."

The circumstances in which the question arises are these:—The pursuers were consignee of a part only, although a large part, of the cargo. I do not think that the main question in the case (the meaning and effect of the clause in the bill of lading) is affected by that circumstance. The question would have been the same if the defender had been consignee of the whole cargo. (Lordship then stated the facts *ut supra*.)

The pursuers now claim from the defender the expenses incurred in clearing the quay when a block occurred, and the question is whether that is a claim which they are entitled to make under the clause in the bill of lading which I have quoted?

It seems to me that, so far as the language used is concerned, there is no ambiguity in the first branch of the clause. The consignee is bound to receive the goods as fast as they can be delivered by the ship's tackles, and that obligation is not to be limited by any custom of the port.

Upon that part of the clause I have two remarks to make. In the first place, I think that the words "any custom of the port" refer to all events included, the custom of weighing the sugar on the quay before it was removed into the sheds. That is the only custom of the port of which there is any evidence, and it is plainly a custom which materially affects the rate of discharge, because it is admitted that if, instead of weighing the sugar upon the quay, it had been at once run into the sheds, the consignee would have had no difficulty in receiving the cargo as fast as it was delivered it.

In the second place, although, in my judgment, the words of the clause now considering are unambiguous, I have no doubt that the question must be construed reasonably, and that the extent of the consignee's obligation must depend a good deal upon the circumstances existing in the particular case. For example, if the shipowner devised some means by which the cargo could be discharged much faster than the consignee had any reason to expect or be prepared for, I do not think that his failure to take advantage of it was tendered would be a breach of his obligation. For n

tly, however, I do not think that any case of that kind has

the second branch of the clause, which is much more difficult than the first. I repeat the words: "All charges being discharged necessary for the steamer's quick dispatch to the owner or consignee of the goods."

I compute that the words "after being discharged" mean after being discharged, but I think that it is also plain that they do not mean that the goods have been discharged, because if all the goods were discharged the ship would be free, and there would be no room for delay to ensure quick dispatch. The clause therefore referred to might require to be done during the course of the discharge, the only thing, so far as I can see, to which it could possibly refer is the very thing which happened, namely, a block occurring, which interrupted the discharge if the pursuers had not cleared

the words "quick dispatch." The pursuers argued that they referred back to the first part of the clause, and that the expression "steamer's quick dispatch" was just a short way of saying "to order to discharge the cargo as fast as she can deliver from the ship." The defender, upon the other hand contended that the expression "quick dispatch" must be read according to their ordinary significance, meaning that the ship should be discharged with reasonable speed in all the circumstances.

The construction for which the pursuers contend is in accordance with the intention of the clause. If it were not so, the stipulation was laid upon the consignee by the first branch of the clause, which is inoperative and ineffectual, because unless the shipowner complied with the second branch of the clause, and clear away any obstructions which would otherwise interrupt the discharge, the shipowner would incur no penalty for failing to implement his obligation to deliver the cargo as fast as the ship could deliver them. I further think that the expression "quick dispatch" is a flexible expression which may be interpreted in the manner which I have indicated if the context requires it, in the sense in which it was used. It is also important to note that, in any view, the custom of the port is excluded. That was the defender's counsel. Now, if the custom of the port had been different, and if the stipulation had simply been that, in discharge of the cargo the steamer should get "quick dispatch," I think that the pursuers would have successfully maintained that he was entitled to weigh the cargo upon the quay, and to employ the number of men and of weighing-machines which he did employ, because that was in accordance with the custom of the port. As the clause stands, however, the defender cannot rely upon the custom—it is expressly excluded—and as I have already said, the pursuers admit that if he had not weighed the sugar upon the quay, but had received the cargo as fast as it could be delivered from the steamer, he would have received the cargo as fast as it could be delivered from the steamer. Except the custom of weighing the sugar upon the quay, the circumstances which would have prevented the defender

Jan. 31, 1908. from taking, or justified him in not taking, delivery as fast as he could. The ship was discharged.
 Crown S.S. Co., Limited, v. Leitch.

Lord Low.

It is said, however, that the claim of the pursuers is contrary to an established principle which was finally settled by the judgment of the House of Lords in *Hulthen v. Stewart & Company*.¹ That principle is that if a specific number of days is fixed within which the discharge of the ship is to be accomplished, then if these days are exceeded, demurrage is due whatever the actual circumstances were. If, upon the other hand, a specific number of days is not fixed, but the contract is to deliver the goods "all dispatch" or "as fast as steamer can deliver," or expressed in similar terms, the question whether demurrage is due depends upon whether the discharge has been carried out with reasonable expedition and diligence, having regard to the whole circumstances.

If the pursuers had been claiming demurrage I agree that their claim would have fallen under the latter category, because I cannot regard the clause in the bill of lading as fixing a specific time for the discharge. But the question of demurrage does not arise. The only question is whether under the contract the pursuers were entitled to do, at the defender's expense, the work which the defender was under obligation to do himself. The object of the agreement was to prevent the steamer being delayed, and that does not make the pursuers' claim one for demurrage. It does not necessarily introduce a principle which would have been applicable if the claim had actually been for demurrage.

The difficulty in this case seems to me to be entirely one of construction. But suppose that there had been no ambiguity in the language of the bill of lading, that the bill of lading had provided in the clearest terms that the consignee should receive the goods as fast as the steamer could deliver them by its tackles, any custom of the port to the contrary notwithstanding. Suppose the consignee chose to weigh the goods upon the quay he should employ a sufficient number of men and of scales to enable him to do so without interrupting or retarding the discharge; and that if he failed to do so the ship should be entitled, at his expense, to do what was necessary to complete the discharge being interrupted or retarded, by removing the goods without being weighed any bags of sugar which the defender might have weighed as fast as they were delivered by the ship's tackles—that is the bargain between the parties—as I think it truly was expressed in quite unambiguous language, I fail to see why it should not be regarded as a lawful bargain, and enforceable according to its terms.

The only ground upon which such a contract could be held unenforceable would be that it was not sufficiently definite. Now, in the present place, I think that the obligation laid upon the consignee was sufficiently definite for the purposes of the contract, because I imagine that persons experienced in the unloading of ships would know, with sufficient accuracy for practical purposes, what was involved in an obligation to deliver goods as fast as they could be delivered from the ship's tackles. I do not regard the obligation as being absolutely unconditioned, nor do the witnesses say anything to the contrary. In the second place, I do not regard the obligation as being absolutely unconditioned.

¹ L. R., [1903] A. C. 389.

COURT OF SESSION, &

circumstances which, in my opinion, the obligation to take delivery as fast as the discharge of the cargo which actually occurred (except the custom of the port, which the defender cannot found) which prevented it as it was tendered.

A circumstance which might have been required for exact fulfilment of his contract is (and no means clear on this point) the number of men to discharge the cargo. The defender had been taken by surprise and was not expected to be prepared for the discharge. That consideration might have had some effect on his liability. But no such defence was given ample notice of the manner in which the cargo was to be discharged. He was told that the sugar was to be discharged by four derricks at the rate of not less than four tons at each derrick," and that he was to have two slings of 5 bags each, with each derrick. He told that "if you intend to weigh the cargo, it will be necessary for you to have at least four men." He was also told that, failing his receiving the cargo, the owners would put the cargo on the terms of the bills of lading.

The defender took no objection to the rate of discharge. At the time of the discharge did he take any objection to the pursuers of men to clear away the cargo? In correspondence the pursuers proceeded to discharge the cargo. The bills of lading was that for weight of the cargo. The defender took no objection. It was not until the payment of the sum now sued for that the defender was not justified by the bills of lading. It is somewhat difficult for the pursuers to show that the contract is something different from what was at the time, and upon the faith of which the pursuers incurred their expense.

The pursuers are of opinion that the pursuers were justified in what they are entitled to recover from the defender. They were injured by them in running into the sugar. The amount paid by the pursuers to their stevedores was £103, 14s. 7d. The pursuers have no consignees in proportion to the weight of the cargo. For the defender 468 tons of sugar. The total cost, for which the pursuers are entitled to a rate of 1s. 9d. per ton, which, the pursuers say, is the rate.

In that, I think that he is right. The pursuers had their anxiety to secure that the defender should not incur any expense. They had a very strong desire to run the sugar into the

Jan. 31, 1903. occurred, and the bulk of the men were brought from Glasgow course, cost more than if they had been hired in Greenock.
 Crown S.S. Co., Limited, independent evidence was led by the pursuers to shew that the
 v. Laitch. by them was a usual and reasonable charge. One witness,
 Lord Low. adduced by the defender—Mr Harvey, secretary of the Greenock Sugar Association—who said: "Part of our business is running and piling up sugar discharged from steamers at the quays. Our rate is 6d. per ton. I was prepared to run in the cargo in question if it had been ordered." That was the whole of Mr Harvey's evidence, which was not cross-examined. His evidence, therefore, is not challenged, and it must be held as establishing that the running in of the cargo must have been done for 6d. per ton instead of 1s. 9d. That brings the sum to £11, 14s., for which I think that the pursuers are entitled to be paid.

LORD ARDWALL.—I have found this case to be one of much interest. If it were a question of demurrage that was here raised it appears that the decision of the House of Lords in the case of *Hulthen v. Stewart*, affirming the decision of the Court of Appeal, would have been against the pursuers. But, what is here sought to be enforced is a contract under which I am of opinion that it was the duty of the parties that should delay occur in the removal of the goods by the ship from the quay at the ship's side the shipowner should employ men to run such goods into the sheds in order to give a quick dispatch—that is, dispatch as quickly as the goods could be run over the ship's side. The document is very obscurely worded, but it has not been that the parties, both in the correspondence and at the discussion on the appeal, assumed that what was provided in the bill of lading was charges for removing goods from the side of the ship after they had been put over the ship's side, I should have been guilty in construing the clause at all. I think that the evidence of the custom of the port to the contrary notwithstanding¹ prevented the defender from pleading, as he might otherwise have done, that the delay was caused by his endeavouring to weigh the sugar before it was run into the sheds. Therefore it must be taken that his obligation was to keep the front of the quay from being blocked by goods either by weighing machines opposite each hold to weigh the sugar as the ship could deliver it, or failing that to run the sugar straight into the sheds leaving it to be weighed afterwards, which was what actually happened to a considerable portion of the cargo in question. I do not go into detail either with regard to the construction of the bill of lading or with regard to the law applicable thereto, as I have had the advantage of my brother Lord Low's opinion, and agree with the views expressed. The next question is whether the sum sued for is "necessary for the steamer's quick dispatch," for it is only such sums which, according to the bill of lading, are "to be paid by the consignee of the goods." Now I think it is clearly proved that at the time in the discharge of this steamer a block took place, and

¹ L. R., [1903] A. C., p. 389.

proved by the intervention of stevedores' men provided by the pursuers, this being so, the only remaining question is as to the charges. Now, I think it clear that the shipowners here were in the business of discharging the vessel in a most extravagant manner. They did not content themselves with getting stevedores or quaysmen, but brought them all the way from Glasgow, and employed quite unnecessary numbers. It is proved by the uncontradicted evidence of Mr Harvey, a witness for the defenders, that 60 men were allowed for running in and piling sugar from the vessel on the sheds, and I think it is only that sum that should be allowed in the present case. It is said that there were 468 tons run in, and on this amounts to £11, 14s., and for this amount I think the pursuers are entitled to decree.

I must add that it appears to me that the clause under discussion is a new one, is not much of an improvement upon the clause hitherto in use in bills of lading, and instead of being of any benefit to shipowners, is likely to cost them a good deal of money. It is saved, at all events if they follow the course that was followed by the shipowners in the present case; and I must also add that, on a sound construction of the peculiar contract which was entered into by the bill of lading, the pursuers were not justified in so hastening on as they did the dispatch of the vessel. The time saved was of comparatively small amount, and was not worth all the trouble and expense which the shipowners incurred. Indeed it appears on the evidence they would have saved a good deal of money instead of beginning the discharge of the vessel on the 28th of January, and indeed it immediately on her arrival on the afternoon of the 28th they would have been content with the usual rate of discharge of sugar from the vessel.

THE LORDS.—I am sorry that I cannot reach the conclusion which your Lordships have arrived at. The action is one by the pursuers against the consignee of part of a cargo of sugar carried by the pursuers' ship to the port of Greenock. The claim is not for the cargo, but for a contractual substitute therefor. The clause in the bill of lading to which the action is laid is in these terms:—"The goods to be delivered to the consignee from the ship's tackle as fast as the steamer can deliver them from the port to the contrary notwithstanding, and as soon as after being discharged necessary for the steamer's quick return, to be paid by the owner or consignee of the goods." The pursuers have incurred certain charges to a stevedore from Glasgow in landing the cargo consequent on failure to take delivery from the ship, and the steamer could deliver it, and the proportion of the charges is claimed by the defender's consignment (which consisted roughly of one-third of the total cargo), the pursuers estimate, so far as the charges of the men, at £40, 19s. It is plain, and was indeed admitted by the pursuers' counsel, that this estimate must, in any view, suffer considerable deductions in amount.

The pursuers' substitute, from whom the appeal is brought, has found the

Jan. 31, 1908. the pursuers have not proved that the sum sued for consisted of expenses incurred after being discharged necessary for the steamer's quayside service in terms of the bill of lading, and he accordingly has assailed the pursuers' case with expenses. I am of opinion that the Sheriff-substitute's decision ought to be affirmed.

Darling.

The proposition which lies at the root of the pursuers' case is that a clause in the bill of lading requiring "the goods to be received by the consignee from the ship's tackles as fast as the steamer can deliver at the port to the contrary notwithstanding," is practically equivalent to a clause fixing the number of days or hours during which the delivery is to be completed. It is true, they say, that a definite period of time is not prescribed, but a standard is fixed, viz., the ship's capacity of delivering when her tackles are working as fast as they can, and this standard can be perfectly well known to the shipowner, and can be ascertained by the charterer or consignee if he takes the trouble to inquire. They say, therefore, they say, vague or uncertain about a clause of this kind imports a mechanical equivalent for a definite period of time, and there is no reason for attaching to it different consequences from those which would follow down in plain terms a certain number of days or hours for delivery. Unfortunately for this argument the point has been considered and determined the other way in a recent judgment of the House of Lords in *Stewart & Company*,¹ affirming a decision of the Court of Appeal. The claim in that case was no doubt one for demurrage, whereas here it is a claim for something in the nature of demurrage, and intended to produce the same deterrent effect. Demurrage being simply "the agreed sum of damage which is to be paid for the delay of the ship caused by the charterers at either the commencement or the end of the voyage," a demurrage clause has been held elastic enough to cover damage caused in that way as being "in the nature of demurrage" (see *case of Hulthen's case*,² therefore, seems to me directly in point—as a claim for demurrage or of something in the nature of demurrage. If it had prevailed that the two clauses were practically identical (the one fixing a mechanical equivalent, and the clause fixing a definite time), the obligation in the case before us would have had to be treated as an unconditional one on the part of the consignee to take delivery within the time which could be shewn to be the utmost capacity of the ship's tackles to give delivery, without regard to the actual circumstances of the case, just as if a definite time had been prescribed. But what would the learned Lords say? After stating the opposing contentions, Lord Macnaghten said: "It is certainly satisfactory to find that the result of decisions, some in this House and others of great weight in England and in Scotland, which leave little or no room for argument, has been established that, in order to make a charterer unconditional, it is not enough to stipulate that the cargo is to be discharged 'as fast as dispatch,' or as 'fast as steamer can deliver,' or to use expressions

¹ [1903] A. C. 389.

² [1902] 2 K. B. 15 Q. B. D. 247.

Jan. 31, 1908. sary for the steamer's quick dispatch." Therefore I concur
 Crown S.S. substitute's negative finding as to the effect of the proof.
 Co., Limited, syllable of evidence to the effect that the vessel was prevented
 v. Leitch. on the defender's part from sailing on her appointed day, or
 LdStormonth- have been so prevented if the pursuers had not used the
 Darling. exertions which they did. How then can it be said that any
 expenses were "necessarily" incurred for that purpose? To
 reach the conclusion that the obligation to take delivery
 steamer can deliver" is not an absolute obligation, and that
 stances must be taken into account in order to judge whether
 has acted reasonably or not, I think it is impossible to lay
 any definite failure in fulfilling his obligation to take delivery
 owners are desirous to lay new liabilities on charterers or
 must be prepared to express these liabilities in what Lord
 describes as "plain and unambiguous terms." I think they
 do so in this bill of lading, and therefore I should be for affirming
 the interlocutor appealed from.

THE COURT pronounced this interlocutor:—"The
 heard counsel for the parties on the pursuers' appeal,
 the interlocutor of the Sheriff-substitute of 21st December 1906, Sustain the appeal: Revoke the
 interlocutor: Find that the pursuers have proved the
 charges sued for incurred at the time the s.s. 'Crown
 was being discharged were to some extent necessary for the
 'steamer's quick dispatch': Therefore ordain that the
 make payment to the pursuers of the sum of £1000, as
 of the conclusions of the action, with interest at the
 rate of £5 per cent per annum until payment.
 Find no expenses due to or by either party."

HUGH PATTEN, W.S.—W. B. RAINNIE, S.S.C.—Agent.

No. 73. WILLIAM FYFE AND OTHERS (John Fyfe's Trustees), First Parties.
 Cullen, K.C.—Spens.
 Jan. 31, 1908. MRS LESLEY FYFE OR DUTHIE AND ANOTHER, Second Parties.
 D.-F. Campbell—Murray.
 Fyfe's Trustees v. Duthie. MISS RAY FYFE AND OTHERS, Third Parties.—D.-F. Campbell—Murray.

WILLIAM LEONARD DUTHIE AND OTHERS, Fourth Parties.
 Cullen, K.C.—Spens.

JOHN MALCOLM FYFE AND OTHERS, Fifth Parties.—D.-F. Campbell—Murray.

*Succession—Vesting—Vesting subject to defeasance—Fee
 Initial gift of fee to daughters—Subsequent directions to sell
 shares for behoof of daughters and their respective children—
 directed his trustees to realise and divide the residue of his
 his children equally, "declaring that the term of the vesting of
 provisions of residue shall, as regards daughters, be on their
 attaining majority or being married, whichever of these events
 first: As regards said provisions to my daughters, I hereby
 the capital of the same shall not be paid to them . . .
 trustees shall pay to my daughters the revenue of their
 provisions while they remain unmarried; and on their marriage*

at the said provisions, both revenue and capital, be secured by antenuptial settlement upon my daughters and their born, in usual form, the husbands of my said daughters (if they shall so desire) to have a liferent only, postponed to my liferent." There was no destination over in the event of a daughter dying after the period of vesting without leaving children.

was survived by daughters, who had attained majority.

a right to a share in fee had vested in each daughter but trust for the purpose of securing to her the income of her life, and the capital to her children who should survive her. (2) that on the death of a daughter without leaving issue the same would be carried by her will if she left one, and if not by her heirs *ab intestata*.

Testament—Construction—Trust Directions—Impossibility of Performance.—A testator directed his trustees to realise and divide the residue of his estate among his children equally, "declaring . . . that in the event of the vesting of the foregoing provisions of residue shall, as regards the children, be subject to their respectively attaining majority or being married, and in the event of these events shall happen first: As regards said provisions to the effect that I hereby appoint that the capital of the same shall not be subject to the same (except as after mentioned), but that my trustees shall pay to the children the revenue of their respective provisions while they remain unmarried, and on their marriage my trustees shall see to it that the said revenue and capital, be secured in trust . . . by antenuptial settlement upon my daughters and their children to be born . . . notwithstanding what is before written, my trustees shall have power, in the event of marriage of such daughter to pay to her, or to pay to any person married at my death, for her own absolute use, such portion (not exceeding one-tenth part) of the capital of her provision as my trustees shall think proper."

was survived by two married daughters, whose marriages took place at the date of the settlement.

These daughters maintained that they were entitled to the payment of their respective shares of residue on the ground that the provisions secured by "antenuptial contract" being inapplicable to the daughters who were already married was ineffectual to burden the residue, and fell to be disregarded.

The testator's intention that the shares of the daughters, married at the date of his death, should be secured to them and their children being born after his death, that intention was not to be defeated simply because he adopted a particular method of carrying out his wishes which was not precisely the method in every case, and that the trustees were bound (subject to the provisions of the will) to settle the shares of daughters, married at the date of his death, in trust in names of the trustees or of other trustees, as they might see fit, in behoof in liferent and otherwise as directed by the will.

A granite merchant in Aberdeen, died on 18th July 1906, leaving two sons and eight daughters, and predeceased by his wife. He made a trust-disposition and settlement, dated 15th January 1906, by which he conveyed his whole estates, heritable and moveable, to his trustees.

The purpose of the trust-disposition and settlement provided for was:—"In the seventh place, I direct my trustees, as they may find convenient, to realise and divide the residue of my estate, whether moveable or immoveable, real or personal (including the proceeds of my business and others, if not taken over by my said daughters) among my children, in such proportions as I shall by my will appoint, and failing such appointment, equally among

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them share and share alike: But declaring that if my s shall elect to accept the legacy of my business and other by the sixth purpose hereof, along with the said legacies of £5000 each, provided to them or him in terms of the sixth purposes hereof, such sons or son shall take and legacies in full of all claim on my estate, and shall have the said residue, which shall in such case be divided, as among my children who do not benefit by the legacy of my said others: Declaring . . . that the term of the vesting of the going provisions of residue shall, as regards daughters, be respectively attaining majority or being married, whichever events shall happen first: As regards said provisions to which I hereby appoint that the capital of the same shall be paid to them (except as after mentioned), but that my trustees shall pay to daughters the revenue of their respective provisions while they are unmarried, and on their marriage my trustees shall secure the said provisions, both revenue and capital, be secured in their own names, or in the names of other trustees, by antenuptial settlement, upon my daughters and their children to be born, and the husbands of my said daughters (if my said daughters desire) to have a liferent only, postponed to my said daughters' death: Further, notwithstanding what is before written, my trustees shall have power on the marriage of such daughter to pay to any daughter already married at my death, for her absolute use, such portion (not exceeding one-tenth part of her provision as my trustees shall think proper, which shall be imputed towards such daughter's provision: Such directions, in general directions, the terms of such antenuptial settlements as regards my said daughters' provisions, be determined by my trustees: And I declare that if any of my children predecease the term of vesting of their provisions without leaving lawful issue, the share of such predeceasing child shall accrete to those of my children who shall survive the term of vesting of their provisions, or *per stirpes*, but if such predeceasing child shall leave lawful issue, such issue shall have right to their predeceasing parent's share in the proportion of any share that may have accreted in me: And I declare that my trustees shall have power to advance to or expend for the aliment, education, and advancement of any of my children or of their issue, such portion not exceeding one-fifth of the revenue or capital of the provisions hereby made, as to my trustees shall seem expedient, and that even after the term of vesting of such provisions may not have arrived, such sum being imputed towards the provision of the child, on which such advances shall be made."

Questions having arisen as to the disposal of the trust-estate, a special case was presented.

The case set forth as follows:—

The testator's two sons, William Fyfe and John Fyfe, had exercised the option conferred on them by the sixth purpose of the trust-disposition and settlement, and had taken over the business, and accepted the legacies of £5000 bequeathed to them by the fourth purpose of the trust-disposition and settlement. They therefore took no share of the residue of the trust-estate under the trust-disposition and settlement.

The first parties were the trustees under the trust-

Jan. 31, 1908. should have been conferred on such children by such settlement.

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The fourth parties maintained that they had taken a vested interest in the fee of the share of residue provided to their mother by John Fyfe or Duthie, and that the capital of such share was to fall on the death of their mother, fall to be divided among the first parties along with any children that might thereafter be born to the first parties to such provision, if any, in favour of Mr Duthie as might be presently made by Mrs Duthie.

The fifth parties maintained that they were entitled to the *intestate* of the testator to the fee of the shares of any of the first parties who might die without leaving issue born after the testator's death.

The questions of law were, *inter alia*, as follows:—

" 1. Has an unqualified right of fee in their respective shares of residue vested in the second parties, and are they entitled to payment of the capital of their shares? or

" 2. Are the first parties bound (subject to the power of appointment) to procure said shares settled in trust in the names of the first parties or of other trustees for behoof of the second parties respectively in *liferent* and otherwise, in terms of the truster's directions for the settlement in trust of daughters' provisions contained in the trust-deed for the purpose of his trust-disposition and settlement? or

" 3. Has an unqualified right of fee in their respective shares of residue vested in the third parties, and are they entitled to payment of their shares? or

" 4. Are the first parties bound (subject to the power of appointment) to retain the shares of the third parties, and to pay to the third parties respectively only the income thereof, so long as they are unmarried, and in the event of any of the third parties becoming after married, to procure her share (subject to the power of appointment) settled in trust for behoof of her in *liferent* and otherwise, in terms of the truster's said directions for the settlement in trust of daughters' provisions? or

" 6. As regards the share of residue provided to Mrs Duthie by John Fyfe or Duthie, do the fourth parties (together with any children who may be born to her) have a vested right of fee in said share? or

" 8. Does the fee of the share of any daughter who may die without leaving issue, born after the testator's death, fall to the first parties as heirs *ab intestato* of the truster?"

The arguments sufficiently appear from the contentions of the first parties.¹

At advising,—

LORD LOW (whose opinion was read in his Lordship's absence by the Lord Justice-Clerk)—The questions raised in this special case relate to the construction of the residue clause in the trust-disposition and settlement left by the deceased John Fyfe. The truster's sons have taken certain other provisions instead of sharing in the residue, and the legatees are the truster's daughters, of whom there are eight. The first parties, Mrs Duthie and Mrs Weber, are married. They were

¹ Cited at the hearing:—Chambers' Trustees v. Smiths, A. 15 R. (H. L.) 151; Tweeddale's Trustees v. Tweeddale, Dec. 1897, F. 264.

the execution of the trust-disposition and settlement. Mrs Ja
children, all of whom were born prior to the truster's death. ^{Fy}
no children. Th

the purpose of the trust-disposition and settlement the truster ^{Di}
tees, as soon as they might find convenient, to realise and Le
e of his estate among his children equally, share and share
that "the term of the vesting of the foregoing provisions of
regards daughters, be on their respectively attaining majority
whichever of these events shall happen first."

tion which amounts to an absolute gift of a share of the
daughter who shall attain majority or be married. So far
quity, but the testator proceeds to give certain further direc-
to the way in which the trustees are to deal with the
, which are so badly expressed as to render their construc-
difficulty.

ers maintain that the directions are so ambiguous that it is
e to them any effect whatever, while the married daughters
that at all events the directions cannot be applied to the
o them.

he fact that two of the daughters were already married when
was made does add to the difficulty of construction, but
out of view in the meantime, and considering the clause as
d arisen with daughters who were all unmarried, I do not
is any reasonable doubt what the testator's intention was,
think that that intention is sufficiently expressed by the

rects that the capital of the residue shall not be paid to
cept to a certain small extent), but shall be held by the
stees, or by other trustees whom they are authorised to
the lifetime of the daughters. So far I do not think that
bt, because the directions to that effect are not really
re is more difficulty, however, in regard to the purposes for
is to be held in trust. As regards the daughters themselves,
sufficiently clear that they are only to be entitled to pay-
ne. It is expressly said that so long as a daughter remains
ustees are to pay the "revenue" of her share to her, and
ughter after she is married is referred to as a "liferent."

, the next question is, what becomes of the capital? I
very words of the clause upon which the answer to that
After directing the trustees to pay the revenue of their
ughters so long as they remain unmarried, the clause
d on their marriage my trustees shall see to it that the said
revenue and capital, be secured in trust in their own
names of other trustees, by antenuptial settlement, upon
d their children to be born, in usual form, the husbands of
e (if my said daughters shall so desire) to have a liferent
o my said daughter's liferent."

which is to be set up on the marriage of a daughter is to be
f securing both revenue and capital. The revenue alone,

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Lord Low.

as we have seen, is to be paid to the daughters during their lives, and therefore the securing of the capital must be primarily for the benefit of the children. But it was argued that there was nothing to show the precise nature of the right to the capital which was given to the daughters. It might be an absolute and unqualified fee, the daughters to have it to a life interest, or it might be a right which depended upon the children surviving their mothers. The language used, it was contended, was consistent with either of these alternatives. I do not think the contention is well founded. It seems to me that there are strong grounds for holding that the right given to the children depended upon their survivance of their mother.

In the first place, to restrict the daughters to a life interest in the capital would be inconsistent with and repugnant to the initial gift to them of the capital. In the second place, there is no destination over of the share of the capital if the daughter survives the period of vesting but has no children. If, however, the fee is conferred upon the daughter by the initial gift, and if the subsequent directions were merely to burden that fee with a trust for the children in the event of the daughter being survived by children, there would be room for a destination over in the event of failure of children.

It therefore seems to me that this is a case of the kind of fee which in *Dale's Trustees*¹ is the most recent example, and that a fair construction of the language used is that a fee was given to the daughters, the fee to be burdened with a trust for the purpose of securing to the daughters the income of their shares during their lives, and the capital to be paid to the children who should survive them. The result would be that in the event of a daughter dying without leaving children, her share would be paid to her will, if she left one, and if not would pass to her heirs *ab intestato*.

For these reasons I am of opinion that as regards unmarried daughters the directions in question sufficiently disclose the intention of the testator, and I shall now consider the case of the daughters who were already married.

In the first place, it seems to me to be certain that the directions were intended to apply to all the daughters. They are introduced by the words "As regards said provisions to my daughters, I hereby appoint that the capital of the same shall not be paid to them"—words which apply to all the daughters. Then in the clause immediately following, in question the testator authorises his trustees to pay a certain portion of the capital to his daughters. The clause is in the following terms: "Notwithstanding what is before written, my trustees shall, in the event of the marriage of such daughter to pay to her, or to pay to her if already married at my death," a portion of her share not exceeding one-tenth. Now, there the testator does contemplate that a daughter may be already married at his death, and obviously there would be no objection to empowering the trustees to pay a portion of the capital to a daughter already married at that position unless the previous direction to the trustees to pay the capital was applied to daughters already married.

¹ 1905, 8 F. 264.

ity which arises is this—that although the trustees are Jan
 the capital of their shares to any of the daughters, the tes-^{Fyf}
 as to the purposes for which the shares are to be retained ^{Tru}
 applicable only to the case of unmarried daughters. Thus ^{Dut}
 directed to pay the revenue of the shares “to my daughters Lor
 ed unmarried,” and “on their marriage” the trustees are
 res in trust “by antenuptial settlement upon my daughters
 to be born.” Therefore upon a literal reading of the
 , although they would be bound to retain the share of a
 would have no power, or at all events no express power,
 ue to her, and they could not secure the share by ante-
 unless such daughter became a widow and married again,
 no case secure the capital to children born prior to the
 because the settlement is only to be on children “to be

stances there is much force in the contention of the mar-
 at as regards them the directions must be disregarded
 e assuming that the trustees are directed to hold their
 o specification of the purposes for which they are to do so,
 assumed that the intention of the testator was the same as
 nd unmarried daughters.

is one of very considerable difficulty, but I have come to
 t the directions are capable of being applied, as they were
 nded to be applicable, to the case of married as well as of
 ters. I think that the instructions to the trustees as to
 do with the shares of the daughters (which they are un-
 ed in all cases to retain) may be regarded first, as express-
 intention as to the purpose for which the shares were to
 secondly, as indicating what might be called the machinery
 purpose into effect. Now, if I am right in holding that
 efficiently clear, I do not think that the testator's intention
 simply because he has indicated a method of carrying out
 h is not precisely applicable to every case. There is no
 ing the shares of the married daughters in trust to secure
 revenue to them, and of the capital to their children in the
 urvance, and that is the kind of settlement which the
 ew, although it is not and cannot be precisely the form of
 a he specified.

e of opinion that the first and third questions should be
 negative, and the second and fourth in the affirmative, and
 d eighth questions should be answered in the negative. In
 fth and seventh questions, I think that we should find it
 nswer them.

JUSTICE-CLERK and LORD ARDWALL concurred.

MR. HATH-DARLING was absent at the hearing.

MR. T. answered the first, third, sixth, and eighth questions
 negative, and the second and fourth in the affirmative.

COOK, W.S.—SKENE, EDWARDS & GARRISON, W.S.—Agents.

No. 74.

Jan. 31, 1908.

Mulvein v.
Murray.GEORGE MULVEIN, Pursuer (Respondent).—*Mac*
JOHN MURRAY, Defender (Appellant).—*Wi*

Contract—Pactum illicitum—Restraint of Trade—Agreement—Severability of agreement.—By agreement between Mulvein, boot and shoe factor, Maybole, and Murray, Mulvein engaged Murray as a retail traveller, salesman, and collector in his said business of boot and shoe factor, and Murray bound himself "not to sell to or to canvass for the said Mulvein's customers, or to sell or travel in any of the districts traded in by the said Mulvein for a period of twelve months from the termination of this engagement."

Murray having left Mulvein's employment, Mulvein, pursuant to the agreement, brought an action to have Murray interdicted from selling boots and shoes to or canvassing any persons who were customers of Mulvein prior to the date when the defender left the pursuer's employment, from selling, travelling for, or trading in, boots and shoes in the districts specified.

The defender pleaded that the agreement founded on was unreasonable in respect that it was in restraint of trade, and was more compulsory than was reasonably necessary for the protection of the pursuer's business.

From a proof it appeared that the districts specified in the petition were the districts in which the defender had travelled during the pursuer's employment, and further that the pursuer did business in other parts of Scotland.

Held that the obligation not to sell to or canvass the pursuer's customers for a period of twelve months from the termination of the agreement was reasonable and valid.

Held further (*dicta*. Lord Low), that *quoad ultra* the obligation was unreasonable and invalid, both because the area within which the defender bound not to travel was unnecessarily wide, and because it took him bound not to travel in any trade whatsoever—Lord Low expressing the opinion that while the obligation not to travel as it stood was wide as regarded area, an obligation not to travel in the districts in which the defender had travelled was severable from the rest of the obligation, and was valid and effectual; and further, that the obligation related to the boot and shoe trade, being contained in an agreement between a boot and shoe factor and his traveller.

2D DIVISION.
Sheriff of
Lanarkshire.

ON 6th February 1905 George Mulvein, boot and shoe factor, Maybole, engaged John Murray as a retail traveller, salesman, and collector, under a minute of agreement in the following terms:—
"This minute of agreement entered into between George Mulvein, boot and shoe factor, Maybole, and John Murray, present in 1 Coral Hill, Maybole, witnesseth that the said George Mulvein hereby engages the said John Murray from the 6th day of February 1905, as a retail traveller, salesman, and collector in his said business of boot and shoe factor, . . . and this engagement shall be terminable by either party, by giving a fortnight's written notice to the other party of his intention to terminate it; and that the said John Murray binds himself not to sell to or to canvass for the said George Mulvein's customers, or to sell or travel in any of the districts traded in by the said George Mulvein for a period of twelve months from the date of the termination of this agreement.
In witness whereof," &c.

On 27th October 1906 Murray, having given the required notice, terminated his engagement with Mulvein.

In November 1906 Mulvein brought an action in the

against Murray, praying the Court "to interdict the J^r selling boots and shoes to or canvassing any parties who M of the pursuer prior to 27th October 1906, and from M ng for, or trading in boots and shoes in the following ly—Cambuslang, Tollcross, Parkhead, Kinning Park, , Rutherglen Road, Tradeston, Auchencairn, and Spring- tricts traded in by the pursuer, and in particular from ollowing persons or their representatives for orders for s, namely— . . . and to grant interim interdict o ordain the defender to pay to the pursuer the sum g."

averred:—(Cond. 5) "The pursuer has learned and defender, in violation of said provision, has, since the his employment, actively canvassed for and obtained rious parties in certain of the districts specified in the petition. The districts mentioned were the districts the defender while in the pursuer's employment. In defender has called upon and solicited orders on behalf n from the parties whose names and addresses are e prayer of the petition. Said districts were and are e pursuer, and said parties are customers of the pur- travelling and selling the defender has contravened of the said agreement."

r answered:—(Ans. 5) "Denied that the defender has rovision referred to in No. 5, or has contravened the said agreement. *Quoad ultra* admitted. The pursuer districts and towns than those travelled by defender." pleaded, *inter alia*;—(1) The defender having by said ment bound himself not to sell or travel in said dis- od of twelve months, and having acted in violation of , the pursuer is entitled to interdict as craved. (2) aving, in violation of the said minute of agreement, mers of the pursuer within said districts, and such ing to the prejudice of the pursuer, he is entitled to ved.

r pleaded, *inter alia*;—(2) The action being based on which is illegal in respect that it is in restraint of e comprehensive than is reasonably necessary for the the pursuer's interests, should be dismissed, with

ember 1906 the Sheriff-substitute (Fyfe) assoilzied the ng that the agreement was unreasonable.

January 1907 the Sheriff (Guthrie), on appeal, recalled stitute's interlocutor, before answer allowed a proof, o the Sheriff-substitute.

thereafter led. The material results of the evidence c—The pursuer did business in Ayrshire, Renfrewshire, Dumbartonshire, Stirlingshire, and Linlithgowshire. when in the pursuer's employment, travelled in the oned in the prayer of the petition. On leaving the yment the defender entered the service of a boot and urer in Ayr, as a commercial traveller, and in that ed and canvassed in districts in which he had travelled when he was in the pursuer's employment. In parti- der canvassed persons who were customers of the pur-

ner at the date when the defender terminated his engagement with the pursuer.

On 8th May 1907 the Sheriff-substitute pronounced this interdictor:—" Finds (1) that at the date of this action defender had been canvassing for orders in the districts specified in the prayer of the petition; (2) that his doing so was in contravention of his agreement with pursuer, No. 7 of process: Therefore grants interdict as craved *in toto ultra* assailing the defender."

The defender appealed, and argued;—(1) The clause prohibiting the defender from selling or canvassing did not specify in what capacity the defender was prohibited. That being so the clause was to be read as prohibiting the defender only in the capacity of principal and not as agent for a third party;¹ and as it was not suggested that the defender had either sold or canvassed as a principal, he had not violated the restriction, assuming it to be a valid and effectual restriction. (2) The restriction was invalid and ineffectual. Contracts in restraint of trade were not favourites of the law, but such a contract would stand if it was reasonably necessary for the protection of the interests of the person in whose favour it was granted.² Tried what standard the restriction here was bad in the first place because the prohibited area was unnecessarily wide and indefinite, and to limit the pursuer in the prayer of the petition asked the Court to do, in places where the defender had actually travelled for the pursuer, was in effect to make a new contract for the parties, which was not legitimate.³ No doubt if the restriction consisted of two separate parts, one of them bad and the other good, the bad would fall and the good would stand. Here, however, there was a single obligation not "to sell or travel in any of the towns or districts traded in by" the pursuer. In the second place the restriction was bad because it was an absolute prohibition of all trading, and not merely of the boot and shoe trade.

Argued for the pursuer;—The agreement was to be construed from the point of view of a business man.⁴ So construed, it in the first place prohibited the defender from selling and canvassing both as principal and as agent, and in the second place, it was a prohibition only against selling and canvassing in the boot and shoe trade. A more serious objection was that the agreement, as regarded the area of its operation was unreasonably wide. The soundness of that objection depended upon whether the agreement was separable into parts or must stand or fall as a whole. As regarded the obligation not to canvass any of the pursuer's customers—which meant any of the pursuer's customers as at the date when the defender left the pursuer.

¹ Allen v. Taylor, 1871, 19 W. R. 556; Dunning v. Owen, L. R., [1900] 1 K. B. 237.

² Nordenfeldt v. Maxim-Nordenfeldt Gun and Ammunition Co., L. R., [1894] A. C. 535; Mitchel v. Reynolds, 1711, Smith Leading Cases, vol. 1, p. 406; Dowden & Pook, Limited, v. Pook, L. R., [1904] 1 K. B. 411; British Workman's and General Assurance Co., Limited, June 16, 1900, 3 L. T. 67.

³ Dumbarton Steamboat Co., Limited, v. MacFarlane, June 23, 1899, 1 F. 993.

⁴ Baker v. Hedgecock, 1888, L. R., 39 Ch. Div. 520.

The defender also cited:—Woolley & Son v. Morrison, Feb. 26, 1894, 1 F. 451; Davies v. Davies, 1887, L. R., 36 Ch. Div. 359; Palmer v. Malins, 1887, L. R., 36 Ch. Div. 411.

⁵ William Cory & Son, Limited, v. Harrison, L. R., [1906] A. C. 274.

that plainly and in point of expression was separable from the clause, and consequently was valid and effectual. The agreement in its terms was too wide in prohibiting the pursuer from selling or canvassing in any of the towns or districts by the pursuer, but it was legitimate to go outside the deed to ascertain the circumstances of the case; and if that were found, it could be found that there were two perfectly ascertainable areas, wider, the area of the pursuer's whole business operations, and narrower, the area in which the defender had travelled or the pursuer. That being so, the obligation was severable, and as far as applicable to the narrower area was effectual.²

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JUSTICE-CLERK.—There is no doubt that in this case the restrictive obligation was for a time specified, and, in so far as it was an obligation upon the pursuer not to canvass customers, that it is valid and must be sustained. The obligation not to travel in any of the towns or districts traded in by George Mulvain for a period of twelve months is in a different position. This is an unreasonable restraint. There is an absolute want of definiteness. The word "district" seems to me to be a most indefinite expression of area. It leaves the application of the restriction to be made by the court. It may turn out that the pursuer has been in the past doing business in a particular area, but what are the limits assigned to the expression "district" is nowhere stated. I cannot but think that such a restrictive bargain should be subject to a ready and easy of interpretation, and applied with definiteness to the area to be protected.

When we come to look at the subject of agreement the same indefinite character appears. By the letter of the agreement the limitation does not apply to any particular business, but is absolutely general in its terms. It is said that the words must be read as limited to the particular trade in boots and shoes in which the defender was engaged. That would be to infer a limitation of the pursuer's future action merely from the designation of the defender's business. It seems that if the conditions agreed to were not bad, as being in restraint of trade, that the defender could have resisted a general interdict against him from trading in the prohibited places. The case of *Baker v. Baker*³ seems to militate against such a view.

It is the opinion that the judgment of the Sheriff-substitute is erroneous, and should be recalled, and that the interdict should have been limited to the sale of boots and shoes to persons who were customers of the pursuer in October 1906, naming the persons stated in the prayer of the petition, and being of those persons, and that no interdict going further should be granted.

REMARKS.—This case belongs to a class which has given rise to much discussion, and to considerable diversity of judicial opinion, but the law as to such cases has been settled by the judgment of the House of

² *McKinnon & Sons v. Goldstein*, L. R., [1896] 1 Q. B. 478.
³ Pursuer referred to *Meikle v. Meikle*, Dec. 13, 1895, 33 S. L. R. 362.
⁴ *Tomkins & Courage v. Wilson*, 1907, 23 T. L. R. 362; *Williams v. Fairbairn*, June 17, 1899, 1 F. 944.
⁵ 39 Ch. Div. 520.

Jan. 31, 1908. Lords in *Nordenfeldt v. Maxim-Nordenfeldt Gun and Ammunition Company*,¹ in which all the authorities were reviewed.

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Murray.

Lord Low.

I think that the result of that judgment is that the question whether the agreement entered into between the pursuer and the defender is or is not enforceable depends upon whether, in view of the circumstances, the restraint imposed upon the defender was reasonable, in the sense that it did no more than afford a fair protection to the interests of the pursuer.

In so far as the defender was taken bound not to "sell or to canvass" any of the pursuer's customers for a period of twelve months from the date of the termination of the agreement, I have no doubt that the restraint was reasonable; but more difficulty arises in regard to the additional obligation which is laid upon him not "to sell or travel in any of the towns or districts traded in" by the pursuer for the same period.

A commercial traveller becomes acquainted with his employer's customers in the district allotted to him, and he gets to know the possibilities of the district in regard to the extension of the trade in which he is engaged. I therefore think that it would be reasonable for his employer to take him bound, in the event of his employment coming to an end, not to use the knowledge which he had gained for the purpose of carrying on the same trade, either on his own account or as traveller for another, within the district in which he had acted as traveller, for such a period as might be supposed to be necessary to enable his successor to become acquainted with the customers and with the district. That I take to have been the object of the agreement in question, and if the second branch of the restraining clause had been limited to the districts in which the defender travelled, I should have thought it was reasonable. It, however, extends to "all the towns or districts traded in" by the pursuer. That is extremely wide, because although the volume of business done by the pursuer does not appear to be very large, it extends over a wide area. He says in his evidence that his business extends to Ayrshire, Renfrewshire, Lanarkshire, Dumbartonshire, Stirlingshire, and Linlithgowshire, and he also says that he employs eight travellers. There is nothing in the evidence to shew that it was reasonably necessary for the fair protection of the pursuer's interests that the restriction placed upon the defender in regard to towns and districts should extend over so large an area.

The pursuer, however, only seeks to interdict the defender from selling or travelling in districts in which he was actually employed as traveller, and the question arises whether it is competent to grant an interdict so limited. The general rule is that if such an obligation is severable, that part of it which is lawful may be enforced; but if the obligation is not severable, then if it cannot be enforced to its full extent, it cannot be enforced at all, because for the Court to make a severance which the parties have not made would be to remake the contract for them.

So far as I can find, all the cases in which the obligation has been held to be severable have been cases in which the severance has been made in the contract; but, on the other hand, the cases in which the obligation has been held to be not severable have been cases in which any restriction of

¹ L. R., [1894] A. C. 535.

the generality of the obligation would be entirely arbitrary, there being no Jan. 31, 1908. data upon which a definite line could be drawn. Now, the peculiarity in Mulvein v. Murray. this case is that it supplies a perfectly definite line, dividing what is a reasonable and enforceable restriction from what is an unreasonable restriction which the Court will not enforce. Suppose that the restriction had been that the defender should not sell or travel either in the towns or districts in which he had been employed as a traveller, or in any towns or districts traded in by the pursuer, the effect of the restriction as a whole would have been exactly the same as that which was actually imposed, but it would have been plainly severable, and the pursuer would have been entitled to the interdict which he now craves. The reason why he would be entitled to that limited interdict would be that it was certain from the terms of the contract that the whole area covered by the restriction was composed of two ascertained and definite areas, namely, that in which the defender had travelled, and that in which he had not travelled but in which the pursuer had traded. Now, if from the nature of the case it is as certain that the total area is composed of these two areas as if that had appeared upon the face of the contract, I am unable to see any sufficient reason why the same result should not follow here. In neither case would the Court be making a contract for the parties which they had not themselves made, but in both they would be holding that, to an extent which was precisely ascertained, the contract was lawful and enforceable. Lord Low.

I am therefore of opinion that the application of the pursuer for an interdict limited to the districts in which the defender was employed as traveller was competent; and if so, there is no question that the facts proved entitle him to decree.

There is an argument which was strongly urged on behalf of the defender, and that was that the contract was wholly bad, in respect that in the restraining clause the kind of business which the defender was restricted from carrying on was not specified. I am of opinion that this argument cannot be sustained. In the agreement the pursuer is described as "boot and shoe factor," and the defender is described as "a retail traveller, salesman, and collector" for the pursuer, "in his said business of boot and shoe factor." The agreement, therefore, is between a boot and shoe factor and his traveller, and relates to that employment and to nothing else. That being so, it seems to me that the implication is plain that the selling, canvassing, and travelling referred to in the restraining clause relate only to the boot and shoe trade, with which alone the contract is concerned.

I am accordingly of opinion that the interlocutor under appeal should be affirmed.

LORD ARDWALL.—Originally at common law all such agreements as that under consideration in the present case were void as being made in restraint of trade and contrary to public policy. To this general rule exceptions have been from time to time admitted in certain cases, on the ground that the restraint imposed in these cases was reasonable and proper on a consideration of the contract between the parties.

It is a question of circumstances in each particular case whether the restraint imposed is reasonable or not, and the main point to be considered

Jan. 31, 1908. in each case is whether the restraint is or is not wider than is necessary for the reasonable protection of the party desiring to enforce it.

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Lord Ardwall.

With regard to the agreement in question, I am of opinion that the first part of it in which the defender "bound himself not to sell to or to canvass any of the said George Mulvein's customers" is a valid provision, and is separable from what follows. But the contract also binds the defender not "to travel in any of the towns or districts traded in by the said George Mulvein for a period of twelve months from the date of the termination of this engagement." The limitation in time which is applicable to both the clauses I have quoted, is quite reasonable, but I am of opinion that the latter clause I have quoted imposes an unreasonable restraint upon the defender. It is too wide and too vague. For all that appears the pursuer may have traded in every district in Scotland and England too, and I may add that the word "district" is in itself a very vague term, as it is not a known geographical division of either town or country. In short, this provision leaves the defender entirely in the dark as to what towns or districts he is precluded from selling or travelling in, and so far as its terms are concerned it might embrace the whole country, should it turn out that Mulvein had traded in each district thereof, whatever that may mean. It appears that according to his own evidence his business extends to "Ayrshire, Renfrewshire, Lanarkshire, Dumbartonshire, Stirlingshire, and Linlithgowshire," and he adds after this enumeration, "I have a traveller who goes to Bo'ness in Linlithgow." So apparently the pursuer seems to think if a traveller of his visits one town in a county the restriction will apply to the whole of the county; but be this as it may, I am of opinion that an agreement of this sort in restraint of trade should at least be definite and distinct, and in such terms as that the person who is coming under the restraint should know what he is binding himself to refrain from doing.

It was argued for the pursuer that this second clause might be held to be valid with regard to towns or districts which the defender had himself traded in while in the pursuer's service and invalid *quoad ultra*. I cannot assent to this argument. I think that to introduce such a limitation into the clause would really be to re-form the contract, and would be contrary to the law laid down in the cases of the *Dumbarton Steamboat Company v. MacFarlane*,¹ and *Baker*.²

But further, I am of opinion that the second clause I have quoted is invalid, inasmuch as it is a restraint against selling or travelling for any purpose in any of the towns or districts mentioned. Now I think it was wholly unnecessary for the protection of the pursuer that the defender should be prohibited from selling or travelling for any purpose whatever in these towns or districts, and was unreasonable in respect that the defender had a right to engage in any sort of business for himself, provided he did not interfere with the pursuer's class of business in such towns or districts.

It was pleaded for the pursuer that this clause must be held to be limited to selling boots and shoes or travelling for the purposes of the boot and shoe trade, because the pursuer is designated "boot and shoe factor" in the commencement of the agreement; and the defender is engaged as a

¹ 1 F. 993.

² L. R., 39 Ch. D. 520.

retail salesman and collector in the said business of boot and shoe factor, Jan. 31, 1908. but I am unable to hold that the mere designation of the pursuer or the statement of the purpose for which the defender was to travel modifies the absolutely general obligation of the defender not to sell or travel at all in the towns and districts indicated, and I am of opinion that under that obligation, if valid, he might have been prevented from selling or travelling in any trade whatever.

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Lord Ardwall.

I may point out that in the case of *Baker*,¹ where the obligation was not to carry on any business whatever, it was held to be of no moment that in the beginning of the agreement the employer was designated as "of 61 High Holborn, tailor," and the employee was designated "skilled foreman cutter and general superintendent," and the employer was not permitted, by limiting the agreement for the purposes of the action to an injunction against carrying on the business of a tailor, to render the agreement valid or the action good. It was accordingly there held that the agreement was void, and the injunction was refused. Applying that case to the present, I am of opinion that the limited restriction in the prayer of the petition against selling, travelling, or trading in boots and shoes will not render the agreement valid so as to entitle the Court to grant the limited interdict asked for; and similarly I am of opinion that the limitation of the districts, against trading in which interdict is sought, will not have the effect of rendering the agreement valid to that limited extent. I regard the obligation, as one and indivisible and not separable or restrictable in part, as suggested by the pursuer.

On these grounds I am of opinion that the interlocutor of the Sheriff-substitute of 8th May 1907 ought to be recalled, and that we should find that at the date of the action the defender had been canvassing the persons mentioned in the prayer of the petition, being customers of the pursuer, for orders for boots and shoes; that his doing so was in contravention of his agreement with the pursuer, and in respect that the period of twelve months fixed by the contract has now expired, should find it unnecessary to grant interdict against the defender from selling boots and shoes to or canvassing any parties who were customers of the pursuer prior to 27th October 1906, and in particular from selling to or canvassing the persons specially named in the prayer of the petition or their representatives for orders for boots and shoes, and *quoad ultra* should assoilzie the defender.

LORD STORMONTH-DARLING was absent.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor: Find that at the date of the action the defender had been canvassing the persons mentioned in the prayer of the petition, being customers of the pursuer, for orders for boots and shoes; that his doing so was in contravention of his agreement with pursuer; but as the twelve months referred to in the said agreement have long since expired, find it unnecessary to interdict the defender from selling boots and shoes to or canvassing any parties who were customers of the pursuer prior to 27th October 1906, and in particular from

¹ L. R., 39 Ch. D. 520.

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selling to or canvassing the persons specially named in the prayer of the petition or their representatives for orders for boots and shoes ; and *quoad ultra* assoilzie the defender from the conclusions of the petition, and decern."

YOUNG & FALOONER, W.S.—ALEXANDER BOWIE, W.S.—Agents.

No. 75.

Feb. 1, 1908.

Donnelly v.
Baird & Co.,
Limited.

WILLIAM DONNELLY, Appellant.—*Hunter, K.C.—Munro.*
WILLIAM BAIRD & COMPANY, LIMITED, Respondents.—*R. S. Horne—Strain.*

Master and Servant—Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), First Sched. par. (12)—Review of weekly payments—Refusal of workman to undergo surgical operation.—In an arbitration under the Workmen's Compensation Act, 1897, the employers prayed the arbiter under the First Schedule, par. (12), of the Act to review and end or diminish a weekly payment which was being made to a workman who had been totally incapacitated in consequence of an injury to his left hand. The following facts were proved, viz. :—That the workman's loss of the use of his left hand was caused by the removal of the third finger and the top of the thumb, the existence of pain in the palm, and the permanent curvature of the second finger into the palm ; that three doctors, who had examined the workman, recommended that the second finger should be removed, and that a nodule in the palm, which they believed to be the source of the pain, should also be removed ; that the proposed operations were simple or minor operations, not attended with appreciable risk or serious pain, and were likely to restore to the workman in large measure, or altogether, the use of his hand for the purpose of his former work ; that the workman refused to undergo the operations ; and that "his continued incapacity to use his left hand and any continued pain in his left palm are fairly attributable to the want of such operations."

Held by a Court of seven Judges (diss. Lord Stormonth-Darling and Lord Pearson) that the workman by refusing to undergo the operations had precluded himself from any right to receive further compensation.

2D DIVISION.
with three
consulted
Judges.
Sheriff of
Stirling, Dum-
barton, and
Clackmannan.

THIS was an appeal by stated case against a judgment of the Sheriff-substitute (Mitchell) at Stirling, in an arbitration under the Workmen's Compensation Act, 1897, between William Donnelly, appellant, and William Baird & Company, Limited, respondents.

The case set forth :—"This is an arbitration under said Act, in which the Sheriff of Stirling, Dumbarton, and Clackmannan at Stirling was asked to review and end or diminish a weekly payment of 7s., of which the appellant was in receipt in virtue of an agreement entered into by the appellant and the respondents on 24th May 1904.

"On 9th January 1906 the then Sheriff-substitute found that the appellant was still totally incapacitated, as the result of injuries sustained by him while in the employment of the respondents, and entitled to the weekly payment of 7s. in virtue of the agreement before mentioned. On 9th April 1907 a minute was lodged by the respondents again asking the Court to review and end or diminish the weekly payment before mentioned, and on 1st June 1907 I found (1) that the respondent (the present appellant), on or about 28th January 1903, lost the use of his left hand, in consequence of injuries sustained by him while in the employment of the petitioners (the present respondents), and that respondent still continues to be without the use of said hand ; (2) that by agreement between petitioners and respondent, entered into on or about 24th May 1904, respondent

became entitled to compensation at the rate of 7s. weekly during Feb. 1, 1908.
 incapacity, and that payment thereof has been made to him up to the present time; (3) that respondent's loss of use of his left hand Donnelly v.
 was and is caused by the removal from said hand of the third finger Baird & Co.,
 and of the top of the thumb, the existence of pain in the palm at Limited.
 or near the knuckle from which said finger was removed, and the curvature into the palm and permanent fixing in that position of the second finger; (4) that the respondent has been examined by five doctors, three of whom were asked to examine by petitioners, and that the said three doctors recommend that the crooked second finger should be removed at the knuckle, or the joint next the knuckle, and that a nodule in the palm of said hand, which they believe to be the source or centre of the pain complained of, should also be removed; (5) that said proposed operations are simple or minor operations, not attended with appreciable risk or serious pain, and operations likely to restore to respondent in large measure, or altogether, use of his said hand for the purpose of his former work, viz., "drawing," that is pushing, guiding, or pulling hutchies in a coal pit, or for manual work of some kind in or about a pit, or elsewhere, and to enable him to earn the same wages as before the accident, or wages to some substantial amount; (6) that respondent is of good constitution and in sound general health; (7) that he has not undergone, and refuses to undergo, such operations; (8) that his continued incapacity to use his left hand and any continued pain in his left palm are fairly attributable to the want of such operations; (9) that in these circumstances respondent is not entitled to refuse, and ought to undergo said operations,' and I continued the cause till 1st July 1907, that the respondent (now appellant) might intimate whether he was then willing to submit himself to said operations.

"On 25th July 1907 I, having further considered the cause, and in respect of respondent's (now appellant's) declinature to undergo the proposed operations, found that the compensation payable to him should then end, and granted order accordingly."

The question of law was:—"Whether the appellant by his refusal to undergo the operations has forfeited his right to receive further compensation?"

After a hearing before the Second Division (the Lord Justice-Clerk, Lord Stormonth-Darling, and Lord Low), the cause was appointed to be heard before seven Judges.

Argued for the appellant;—The question here was—Did a workman who had been receiving compensation under the Act forfeit the right to receive further compensation if he refused to undergo a surgical operation? The Act did not contain one word about surgical operations. Paragraph (11) of the First Schedule mentioned only the examination of workmen by a medical practitioner, and enacted that if a workman refused to submit to such examination, or in any way obstructed the same, his right to weekly payments should be suspended. The Act would surely have contained an analogous provision if it had been intended that the refusal to undergo a surgical operation should have the effect of suspending or ending the right to further compensation. The respondents were really asking the Court to impose a condition which the statute might have imposed, but had not. There was equally no statutory warrant for compelling a workman to submit to medical treatment as distinguished from a surgical operation, but there was a broad and obvious distinction

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between medical treatment and a surgical operation; and it might be that a workman in refusing to submit to medical treatment was acting so unreasonably as to warrant the inference that his continued incapacity was due to his refusal to submit to medical treatment. If that principle applied to surgical operations at all, it must come up to this, that the workman's refusal to undergo such an operation was totally unreasonable. It had never been held that a workman was bound to submit to a surgical operation as a condition of receiving further compensation. In *Rothwell v. Davies*¹ the Court of Appeal in England emphatically negatived such a notion. *Dowds v. Bennie*,² the only case in which the compensation was in fact stopped, was not really a case of surgical operation, but rather of medical treatment, and Lord Adam, who delivered the leading opinion, expressly reserved the case of "a more or less serious operation, with more or less probability of a successful case." In *Sweeney v. Pumphreton Oil Company*³ the compensation was continued notwithstanding the workman's refusal to undergo a surgical operation. In *Anderson v. Baird*⁴ the question was kept open by the award of a nominal sum, and in that case Lord Young strongly protested against the notion that a workman was bound to submit to a surgical operation as a condition of receiving further compensation. In the present case it could not be said that the appellant was unreasonable in refusing to submit to a surgical operation. The Sheriff-substitute had not so found, for finding (8) could not be read as equivalent to such a finding, and the preceding findings shewed that the appellant was not unreasonable in refusing to submit to the proposed operations. He had already lost one finger and a part of his thumb, and it was proposed to amputate another finger, and all that could be said in favour of that course was that it was "likely to restore" to him in large measure, or altogether, the use of his hand. The proposed operation might be a "minor" operation from the point of view of surgical nomenclature, but it was a serious operation from the appellant's point of view, and one that he was justified in refusing to undergo. In any case, the compensation ought not to be ended; it ought, at most, to be reduced to what the appellant would have been entitled to had the operation taken place.

Argued for the respondents;—The Act⁵ gave compensation only where the incapacity "results" from the injury, and if the incapacity had come to be due not to the injury, but to the workman's unreasonable refusal to undergo an operation, it could not be said that the continued incapacity "resulted" from the injury. No sound distinction could be drawn between medical and surgical treatment. The respondents did not suggest that a workman was bound to submit to any operation, however hazardous, however painful, and however unlikely to effect a cure. The question was one of degree—Was the workman unreasonable in refusing to submit to the proposed operation? On the facts here stated the appellant was unreasonable. The proposed operations were found to be simple operations not attended with appreciable risk or serious pain, and likely in large measure, if not altogether, to restore to the appellant the use of his hand. The case was ruled by *Dowds v. Bennie*² and *Anderson v. Baird*.⁴ In *Sweeney*³ there was a conflict of medical evidence, and

¹ 1903, 19 T. L. R. 423.² Dec. 19, 1902, 5 R. 268.³ June 23, 1903, 5 F. 972.⁴ Jan. 15, 1903, 5 F. 373.⁵ Act, First Sched. par. (1) (b).

in *Rothwell v. Davies*¹ the proposed operation was a dangerous one. Feb. 1, 1908.
 The proposal to reduce the compensation to what would have been payable had the operation taken place was out of the question. It would be hopeless to attempt to form a hypothetical estimate of that sort. There was no middle course between full compensation and no compensation at all.

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 Limited.

At advising,—

LORD JUSTICE-CLERK.—The facts necessary for the consideration of this case are—(1) that by the accident suffered by the appellant his left hand was disabled, (2) that by agreement between him and the employers the respondent received compensation at the rate of 7s. weekly, (3) that he has suffered permanent loss of the third finger and part of the thumb, (4) that he still has pain at the stump of the removed finger, (5) that his second finger is fixed in a curved position into the palm. In this state of matters the respondents requested three medical men to examine the hand, and they and two other medical men examined the appellant. There is no statement in the case as to what was the opinion of these latter two medical men, the appellant not having produced their reports to the Sheriff. The three doctors employed by the respondents reported that in their opinion the second finger, or part of it, should be removed, and a nodule in the palm, from which they believed the pain proceeded, should be removed. They reported that the operations were of a simple and minor character, involving no appreciable risk or serious pain, and that what was proposed was likely to restore in large measure the use of the hand for work such as the appellant was accustomed to fulfil, or other pit manual work, enabling him to earn full or at least substantial wages, he being of sound constitution and good health.

I have thought it well in this short form to state the facts which have to be dealt with, for the question of law for decision in this case turns upon the view to be taken of them—do they or do they not justify the position taken up by the appellant, which is,—“I decline to submit to any operation, and demand compensation in respect that my present condition is one of disablement.”

The question whether a refusal to submit to skilled treatment for the restoration, whole or partial, of capacity for work is an unreasonable refusal is necessarily a question of degree. For it cannot be maintained that no matter what may be the severity of the operation recommended, or how great soever the risk to life or general health of the treatment, the workman loses right to compensation unless he brings himself to undergo the treatment and to take the risk. I think the sound view on this matter is well expressed by Lord Adam in the case of *Douglas v. Bennie & Son*,² when he laid it down that a workman who has been incapacitated is not bound in every case to submit to any medical or surgical treatment that is proposed, under penalty, if he refuses, of forfeiture of his right to a weekly payment—*e.g.*, in the case where a serious surgical operation is proposed with more or less probability of a successful cure.

On the other hand, I hold it to be the duty of an injured workman to

¹ 19 T. L. R. 423.

² 5 F. 268.

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submit to such treatment, medical or surgical, as involves no serious risk or suffering, such an operation as a man of ordinarily manly character would undergo for his own good, in a case where no question of compensation due by another existed. In preparing this opinion I find that I have used almost the terms which are to be found in the case of *Anderson v. Baird & Co.*¹ These two cases which I have referred to seem to me practically to rule this case. The appellant refuses to follow the course recommended by the medical men. He has brought no counter evidence for the purpose of inducing the Sheriff to hold that the evidence led should not lead to findings in fact in accordance with that evidence. The Sheriff has found in fact in terms of that evidence, and has in consequence held in law to the same effect as was held in the cases of *Dowds*² and *Anderson*.¹ In that I am of opinion that he was right, and would therefore propose that the question in the case should be answered in the affirmative, except that I think the word "forfeiture" is an unfortunate one to use. A better form would be that used in *Anderson's*¹ case, that the appellant "is precluded from further insisting on his claim for weekly payments."

LORD M'LAREN.—I cannot say that I have found this case free from difficulty, but the difficulty is not so much in finding a principle of decision consistent with the statutory provisions, as in applying the principle to the facts of the case before us.

There is of course no question of compelling the party to submit to an operation. The question is whether a party who declines to undergo what would be described by experts as a reasonable and safe operation is to be considered as a sufferer from the effect of an injury received in the course of his employment, or whether his suffering and consequent inability to work at his trade ought not to be attributed to his voluntary action in declining to avail himself of reasonable surgical treatment.

In order to test the principle of decision I will suppose a more simple case. A workman whose trade requires the perfect use of both hands—a watchmaker or an instrument-maker for example—has the misfortune to break one of the bones of a finger, and from want of immediate assistance, or it may be from neglect, the bone does not unite in the proper way. The hand is disabled, but he is advised that by breaking the bone at the old fracture and resetting it the use of his hand will be completely restored. I am supposing a case where the operation is not attended with risk to health or unusual suffering, and where the recovery of the use of the hand is reasonably clear. If in such a case the sufferer, either from defect of moral courage, or because he is content with a disabled hand and is willing to live on the pittance which he is receiving under the Compensation Act, refuses to be operated on, I should have no difficulty in holding that his continued inability to work at his trade was the result of his refusal of remedial treatment, and that he was not entitled to further compensation.

Passing to the other extreme, it is easy to figure a case of internal injury where an operation, if successful, would restore the sufferer to health, but where the surgeon was bound to admit that the operation was attended with

¹ 5 F. 373.

² 5 F. 268.

danger. In such a case it would be generally admitted that there was not only a legal but a moral right of election on the part of the injured person ; and if he preferred to remain in his disabled condition rather than incur the risk of more serious disablement or death, it could not be said that his inaction disentitled him to further compensation.

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Lord M'Laren.

In view of the great diversity of cases raising this question, I can see no general principle except this, that if the operation is not attended with danger to life or health, or extraordinary suffering, and if according to the best medical or surgical opinion the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him. In other words, the statutory obligation of the employer to give maintenance during the period of incapacity resulting from an accident is subject to the implied condition that the workman shall avail himself of such reasonable remedial measures as are within his power. I think that this statement is in accordance with all the decisions that have been given in similar cases, but in whatever way the condition is defined each case must be considered as a circumstantial case depending on the nature of the proposed operation and its probable results. I do not think that in principle any distinction can be taken between medical treatment and surgical treatment as regards the duty of the patient to co-operate with his professional advisers towards his own restoration to health and working capacity. The distinction only begins when an operation is proposed which may be attended with danger, or the results of which are not in the region of reasonable and probable success.

My difficulty in this case is that, Donnelly not being a skilled workman but a drawer of hutches in a coal pit, I can imagine that the man might honestly believe that no operation on his hand would suffice to remove the sensitiveness to pressure that at present makes him unfit for hard work. This, however, is a point which could not be overlooked by the doctors who have been consulted as to his case, and they have given their opinion that the crooked finger and the nodule in the palm of the hand should be removed, and that the operation is likely "to restore to him in large measure, or altogether, the use of his hand for the purpose of his former work," viz., drawing hutches.

In such cases a prudent and reasonable man will be guided by medical opinion rather than by his own fears ; and, without saying that the case is absolutely clear, my view is that by refusing to submit to the operation the party has disentitled himself to further payments. Any difficulty I have felt in considering the case is almost entirely removed by the consideration that nothing but good can come to this young man from the operation. Even if his hand should continue to be too tender to be useful to him in drawing hutches, it will according to medical opinion be greatly improved, and so the man will be in a more favourable position for doing work in some other occupation where the use of the left hand is not so necessary as in the work of a drawer.

I am therefore for affirming the Sheriff-substitute's determination.

LORD STORMONT-DARLING.—I concur with my brother Lord Pearson.

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Darling.

His view, and that as I understand of the rest of your Lordships, is that the question of law which the Sheriff has formulated is not quite accurately expressed, and that the proper result of his findings would not be to "forfeit" the appellant's right to receive further compensation. But even taking the case as fairly raising the question which probably the Sheriff intended to raise, viz., whether the workman by his refusal to undergo the particular surgical operation recommended by the three doctors who examined him at the request of the employers has disentitled himself from claiming further payments by way of compensation, I agree with Lord Pearson that the Sheriff's ninth finding is really a finding in law, and therefore not a finding on which the Sheriff is final. As I read the cases, both in England and Scotland, which were cited I think it has never been decided, at all events in explicit terms, that a workman's refusal to undergo a surgical operation, even of a minor kind, can be visited with a practical denial of his right to further compensation.

In *Rothwell v. Davies*¹ the English Court of Appeal negatived such a result. In *Dowds v. Bennie & Son*,² which was treated by the First Division as a case where the injury was comparatively slight and the treatment proposed simple and common (principally passive movements and massage), and therefore was treated as one where the present condition of the limb was truly due to the injured man's own fault and neglect, yet Lord Adam, in delivering the leading judgment, said that cases might easily be figured of "a more or less serious operation" being proposed where it would be out of the question to say that the workman was bound to submit to it. Even in *Anderson's* case³ refusal to undergo a "simple operation" as disentitling the workman to a continuance of substantial compensation was (*diss.* Lord Young) avoided by allowing the matter to be kept open by only awarding him a nominal sum. Lastly, in *Sweeney*⁴ refusal of the workman to undergo a surgical operation which had been recommended by the employers' doctors as disentitling him to further compensation was distinctly negatived in deference to a contrary opinion by a surgeon of eminence.

Therefore I think I am well founded in saying that there is not a single case in either England or Scotland laying down in explicit terms the rule for which the employer here contends, even with regard to a minor surgical operation, however probable the success of it may be. But as Lord Pearson and I are in a minority, it is unnecessary to consider what the practical consequences would be of giving effect to our view.

LORD PEARSON (whose opinion was, in his Lordship's absence, read by the Lord Justice-Clerk).—I agree in the view that the question of law which the Sheriff has formulated is not accurately expressed, and that the proper result of his findings is not to "forfeit" the appellant's right to receive further compensation. But I desire to add that on the question which I think the Sheriff intended to raise, and which was fully argued to us, my opinion is entirely in favour of the appellant. I am clearly of opinion that the Sheriff's first seven findings in fact do not warrant the

¹ 19 T. L. R. 423.² 5 F. 373.³ 5 F. 268.⁴ 5 F. 972.

eighth finding, which is that "the appellant's continued incapacity to use his left hand, and any continued pain in his left palm, are fairly attributable to the want of such operations." It appears to me that the principles laid down in the cases of *Dowds*¹ and of *Sweeney*² lead to the opposite conclusion, and that the Sheriff's ninth finding, that in these circumstances the appellant "is not entitled to refuse, and ought to undergo said operations"—which is really a finding in law—is not maintainable. I cannot hold the appellant to be unreasonable in his refusal to submit to the amputation of a finger. I admit, however, the difficulty of giving effect to this view, having regard to the terms of the eighth finding, which is a finding in fact, and is not before us for review, and which, when fairly construed, imports that the conduct of the appellant in refusing to submit to the operation is so unreasonable as to disentitle him to further compensation.

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Lord Pearson.

LORD ARDWALL—I am of opinion that the question of law submitted in this case should be answered in the affirmative, with the alteration suggested by your Lordship in the chair.

The compensation at the rate of 7s. a week which has hitherto been received by the appellant under an agreement entered into in terms of the Workmen's Compensation Act, 1897, has been paid and received under the provisions contained in the First Schedule of the said Act, section 1 (b), which apply to cases where "total or partial incapacity for work results from the injury." It is stated by the Sheriff-substitute that certain simple and safe operations would remove the appellant's incapacity to work, and in the eighth finding it is stated that "the appellant's continued incapacity to use his left hand, and any continued pain in his left palm, are fairly attributable to the want of such operations." Accepting this as a fact, it appears that now the appellant's incapacity for work does not result from the injury which he received in 1903, but from his refusal to submit to the said operations, and this being so, compensation is no longer payable in respect of incapacity for work resulting from an injury, and the payment thereof ought to come to an end.

But the appellant pleads that he is not bound to submit to the operations in question, and it was contended by his counsel that no person is bound to submit to an operation in such circumstances as the present against his will, however simple such operation may be, and that if a person in the position of the appellant chooses to take his stand on the ground that he objects to an operation on account of the pain or risk involved in it, he is the sole judge and ought not to be forced by the decision of a Court of law into the alternative of either submitting to an operation or forfeiting the compensation which otherwise he is by law entitled to. This raises a question of general importance, but one which has not now to be considered for the first time.

Three cases involving this question have been already under consideration of the Court—*Dowds v. Bennie & Son*,¹ *Anderson v. Baird & Company*,² and *Sweeney v. Pumphreston Oil Company*.³ I think the result of these decisions is that no general rule can be laid down, but that each case must

Feb. 1, 1908. be determined upon its own circumstances, the questions for consideration in each case, generally speaking, being (1) Whether the operation is a simple or a difficult one? (2) Whether it is attended with serious risk? (3) Whether if performed it will attain the end in view by diminishing or putting an end to the injured person's incapacity for work? (4) Whether it is or is not an operation involving much pain, and if it does involve much pain whether there is serious risk to be encountered by the use of anæsthetics during the operation? And (5) What is the opinion of medical men as to the advisability of the operation?

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Lord Ardwall.

Now, in the present case the Sheriff-substitute has found (1) the "proposed operations are simple or minor operations"; (2) that they are "not attended with appreciable risk"; (3) that they are "likely to restore to respondent in large measure, or altogether, use of his said hand for the purpose of his former work"; (4) that the proposed operations are "not attended with . . . serious pain," and that the respondent is of good constitution and in sound general health, from which I infer that there would be no danger to him from the use of anæsthetics; (5) that the respondent has been examined by five doctors, and that three of these doctors recommend that the operations should be performed. Nothing is said with regard to the other two doctors who examined the respondent at his own instance, and I therefore conclude that it must be taken upon the facts as stated that these doctors either did not express any opinion or that if they did their opinion was that they could not state any objections to the operations proposed.

In these circumstances I am of opinion that the Sheriff-substitute has come to a sound conclusion on the facts of the case; that the appellant has shewn no reasonable cause why he should not undergo the operations in question; and that his refusal to do so disentitles him to a continuance of the compensation which he has hitherto received.

LORD DUNDAS.—I agree with the majority of your Lordships. The real point at issue in each case of this kind is, I apprehend, whether the workman's incapacity arises from the accident which befel him or only from his own subsequent unreasonable conduct. If the latter is the fact, the workman must take the consequences of his conduct. I think we must assume from what is set forth in this stated case that there was no conflict of opinion among the medical men consulted on both sides as to the nature or the probable effect of the proposed operations. Now, the Sheriff-substitute has found, among other things, that these are "simple or minor operations, not attended with appreciable risk or serious pain, and operations likely to restore to respondent in large measure, or altogether, use of his said hand for the purpose of his former work"—which was of a very simple nature; that the respondent "is of good constitution and in sound general health"; and that "his continued incapacity to use his left hand and any continued pain in his left palm are fairly attributable to the want of such operations." In this state of matters, it appears to me that a reasonable man would submit to these operations; and that, as the respondent deliberately declines to do so his conduct is unreasonable, and his compensation must be ended. I agree, therefore, with the conclusion at which the Sheriff-substitute has

arrived; but I agree with your Lordships in thinking that the question stated for our determination is not as it stands in proper form. Feb. 1, 1908.

The Lord Justice-Clerk intimated that LORD LOW, who was absent, concurred with the majority of the Court.

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THE COURT pronounced this interlocutor:—"Find in answer to the question of law stated that the appellant has by refusing to undergo the operation to his left hand precluded himself from any right to receive further compensation: Therefore answer said question of law in the affirmative: Affirm the dismissal of the claim by the arbitrator."

ST CLAIR SWANSON & MANSON, W.S.—W. & J. BURNES, W.S.—Agents.

JAMES BURLEY, Pursuer (Respondent).—*Hunter, K.C.—Munro.*
WILLIAM BAIRD & COMPANY, LIMITED, Defenders (Appellants).—
M'Clure, K.C.—R. S. Horne.

No. 76.

Feb. 7, 1908.

Master and Servant—Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), sec. 1 (1)—Accident arising "out of the employment."—The Workmen's Compensation Act, 1897, sec. 1 (1), enacts, that if in any employment to which the Act applies "personal injury by accident arising out of and in the course of the employment is caused to a workman" his employer shall be liable to pay compensation. Burley v. Baird & Co., Limited.

Smith and Paton, two drawers in a coalpit, were sitting in a hutch, Smith driving the horse. In passing near the working place of another drawer, Burley, Paton took hold of a hutch Burley had been using and pulled it after him. Burley followed and in endeavouring to recapture his hutch pushed Paton with a prop. Paton then threw some rubbish at Burley; in avoiding the rubbish Burley struck his head against a projection on the wall and was injured.

Burley having claimed compensation under the Workmen's Compensation Act, 1897, *held (diss. Lord Stormonth-Darling)* that although the accident arose in the course of Burley's employment, it did not arise out of it within the meaning of sec. 1 (1) of the Act.

JAMES BURLEY, miner, Galston, claimed compensation under the Workmen's Compensation Act, 1897, from his employers, William Baird & Company, Limited, and instituted arbitration proceedings under that Act against them in the Sheriff Court at Kilmarnock. The Sheriff-substitute (J. Mackenzie) having awarded compensation, the employers appealed. 2D DIVISION. Sheriff of Ayrshire.

The Sheriff-substitute, in the stated case for appeal, found the following facts proved, namely:—"That the pursuer is a drawer and was employed in the defenders' Maxwood Pit, Galston, which is a mine within the meaning of the Coal Mines Regulation Act, 1887, and the Workmen's Compensation Act, 1897; that on 31st May 1907 while in the course of his employment in said pit he sustained an injury to his eye: that two other lads named Smith and Paton, who were also drawers in said pit, were taking an empty hutch to their own working place, Smith sitting on the front of said hutch and driving the horse, while Paton was sitting on the back of the hutch; that on passing the entrance to pursuer's working place Smith and Paton found a hutch which pursuer had brought there for his own use, and that said hutch contained a tree or wooden prop about seven feet long: that Smith and Paton took possession of this hutch and proceeded to carry it along with them by Paton holding it with his

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hands while he continued to sit on the first hutch ; that when they had passed through a trap-door near at hand, the pursuer, returning to his place, found the hutch gone and went in pursuit of Smith and Paton to recover it ; that the pursuer passed through the trap-door after them and coming up to the hutch in which there was the said wooden prop he raised the end of this prop and pushed it with some force against the front of Paton's body in order to detach the hutch in dispute from his grasp ; that Paton resenting this took up a handful of dust or rubbish and threw it at the pursuer ; that in avoiding this missile the pursuer struck his head against a rough or projecting part of the side of the narrow passage in which they were and received the said injury."

On these facts the Sheriff-substitute found that the accident arose out of and in the course of the respondent's employment, and that the appellants were liable in compensation.

The question of law was :—" Whether, on the facts proved, the personal injury to the respondent was caused by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1897 ? "

The case was heard before the Second Division on 22d January 1908.

Argued for the defenders and appellants ;—The workman was not entitled to compensation unless the accident arose not only in the course of, but also out of, the employment. The injury must result from something which was a risk incident to the man's work.¹ The accident here did not arise " out of " the employment. It arose out of a scuffle between the workman and his fellow-workman. An injury arising in such a scuffle was not a risk incident to work in a mine. The fact that the dispute which originated the scuffle arose out of the work did not make an injury arising out of the scuffle an accident arising out of the work.

Argued for the pursuer and respondent ;—It was not disputed here that the injury was due to accident happening at a place where the Act applied and in the course of the employment. But it was said that it did not arise out of the employment. That was not so. The controversy and scuffle which caused the injury arose out of the employment. The object of the workman, in acting as he did, was the carrying out of his master's work. The fact that in pursuance of that object he acted violently and improperly did not deprive him of his right to compensation. This case was ruled by *M'Intyre v. Rodger & Co.*,² where, as here, the scuffle arose out of the employment. *Falconer*³ and *Armitage*,⁴ cited by the defenders, were distinguishable. There the accident arose from something which was not done in the course of the employment, but which was outside of it altogether. The employment had really ceased for the time. As far as the pursuer himself was concerned the injury here was undoubtedly a pure accident. The fact that it was caused by an intentional criminal act

¹ *Falconer v. London and Glasgow Engineering and Iron Shipbuilding Co., Limited*, 1901, 3 F. 564 ; *Armitage v. Lancashire and Yorkshire Railway, L. R.*, [1902] 2 K. B. 178 ; *M'Intyre v. Rodger & Co.*, 1903, 6 F. 176 ; *Challis v. London and South-Western Railway, L. R.*, [1905] 2 K. B. 154.

² 1903, 6 F. 176.

³ 1901, 3 F. 564.

⁴ *L. R.*, [1902] 2 K. B. 178.

was irrelevant. To hold otherwise would be inconsistent with the Feb. 7, 1908. case of *Challis*.¹

At advising on 7th February 1908,—

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LORD JUSTICE-CLERK.—In this case I have come to an opposite opinion from that arrived at by the Sheriff-substitute. The facts as stated by him are that two other men in the mine where the pursuer was employed carried off a hutch which the pursuer had brought to his own working place, by one of them sitting on their own hutch, which was in motion, and holding the pursuer's hutch by hand; that on the pursuer going forward and endeavouring to get possession of his hutch by pushing a prop against the man who held it, so as to detach his hold, the other man took up a handful of rubbish out of the hutch and threw it at the pursuer, who, in avoiding being struck in the face by it, brought his head against the side of the passage and was injured. He was naturally alarmed by the other man's action, fearing to receive an injury by being struck by what was thrown, which might be a hard substance.

I am unable to hold that this injury was one arising out of, or in the course of, the pursuer's employment. What caused the injury was not in any sense an accident, but was a fault by a wrongdoer, who was acting in a wilful and unjustifiable manner, and the injury was caused by this wrongful personal act. It was not an accident occurring in the course of work. If a person throws a stone to strike another, and injures him, the fact that both the men are workmen in the place of work where the injury is done will not make the injury one for which the master must pay compensation.

I am therefore of opinion that the question in the stated case should be answered in the negative.

LORD STORMONTH-DARLING.—I have the misfortune to differ from your Lordship. There is no dispute that personal injury by accident was here caused to a workman in the course of his employment; and the Sheriff-substitute, holding that the injury arose out of, as well as in the course of, his employment, has awarded him compensation in terms of the Act. The sole question is whether the Sheriff was right in holding that the accident arose out of the employment. I am of opinion that he was, and therefore I should be in favour of sustaining his award.

The injury was to the workman's eye, and it was sustained by the man striking his head against a rough or projecting part of the side of the narrow passage through which he was then passing. No doubt he sustained this injury in trying to avoid a handful of dust or rubbish which another workman in the pit had thrown at the pursuer. And the Sheriff tells us very clearly how this came about. It seems to me that one difficulty in reversing a finding which the statutory arbitrator has come to on the facts—especially when he is so sound and sensible a judge of evidence as we know from repeated experience this arbitrator to be—is that, in a matter like this, a very little difference in the precise mode of stating the facts may make all the difference in the proper conclusion to be drawn from them. Now I take the facts as stated here to be that the lads, who were all

¹ L. R., [1905] 2 K. B. 154.

Feb. 7, 1908. "drawers" in the pit, were not engaged in "horseplay" or anything of the nature of a "lark" at all, but were going about their proper business in the pit, though the lads called Smith and Paton had been guilty of a bit of mischief in carrying off a hutch which belonged to the pursuer—in the case, as I think the Sheriff-substitute must have taken it, on the footing that Paton, in throwing the handful of dust or rubbish, was the aggressor.

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sense that he was entitled to the use of it—and that Paton was certainly in the wrong in throwing the handful of dust or rubbish at the pursuer, though the act might be very far short of a criminal act, as was suggested in the course of the discussion. To that extent I am willing to take the case, as I think the Sheriff-substitute must have taken it, on the footing that Paton, in throwing the handful of dust or rubbish, was the aggressor.

But is it the law that the moment you find that an injury sustained by a workman dutifully engaged in doing his master's work at the time when he received the injury was caused at some link in the chain of causation by the act of a fellow-workman, the employer is relieved of all liability under the act? I put the question in that form because the proximate cause—the *causa causans*—of the injury in this case was the striking of the pursuer's head against the projecting part of the narrow passage. If there had been no projection, there would have been no injury. But I am willing to take the case on the footing that what caused the pursuer to duck his head was the throwing of the missile. Even so, is it the law, taking the decisions both in England and Scotland as a whole, that the circumstance of the injury being caused, though not immediately caused, by the act of a fellow-workman, has the effect of relieving the employer from liability? Now, I must rather demur to decisions about a necessarily different set of facts being taken as if they ruled or governed the particular set of facts which are found by the arbitrator, and on which, so far as they are facts and not law, he is final. At all events these decisions can only be so taken so far as they can be said to lay down some definite or consistent rule of law.

What, then, are the decisions which are said to have this effect? There is first the case of *Falconer*,¹ as to which I must be allowed to say that it was the judgment of two Judges of this Division, against one, Lord Young being absent and Lord Moncreiff dissenting. In the subsequent case of *M'Intyre*² Lord Young, at p. 178, confessed that he would have had very great difficulty in agreeing with the judgment in the case of *Falconer*,¹ and said that if he had been present he would have been disposed to concur with Lord Moncreiff. That learned Judge admitted in *Falconer's* case¹ that the result might have been different if the proximate cause of the accident had been something wholly outwith the employment; and his Lordship's dissent was based on the ground, for which at least there was a great deal to be said, that the injured workman was engaged at his work, while the workman who caused the injury was engaged in something wholly different—viz., horseplay.

I admit that *Falconer*¹ was approved of in the English case of *Armitage*,³ in which it was decided that a workman who was injured through the tortious act of a fellow-workman, which had no relation whatever to their

¹ 1901, 3 F. 564.

² 1903, 6 F. 176.

³ L. R., [1902] 2 K. B. 178.

employment, had no claim against the employer, because the injury did not arise out of the employment. The case was one of "larking" pure and simple, because the piece of iron which was thrown by one boy at another missed that other and injured the claimant. The accident was therefore treated as a tortious act, "having no relation whatever to the employment"; these are the very words of the present Master of the Rolls. I do not think, for the reason I have given, that that could be said of the accident in the present case.

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But what is to be said of the subsequent case of *M'Intyre*¹ in this Court? I greatly doubt whether the case of *Armitage*² would have been decided as it was if the English Court of Appeal had had the case of *M'Intyre*¹ before it, which it could not have, because it was later in date than *Armitage*.² At all events, I think we are not bound, in deference to an English decision, to disregard a judgment of our own Courts. There the injury to the workman complaining was held to be one arising out of and in the course of his employment, though it was the direct result of a forcible act—pulling a brush out of the hand of the injured workman, which drew his hand across the sharp surface of a piece of machinery which was near, and so cutting his hand. Your Lordship in the chair, who had been one of the majority of this Court in *Falconer's* case,³ distinguished that case from *M'Intyre's*¹ by pointing out that the workman whose act was the immediate cause of the injury had no intention of injuring *M'Intyre*; and Lord Trayner, who had been the other member of the majority, drew practically the same distinction, for he said that the act, however careless it was, might still be properly described as "incidental to the employment." That was undoubtedly a "fine distinction," as was admitted by your Lordship in the chair in *M'Intyre's* case¹; and I cannot doubt that the presence of Lord Young and Lord Moncreiff had something to do with the difference in result. But if the intention of the man who caused the injury had anything to do with the effect in law, what is to be said of *Armitage's* case,² where there was no bad intention, for the man who threw the missile hit the wrong man?

What, again, is to be said of the later English case of *Challis v. London and South-Western Railway*?⁴ There, a stone wilfully dropped on a train by a boy from an overhead bridge injured the driver of the train, and it was held to be an accident arising out of as well as in the course of the employment, because it was a matter of common knowledge and experience, in the opinion of the learned Judges of the Court of Appeal, that boys should throw stones at passing trains; and therefore they held it to be a risk incidental to the employment of an engine-driver, although it was a matter over which the company had no control. But it was none the less a tortious act committed by a bystander, and, therefore, if the element of tort was to decide the question whether an act was, or was not, to relieve the employer from liability, I do not see why the employer in that case should have been held liable. The case of *M'Intyre*¹ does not appear to have been cited in *Challis's* case,⁴ although the older case of *Falconer*³ was.

On the whole matter I do not think that the cases cited, when viewed as

¹ 1903, 6 F. 176.

² L. R., [1902] 2 K. B. 178.

³ 3 F. 564.

⁴ L. R., [1905] 2 K. B. 154.

Feb. 7, 1908. a whole, lay down any definite or consistent rule of law, and therefore I think that we should sustain the Sheriff-substitute's decision. If there be any coherent rule of law derivable from the cases, it must be subject to so many exceptions as practically to deprive it of all value as a working rule. For it can be no more than this, that an injury may arise out of, as well as in the course of, the employment, although the act which causes the injury may be the act of a fellow-workman or of a bystander, whether malicious or not, and may have no relation to the employment, except that it is one of the risks to which the injured workman is bound to submit, as being a risk incidental to the employment in which he is engaged.

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LORD LOW.—I am of opinion, in the first place, that it is immaterial that the injury which Burley sustained was occasioned not by his being struck by the missile which Paton threw at him, but by his head coming in contact with some projection when he was avoiding the missile. The question, in my judgment, would have been the same if the missile had struck him and caused the injury.

The question is whether the accident was one "arising out of" the employment, because it is not disputed that it arose "in the course of" the employment.

There are two decisions in which the meaning of the words "arising out of" the employment has been construed in reference to circumstances closely approaching those of the present case. The one is *Falconer v. London and Glasgow Engineering and Shipbuilding Company, Limited*,¹ which was decided in this Division, and the other is *Armitage v. Lancashire and Yorkshire Railway Company*,² which was decided in the Court of Appeal in England.

With the exception perhaps of Lord Moncreiff, the learned Judges in both of these cases took substantially the same view of the meaning and effect of the words "arising out of" the employment, and I think that the result may be accurately stated thus:—If an accident occurs by reason of a danger which is incidental to the employment the workman will be entitled to compensation, but he will not be entitled to compensation if the accident is caused by something done by a fellow-workman outside the scope of the employment.

Now, for a workman to throw something at another is not a danger which is incidental to employment in a coal mine, and it is certainly an act which is entirely outside of the scope of the employment. I am accordingly of opinion that the question of law should be answered in the negative.

LORD ARDWALL.—The accident which gives rise to this case was a very regrettable one, but the question which the Court has to decide is whether, in the words of section 1 (1) of the Workmen's Compensation Act, 1897, the accident was one "arising out of and in the course of the employment" in which the workman was engaged. There is no question that it arose in the course of his employment, but the difficulty is with regard to the additional condition which must be established in order to entitle him to com-

pensation against his employers, namely, that it arose out of his employ- Feb. 7, 1908.
ment.

I am of opinion that it did not, for the reason that it arose directly from the boy Paton throwing a handful of dust or rubbish at the pursuer, in avoiding which the pursuer suffered the injury complained of. It was certainly no part of Paton's employment to throw a missile at any of his fellow-workmen, nor was his doing so a risk incidental to the pursuer's employment which the employers might be supposed to have undertaken the chance of when they employed him. On the contrary, the throwing of the missile in question was a gratuitous piece of mischievous folly on the part of the boy Paton, and I cannot hold that it was such a piece of folly as is common among boys employed in mines.

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I may add that in my opinion the present question is covered by decided cases, for I am unable to distinguish it, so far as principle is concerned, from the cases of *Falconer*¹ and *Armitage*.² The latter case was very similar to the present, for there a boy named Smith pushed another boy named Harrop into a pit, and Harrop becoming angry picked up a piece of iron and threw it at Smith. It missed Smith and hit Armitage on the eye, causing him considerable injuries, and there it was held that Armitage had no claim against the employers.

In the case of *Challis*,³ where an engine-driver was injured by being struck by the glass of the screen of the engine which had been broken by a stone wilfully dropped on a train by a boy from a bridge, the employers were held liable on the ground that the risk of mischievous boys discharging missiles from bridges was a risk incidental to the employment of an engine-driver, and that the accident accordingly arose out of the employment, but I do not think that case can be held to apply to the present, because, as I have already said, the throwing of missiles by boys or others in mines is not, according to common experience, a risk incidental to a miner's employment.

On the whole matter I am of opinion that the accident arose, not out of the employment in which the pursuer was engaged, but out of the mischievous and illegal act on the part of the boy Paton, and that accordingly the only remedy he can have is against the wrongdoer, and not against his employers.

THE COURT found in answer to the question of law that the injury to the respondent was not one arising out of his employment within the meaning of the Workmen's Compensation Act, 1897; recalled the award of the arbitrator, and remitted to him to dismiss the claim, and decerned.

MACPHERSON & MACKAY, S.S.C.—SIMPSON & MABWICK, W.S.—Agents.

¹ 3 F. 564.

² L. R., [1902] 2 K. B. 178.

³ L. R., [1905] 2 K. B. 154.

No. 77. TREVOR INGLIS RUDMAN, Pursuer (Respondent).—*Morison, K.C.*—*Mackenzie-Stuart.*

Feb. 7, 1908.

JAY & COMPANY, Defenders (Reclaimers).—*Clyde, K.C.*—*Mitchell.*

Rudman v.
Jay & Co.

Reparation—Wrongous use of Diligence—Imprisonment—Decree ad factum præstandum—Decree for delivery of furniture sequestrated for rent—Diligence—Malicious use of Diligence—Averments of Malice.—J. & Co. took decree in absence against R. for delivery of furniture obtained by him from them under a hire purchase agreement, the instalments due under the agreement not having been paid, and thereafter on 13th May 1907—in the knowledge that the furniture had been sequestrated for rent by R.'s landlord, and that decree of cessio had been pronounced against R.—applied for and obtained a warrant upon which R. was imprisoned on 14th May 1907.

In an action by R. against J. & Co. for damages for wrongous imprisonment on the ground that J. & Co. at the date when they put the warrant in force knew that it was impossible for R. to give delivery of the furniture, held that, notwithstanding the sequestration and the cessio, the defenders were entitled to enforce the decree by imprisonment; and that the pursuer having been imprisoned under a warrant legally obtained and executed, the defenders, in the absence of relevant averments of malice, were entitled to absolvitor.

2D DIVISION.
Ld. Johnston.

TREVOR INGLIS RUDMAN, civil engineer, Edinburgh, brought an action against Jay & Company, cabinetmakers and furniture dealers, Glasgow, in which he concluded for payment of £1500 as damages for wrongous arrestment and imprisonment on a warrant to imprison obtained after an expired charge *ad factum præstandum*.

The following summary of the circumstances in which the action was brought is taken from the opinion of the Lord Ordinary (Johnston):—"The pursuer Rudman states that in November 1905 he obtained from the defenders Jay & Company, cabinetmakers, Glasgow, upon a hire and purchase agreement, No. 7 of process, certain articles of furniture which in November 1906 were still in his possession, and constituted the whole plenishing of his house, 12 Inverleith Gardens, Edinburgh. At the latter date the pursuer was in arrear both with the rent of his house and with the instalments due under the hire and purchase contract. Accordingly, on 20th November 1906, his landlord sequestrated the furniture in said house for rent past due and to become due. There was included in the inventory under this sequestration the whole of the articles belonging to the defenders, and possessed by the pursuer under said hire and purchase contract. They remained under the sequestration till a point of time posterior to the circumstances upon which this action of damages is founded. The pursuer next states that, in the end of November and after the landlord's sequestration had attached, the defenders, as they were entitled to do, he being in arrear with the instalments under the hire and purchase contract,* sent their representative with a wagon to his, the pursuer's, house to remove their furniture, but that, on his wife informing him of the landlord's sequestration, and exhibiting to him the schedule of sequestration, their representative declined to intermeddle with the furniture. The pursuer further states that on 20th November 1906 one of his creditors presented a petition for

* By the third article of the hire purchase agreement the defenders were entitled to retake possession of the goods let for hire if any of the payments for hire should remain unpaid for one month after becoming due.

cessio against him in the Sheriff Court at Edinburgh, on which decree of cessio was pronounced on 22d January 1907. The pursuer alleges that in consequence of the said decree of cessio he left his house at Inverleith Gardens, leaving the furniture in question in it, and informed the trustee in his cessio that he had done so. . . .

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"In these circumstances, the defenders, on 4th February 1907, raised an action in the Sheriff Court at Edinburgh against the pursuer for decree, ordaining him to deliver the articles of furniture in question to them. That the pursuer was personally served with this summons he impliedly admits, as he alleges that he handed the citation to the trustee in his cessio, and did not himself defend the action. It is common ground that the trustee in the cessio was sisted in this action, and, for his interest, consented to decree being pronounced as concluded for, and that decree in absence was pronounced against the pursuer, with £18, 1s. 10d. of taxed expenses. On 3d May 1907 the defenders gave the pursuer a charge on the decree, and he, not having implemented the decree, they, on 13th May, applied for a warrant of imprisonment, which they obtained on the same day and executed on 14th May 1907, and the pursuer was imprisoned accordingly. He at once presented a note of suspension and liberation, when the defenders consented to liberation, and the note was dismissed, the Lord Ordinary finding the respondents, the present defenders, entitled to expenses. These expenses have not been paid."

The pursuer averred that on 11th May 1907 he by letter requested the defenders "to let him know if they intended to enforce the charge" on the decree for delivery of the furniture "by imprisonment, so that he might suspend the charge before they took that step"; and that "the defenders did not acknowledge this letter, and did not inform the pursuer that they were to imprison him," but without further warning applied to the Sheriff for a warrant. (Cond. 9) "At the time of obtaining and executing the said warrant, implement by the pursuer of the said decree was, to the knowledge of the defenders, impossible, and arrest and imprisonment of the pursuer was wrongously and unjustifiably caused by the defenders. The defenders knew that the pursuer could not personally give delivery, as he was not in possession. The defenders, after notice of the transfer of possession to the trustee by the decree of cessio, were bound to take delivery in his hands, but the defenders have refused to take such delivery. The defenders also arrested and imprisoned the pursuer under the said warrant in the knowledge that the pursuer could not intermeddle with the said articles without being guilty of contempt of Court, both for breach of poinding and for breach of the decree of cessio. The defenders also acted in bad faith in imprisoning the pursuer. He intimated to them that he wished to suspend the decree and charge if they were to enforce the charge by imprisonment, and he relied on their answering his letter of 11th May in order to do so. No answer of any kind was sent. The defenders in hiring the furniture undertook the risk of its being sequestrated under the landlord's hypothec, and of its being affected by the pursuer's bankruptcy, and the liability of the pursuer under the said agreement was qualified by that fact as an implied condition thereof, and the defenders were not entitled to execute the said warrant after the sequestration and cessio. Further, the use of the said diligence was an unwarrantable device to force the pursuer to pay his rent, and when it was no longer possible for him to do so, the defenders persisted in the said diligence, and the

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arrest and imprisonment of the pursuer was part of a scheme to annoy and injure the pursuer. It was not diligence carried out in good faith to enforce the said decree, but imprisonment used to compel payment of rent, and it was due to malice, and was without probable cause."

The pursuer pleaded, *inter alia*;—(1) The defenders having wrongously arrested and imprisoned the pursuer, are liable in damages as craved. (2) The pursuer having been arrested and imprisoned by the defenders maliciously and without probable cause, and having sustained loss and damage thereby, is entitled to be compensated therefor, with expenses.

The defenders pleaded, *inter alia*;—(2) The averments of the pursuer being irrelevant, and insufficient in law to support the conclusions of the summons, the action should be dismissed. (4) The pursuer having been arrested and imprisoned under a legal warrant regularly obtained and executed, the defenders are entitled to decree of absolvitor.

By interlocutor dated 18th December 1907 the Lord Ordinary allowed the parties a proof of their averments.*

* "OPINION.—(After the narrative quoted *supra*)—The present action is for damages for wrongous imprisonment. To the relevancy of the action the defenders object. They maintain that they acted within their legal rights; that they personally served this action on the pursuer, and, he not opposing, obtained the decree of a competent Court, and followed up that decree by legal and competent diligence, everything being done regularly and with judicial authority. And they maintain further that there can be no actionable wrong in following out a legal right (*Allen v. Flood*, L. R., [1898] A. C. 1) and that it is no answer on the part of the pursuer that it was impossible for him to implement the decree, without breach of the standing sequestration, for it was always open to him to pay his rent and free the sequestered articles from the nexus laid on by the landlord. They say that there can be no wrong in putting a man in prison on a competent decree, followed by a competent warrant of imprisonment, though there may be good ground, in the discretion of the Court, for letting him out, if he applies in the recognised way for liberation.

"I agree with the defenders that their case is quite different from that of a defender who has proceeded on *ex parte* diligence. I also discard consideration of certain averments of the pursuer founded on his *cessio*. His *cessio*, there being no divestiture by disposition *omnium bonorum*, or even possession given to and taken by the trustee, was no bar to the pursuer implementing the decree. The effect of *cessio* and of sequestration are quite different in the matter of divestiture of the bankrupt and investiture of the trustee (*Simpson v. Jack*, 16 R. 131). Still I am not able to sustain the defenders' contention, as I think their argument misses the true ground of action.

"The case of *Graham v. Dundas*, 7 S. 876, indeed lays down in unmistakable terms that if a party has 'right to obtain decree, he must also be entitled to enforce that decree by the forms and executorials allowed by law,' without being liable in damages. This was followed in *Aitken v. Finlay*, 15 S. 683. In both these cases the original decrees were found ultimately to have been erroneous on the merits, but it was held that this did not give relevancy to the claim. In *Bell v. Gunn*, 21 D. 1008, the same conclusion was arrived at, though the decree, which was the foundation of the diligence, was found not erroneous on the merits, but on a technical objection to the instance, which had not been stated by the defender, who made no appearance, though personally cited. See also *Kinnes v. Adam & Sons*, 9 R. 698, and other cases referred to. But in *Wolthecker v. Northern*

The defenders reclaimed. The case was heard before the Second Division on 29th January and 7th February 1908. Feb. 7, 1908.

Argued for the defenders and reclaimers;—A warrant of imprisonment on a decree *ad factum præstandum* was a warrant issued in ordinary course, and necessarily following such a decree if asked. It followed upon a decree which implied a right to demand such a warrant. A decree *ad factum præstandum* could not be enforced in any other way than by imprisonment. The defenders, therefore, were in the position of having merely used their legal right. A person who had done no more than exercise his legal right of enforcing a decree of Court by the ordinary and proper executorial could not be made liable in damages for so doing.¹ There was here no flaw in the execution of the diligence. It was perfectly regular in itself. That could not be disputed. But it was said that imprisonment could not legally follow on a decree *ad factum præstandum* if performance was

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Agricultural Company, 1 Macph. 211, the Lord Justice-Clerk (Inglis) predicates an important condition to the freedom from consequences of the litigant who uses any legal right or remedy to which he is absolutely entitled, in these words, 'unless he was shewn to have resorted to it maliciously and without probable cause,' and less definitely where he speaks of such litigant using 'his legal right moderately and in good faith.'

"It is there that the true case of the pursuer arises. He cannot and does not object to the defenders having taken decree against him, nor can he object to their following up the decree by personal diligence *per se*, but he does object to their doing so in the circumstances in which they and he found themselves, which he says was not the following out their legal rights moderately and in good faith, but oppressively and maliciously.

"What then are the circumstances alleged? The defenders were apprised of the sequestration. Apart from averments of special intimation at an earlier date, they admit that they did learn of the subsistence of the sequestration on 12th May 1907, the day on which they applied for their warrant for imprisonment, and two days before they executed it. They also knew at the time, 19th March 1907, when they took the decree, which was the foundation for the warrant to imprison, that the pursuer was under *cessio*, for the trustee was a consenting party for his interest to their taking such decree. They must further be held to have known that it was an incident of their contract of hire and sale, of which they took the risk, that their furniture in the pursuer's possession would be subject to the hypothec of the pursuer's landlord. They must therefore have known that their debtor, the pursuer, could not, unless he was able to pay the rent, implement the decree without breach of the landlord's sequestration, and that being a bankrupt under *cessio* he could not be expected to pay the rent in order to release the furniture. This seems to me a relevant averment to distinguish the case from the general rule of *Graham v. Dundas* and the other cases above quoted, and from which it is possible to infer the malice which is averred.

"I do not think that it is necessary to follow the interesting argument which the defenders maintained, on the question whether the impossibility of fulfilment excused from contract liability (*Gillespie & Company v. Howden & Company*, 12 R. 800; *Jones v. St John's College, Oxford*, L. R., 6 Q. B. 115; *Lord Clifford v. Watts*, L. R., 5 C. P. 577). There are cases

¹ *Graham v. Dundas*, 1829, 7 S. 876; *Aitken v. Finlay*, 1837, 15 S. 683; *Bell v. Gunn*, 1859, 21 D. 1008; *J. & W. Kinnes v. Adam & Sons*, 1882, 9 R. 698; *MacRobbie v. M'Lellan's Trustees*, 1891, 18 R. 470.

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impossible. There was no impossibility in the pursuer's obtempering the decree. There was no physical impossibility. The only difficulty consisted in the pursuer's inability to pay his rent. That did not amount to impossibility of performance in any sense which could have any relevance here. Further, a cessio did not attach *acquirenda*, so that cessio in January did not necessarily imply inability to pay rent in May. In any view, the pursuer could not in this case found on the impossibility of performance, because he had allowed decree to go against him in absence. A person who had so allowed decree to go against him was in the same position as a person who had contracted to do something impossible.¹ It did not make the pursuer's case any better to aver that the defenders acted maliciously. For if they acted legally it could not make any difference whether or not they acted maliciously. A legal act could not give rise to an action of damages because it was done maliciously.² But apart from that there were no relevant averments of malice. The case of *Wolthecker v. Northern Agricultural Company*,³ dealt with arrestment on the dependence, and not with diligence in execution of a final decree.

Argued for the pursuer and respondent;—1. The rule with regard to responsibility for the use of diligence was (1) that where a diligence followed in ordinary course of process, and was granted as part of the ordinary executorial, without the necessity of any *ex parte* statement or representation to the Court, as in the case of arrestment on the dependence, the party using it was not liable in damages, although it was ultimately found that the decree on which it proceeded was erroneous, unless he acted maliciously and not in the *bona fide* exercise of his rights; (2) that where a diligence was only granted upon an *ex parte* statement or representation to the Court, as in the case of interim interdict or a *meditatione fugæ* warrant, it was granted *periculo petentis*, and if such statement or representation was not strictly accurate, the party using the diligence so granted was liable in damages, even

in which undoubtedly it does not. But they depend on the terms of the contract and the cause of the impossibility. But while in many such cases the impossibility of performance will form no defence to an action for breach, it would, I think, form an adequate defence to an action for specific implement, and even if a decree for specific implement was obtained, I think it would be a very dangerous proceeding to attempt to enforce it by personal diligence.

"The case is in some of its aspects not unlike that of *Bottger v. The Globe Furnishing Company*, decided by me in June 1906, 14 S. L. T. 117, to the judgment in which I refer. But I desire to add that I had not the benefit in that case of such a full argument and such an exhaustive citation of authority, and to admit that consideration of the question of malice, to which no argument was addressed, escaped me. I understand that the case did not go further.

"I am unable, as I think there is a sufficient foundation laid for the pursuer's averment of malice, to sustain the defenders' plea to the relevancy. The action must therefore go to proof. But I do not think that in the exercise of my discretion I should send the case to a jury. There are, to my mind, several reasons why it will be better disposed of by a proof before a Judge."

¹ See *Gillespie & Co. v. Howden & Co.*, 1885, 12 R. 800.

² *Allen v. Flood*, L. R., [1898] A. C. 1.

³ 1862, 1 Macph. 211.

although he acted *bona fide* and without malice.¹ 2. The diligence here belonged to the latter class. Formerly it required letters of caption proceeding on a bill. It still required to be specially applied for upon an *ex parte* statement, and could only be granted if there was no lawful cause to the contrary.² Application for it in this case involved an implied repetition of the statement on which the decree was obtained, viz.:—That the furniture was in the pursuer's possession, and that he was bound to deliver it but refused to do so. That statement was erroneous. The pursuer could not deliver it, for it was *in manibus curiæ*, and he was divested of his estate by the *cessio*. A decree of *cessio* transferred the property of the bankrupt at the date of the *cessio* to his trustee. Further, the pursuer was not bound to redeliver the furniture when it had been sequestrated for rent. The obligation to redeliver was qualified by and subject to the landlord's right of hypothec. The warrant having been therefore obtained upon erroneous statements the defenders were liable in damages whether they acted maliciously or not. 3. But apart from that, the execution of the warrant in the circumstances was illegal. Imprisonment could not lawfully be used to enforce a decree *ad factum præstandum* where performance was impossible. Owing to the sequestration and the *cessio* performance was here impossible. The enforcement of the warrant was thus an illegal use of diligence and entitled the pursuer to damages even although he could not aver and prove malice. A decree *ad factum præstandum* was peculiar. Imprisonment for failure to perform the act ordered was awarded as a punishment for contumacious disobedience.³ It was only justified when it was used for the purpose of enforcing obedience. It could not lawfully be used with any other and indirect object. Here the diligence was not used directly to compel the delivery of the furniture. The defenders knew that was impossible. Their purpose was to concuss the pursuer or his friends into paying the rent so as to free the furniture from the sequestration. To allow imprisonment to be used for such a purpose was utterly inconsistent with the whole modern law as to civil imprisonment. The defenders had taken the wrong course here. Instead of bringing an action *ad factum præstandum*, they should have proceeded as suggested in the case of *Lindsay v. Earl of Wemyss*.⁴ 4. Even if the diligence here belonged to the first of the two classes differentiated above, the pursuer had a good case for damages, because he had relevantly averred malice. The failure of the defenders to answer the pursuer's letter, the execution of the warrant without warning after receiving that letter, and in the knowledge that delivery by the pursuer was impossible, and the improper motive and indirect purpose with which the diligence was used, were sufficient to infer malice on their part, and to shew that they did not act in the *bona fide* exercise of legal right. 5. The pursuer was not barred by having allowed decree to go against him in absence.⁵

¹ *Wolthecker v. Northern Agricultural Co.*, 1862, 1 Macph. 211, *per* Lord Justice-Clerk Inglis, at pp. 212-213; *M'Gregor v. M'Laughlin*, 1905, 8 F. 70, *per* Lord President Dunedin, at pp. 74-75.

² *Personal Diligence Act* (Debtors Act, 1838) (1 and 2 Vict. cap. 114), sec. 11, and Schedule No. 8.

³ *Mackenzie v. Balerno Paper Mill Co.*, 1883, 10 R. 1147.

⁴ 1872, 10 Macph. 708.

⁵ *Sturrock v. Welsh & Forbes*, 1890, 18 R. 109.

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LORD JUSTICE-CLERK.—This case is somewhat peculiar. The defenders are furniture dealers who supplied certain furniture to the pursuer on the hire purchase system. When the instalments due for the furniture were not paid the defenders sent to the pursuers and demanded redelivery of the furniture. They were met by production of a decree of Court by which the furniture was sequestrated for rent due for the house in which the furniture was. No doubt that took the furniture out of the control of the pursuer. Then the present defenders as pursuers brought an action against the present pursuer as defender and took a decree in that action for delivery of the furniture. They were quite entitled to take such a decree. That is shewn conclusively by the fact that no one opposed the granting of the decree—neither the present pursuer nor the trustee in his cessio nor anyone else. We must assume that this decree was rightly granted. No one has impugned it. Having a decree *ad factum præstandum* the present defenders—then pursuers—proceeded to enforce it, and the only way open to them for enforcing it was imprisonment. Accordingly the present pursuer was imprisoned under the decree. He was liberated the next day. The question now is whether the person who was so imprisoned has a good claim of damages in respect of such imprisonment. A number of ingenious arguments have been stated to us in support of the pursuer's case, but I am satisfied that none of these arguments are well founded, and that the pursuer has no relevant case. Further, I am satisfied that the pursuer was imprisoned under a legal warrant regularly obtained and executed, and that the defenders are entitled to decree of absolvitor. I do not go further into details, except to say this, that I do not think there is any relevant averment of malice in the pursuer's record, and there is nothing alleged from which malice could be inferred. I think, therefore, that we should recall the interlocutor of the Lord Ordinary, sustain the second and fourth pleas for the defenders, and assoilzie them from the conclusions of the action.

LORD STORMONTH-DARLING and LORD LOW concurred.

LORD ARDWALL.—I agree with your Lordship in the chair that the pursuer has set forth no relevant case, and that the Lord Ordinary's interlocutor ought to be recalled, the second and fourth pleas in law for the defenders sustained, and the defenders assoilzied.

The facts are sufficiently set out in the Lord Ordinary's opinion, and it is unnecessary to recapitulate them at any length.

The defenders, who are furniture dealers in Glasgow, raised an action against the pursuer for delivery of articles of furniture which belonged to them. The present pursuer did not appear to defend the action, but the trustee in his cessio was sisted in the action, and for his interest consented to decree being pronounced as concluded for. The pursuer in the present action not having appeared at all, decree for delivery *ad factum præstandum* in absence was pronounced against him, with expenses. The defenders gave the pursuer a charge on this decree, and, he having failed to implement the decree within the days of charge, on 13th May 1907 they applied in ordinary course for a warrant for imprisonment on which the pursuer

was imprisoned. What the present defenders did was entirely within their Feb. 7, 1908. rights. They merely carried out the decree which they had obtained without objection on the part of the pursuer. The whole proceedings were orderly proceeded, and perfectly regular.

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Lord Ardwall.

This is not one of the proceedings which the party setting them in motion is held to adopt *suo periculo*, such as a summary application for interdict or the arrest of a person *in meditatione fuge*; and although it is said that the diligence was due to malice and was without probable cause, yet there are no relevant averments of malice or want of probable cause. The pursuer's allegations, so far as they have even a semblance of relevancy, seem to be founded on this, that there was no reason for the diligence of imprisonment being put in force, because, the furniture in question being sequestered, the pursuer did not have it in his power to deliver it to the defenders, and being under a cessio, he had no money wherewith to pay his rent and release the furniture from the landlord's sequestration.

I cannot accept this view of the situation. Under the old law of imprisonment for debt, debtors were frequently put in prison although they had no effects or money in their possession, simply as a compulsitor to make them or their friends find the money to pay the debt, and in the same manner the defenders in this case used imprisonment as a compulsitor to induce the pursuer, by raising money, to get rid of the landlord's sequestration and to deliver the furniture in terms of the decree. This was a perfectly intelligible piece of procedure, and was, as I have said, entirely within the rights of the defenders; and while I am not prepared to say that in no case might it be possible that malice could be relevantly averred against a person using such diligence, such averment would require to be very distinct and specific, and I do not think that any such averment exists in the present action. I regard it as wholly out of the question that any person should be subjected to an action of damages for executing the appropriate lawful diligence following on a decree *ad factum præstandum* of a competent Court on bare averments that the diligence was used maliciously and without probable cause.

THE COURT pronounced this interlocutor:—"Recall the . . . interlocutor reclaimed against: Sustain the second and fourth pleas in law for the defenders: Assoilzie them from the conclusions of the action, and decern," &c.

ROBERT WHITE, Solicitor—GRAHAM POLE & LAWRENCE, S.S.C.—Agents.

THOMAS HANDYSIDE BAXTER RORIE (Liquidator of Lochee Sawmills Company, Limited), Petitioner (Respondent).—*Morison, K.C.*—*Hendry.* No. 78.
Feb. 8, 1908.

JOHN LAURENCE STEVENSON AND ANOTHER, Respondents (Reclaimers).—*Graham Stewart, K.C.*—*D. Anderson.* Rorie (Liquidator of Lochee Sawmills Co., Limited) v. Stevenson.

Agent and Client—Agent's Rights—Hypothec—Company—Winding-up—Production of Documents—Reservation of Lien—Companies Act, 1862 (25 and 26 Vict. cap. 89), sec. 115.—Where a law-agent, who has acted for a company, and is its creditor for professional services, in obedience to an

Feb. 8, 1908. order under sec. 115 of the Companies Act, 1862, pronounced in the liquidation of the company, has produced the title-deeds of heritage belonging to the company, without prejudice to any lien which he may have over them, the mere reservation of his lien does not give him a preference over the general assets of the company, unless it can be shewn that, had the titles not been ordered to be delivered up, he would have had an effectual lien over them for his account.

Circumstances in which *held*, applying this rule, that a law-agent was not entitled to a preferential ranking in the winding-up of a company.

2D DIVISION.
Ld. Johnston.

On 9th November 1906 a resolution was passed for the winding-up of the Lochee Sawmills Company, Limited, incorporated under the Companies Acts, 1862 to 1900; and Thomas Handyside Baxter Rorie, C.A., Dundee, was appointed liquidator. On 6th December a supervision order was pronounced by the Court, and the liquidation was remitted to Lord Johnston. Stevenson & Johnston, solicitors, Dundee, claimed a preferable ranking for the sum of £216, 13s. 9d., being the amount of an account for professional services to the Company. The ground upon which they claimed a preferable ranking was that they had a lien over certain title-deeds and other documents which had been ordered by the Court to be produced without prejudice to their lien in terms of section 115 of the Companies Act, 1862.* The liquidator allowed them an ordinary ranking for £114, 16s. 8d.

In a note presented to the Lord Ordinary in the liquidation the liquidator craved approval of this among other deliverances.

John Laurence Stevenson and Peter Reid Johnston, the individual partners of the firm of Stevenson & Johnston, trustees for behoof of said firm, and the partners thereof, lodged answers to this note, in which they objected to the liquidator's deliverance, *inter alia*, (2) in so far as it only allowed the respondents an ordinary ranking, and they repeated their claim for a preferable ranking.

The circumstances out of which this question arose were as follows :—Messrs Stevenson & Johnston were, for some time prior to the liquidation, the law-agents of the Company, and at the date of the liquidation they were in possession of the title-deeds of certain heritable property belonging to the Company. Prior to 11th January 1905 the Company in consideration of a loan of £750 made to them, granted in favour of Mr Stevenson and Mr Johnston, as trustees for their firm, a bond and disposition in security over this heritable property, containing an assignation to the writs in statutory form. At the same time another bond and disposition in security over the same property, with the same assignation of writs, was granted by the Company in favour of Mr Alfred Stevenson, a gentleman not connected with the firm of Stevenson & Johnston, in consideration of a loan by him of £800. Certain persons were taken bound along with

* The Companies Act, 1862 (25 and 26 Vict. cap. 89) enacts, sec. 115:—
“The Court may after it has made an order for winding-up the company summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company . . . and the Court may require any such officer or person to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company . . . nevertheless in cases where any person claims any lien on papers, deeds, writings, or documents produced by him, such production shall be without prejudice to such lien, and the Court shall have jurisdiction in the winding-up to determine all questions relating to such lien.”

the Company as co-obligants for repayment of these bonds, and repayment thereof was also guaranteed to the lenders by the General Accident Fire and Life Assurance Corporation, Limited. Messrs Stevenson & Johnston acted as agents for the lenders in both bonds. Although the writs were assigned there was no change in their custody.

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On 11th January 1905 the Company disposed the same heritable property to Mr Stevenson, Mr Johnston, and another, as trustees for behoof of the holders of debentures issued by the Company to the amount of £1500. This disposition contained an assignation of the writs in the ordinary form, but the title-deeds still remained in the possession of Messrs Stevenson & Johnston. They acted as agents of the trustees.

Prior to the liquidation a fire took place by which part of the heritable subjects was destroyed. The liquidator received from the Fire Insurance Company with which the subjects were insured the sum of £465, which was ultimately applied to reduce the amount due, as after mentioned, under the bonds and dispositions in security for £750 and £800.

After the supervision order in the liquidation had been pronounced, the title-deeds above mentioned being still in the custody of Messrs Stevenson & Johnston, the Lord Ordinary, on 18th January 1907, pronounced this interlocutor:—"Requires and ordains the said John Laurence Stevenson and Peter Reid Johnston and Alfred Stevenson, or such of them as may have the custody of the title-deeds of the heritable subjects belonging to the Company, forthwith to produce the same in terms of section 115 of the Companies Act, 1862, without prejudice to any lien which the said John Laurence Stevenson and Peter Reid Johnston, or their firm of Stevenson & Johnston, may have over the said title-deeds as provided by said section." The title-deeds were produced accordingly, and on 22d January were borrowed up by the liquidator.

On 28th January the debenture-holders unanimously passed a resolution in the following terms:—"This meeting confirms the declaration of the debenture-holders made at their meeting . . . held . . . on 3d December 1906, that they were satisfied to leave their interests in the liquidation in the hands of the liquidator, and concur in the liquidator bringing to sale the heritable property and others of the Company over which their debentures are secured, . . . and in his taking all such steps as may be necessary or expedient for the purpose of effecting such sale."

On 6th February 1907 intimations, requisitions, and protests were given (1) for Mr Alfred Stevenson, and (2) for Messrs Stevenson & Johnston, as trustees for their firm, requiring payment of the bonds in their favour for £800 and £750 respectively.

On 19th February 1907 the heritable property above mentioned was exposed for sale by public roup at the upset price of £1250, but no offerer appeared.

The General Accident Fire and Life Assurance Corporation, Limited, in terms of their guarantee, paid up the sums due under the bonds for £800 and £750, and Mr Alfred Stevenson and Messrs Stevenson & Johnston, in consideration of the payment to them respectively of these sums, assigned their respective bonds and dispositions in security to the Corporation by assignations dated 14th March 1907.

On 3d May 1907 the heritable subjects were again exposed for sale

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by the liquidator, with consent and concurrence of the General Accident Fire and Life Assurance Corporation, Limited, at the reduced upset price of £950, but there was no offerer, and the sale was adjourned. The property was re-exposed for sale by public roup at the further reduced upset price of £800 on 14th June 1907, when it was purchased for £902. This sum (less the expenses of realisation), and also the sum received from the Fire Insurance Company for the subjects destroyed by the fire above mentioned, were paid to the General Accident Fire and Life Assurance Corporation, Limited, as in right of the bonds for £750 and £800. The sums so paid to the Corporation together amounted to £1228, 1s. 10d., leaving a balance of £321, 18s. 2d. still due under these bonds. This balance was paid to the Corporation by the co-obligants above mentioned, who made a claim in the liquidation for the amount so paid by them.

On 20th November 1907 the Lord Ordinary pronounced this interlocutor:—" . . . Finds that, in the circumstances in which the heritable property of the Company was realised, there was no lien available to the firm of Stevenson & Johnston, as law-agents of the Company, over the titles to the Company's heritage, and to that extent and effect approves of the liquidator's adjudication on said claim," &c.*

* "OPINION.—(After narrating the facts)—Now, the liquidator could do nothing in the way of selling the heritage except under burden of the bonds, unless by arrangement with the bondholders—that is, he could only sell the Company's reversion. Had there been any reversion to realise, and had the liquidator realised it, there can be no doubt that, as against him, Messrs Stevenson & Johnston's lien would have been good, and that in respect of the condition under which the titles were handed over, he must have given Messrs Stevenson & Johnston a preference in lieu of their lien, not only over the proceeds of the reversion, but over the general assets in liquidation—*Skinner v. Henderson*, 1865, 3 Macph. 867. But there was no reversion to realise, and the liquidator could do nothing without the consent of the bondholders. The original bondholders having no longer any interest, but having transferred their interest to the Assurance Corporation, the liquidator, with consent and concurrence of the Corporation as assignees, and also of the debenture-holders of the Company, whom I caused to be consulted independently of their trustees, Messrs Stevenson & Johnston, who had a hostile interest, has now realised the heritage and applied the net proceeds in payment *pro tanto* of the sums due to the Assurance Corporation as assignees of the original bondholders. There proved on realisation to be a considerable deficiency even to pay the Assurance Corporation. . . . And, of course, there was nothing from the proceeds of the heritage for the debenture-holders and *a fortiori* for the general creditors.

"Now, in effecting the sale the liquidator was acting, as it appears to me, by reasonable arrangement, primarily as agent for the secured creditors, though in his capacity as liquidator, and Messrs Stevenson & Johnston's lien must be considered as in a question with the secured creditors, and not as in a question with the Company, who were the debtors. From the moment the bonds were granted Messrs Stevenson & Johnston were holding the titles both as agents for the Company, the debtors, and as agents for the bondholders, their creditors, in respect that they were agents for both borrower and lender. They might plead their lien to effect against their clients the borrowers, but they could not plead their lien to effect against their clients the creditors—*Drummond v. Muirhead & Guthrie Smith*, 2 F. 585. The fact of their double agency, which is not affected by the further fact of their personal interest as one of the lenders, makes an exception from

Messrs Stevenson & Johnston reclaimed. The case was heard Feb. 8, 1908. before the Second Division on 21st January 1908.

Argued for the respondents and reclaimers;—The liquidator got the titles for the benefit of the Company and its creditors generally. He used them for a sale at an upset price which would have yielded a reversion. The subsequent consent of the bondholders was irrelevant. No doubt if the bondholders or the debenture-holders had demanded the titles they could have got them free of the lien, as the lien could not be pleaded against them,¹ but neither the bondholders nor the debenture-holders demanded the titles. The liquidator did not represent the debenture-holders, and was not entitled to state pleas which they might have pleaded if they had chosen to do so. A law-agent's lien gave him no right in any particular property. It operated solely by creating inconvenience and so compelling payment.² The rule was that, if a law-agent delivered documents subject to his lien to anyone, for whatever purpose such person might use them, and whether they were found to be of any value to him or not, the law-agent was entitled to payment of his account from such person if solvent, or to a preferential ranking where such person was a trustee in bankruptcy. Even if the papers were not used at all, and were handed back to the law-agent, his right to such payment or preferential ranking still remained.³ The law-agent's claim did not affect only the estate to which the documents related. It was good against the whole estate of a bankrupt.⁴

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Argued for the petitioner and respondent;—The property was sold with consent, and as things resulted, solely for behoof of the bondholders. It did not realise enough to pay the bonds. Subject to the bonds the right to the property was in the debenture-holders, for whom also the liquidator was acting. There was never the slightest possibility of a reversion for the Company or its general creditors. The law-agents could not have pleaded their lien against either the bondholders or the debenture-holders. It could not be pleaded without prejudice to their rights. It was therefore of no value, and consequently the delivery of the title-deeds did not give them any right to a preferable ranking. In any view, it could only give

the ordinary rule. If this exception holds, it is impossible that they should be heard to set up their lien against their own assignees and the assignees of their client. In the circumstances of the actual realisation, therefore, Messrs Stevenson & Johnston had, in my opinion, no effectual lien to reserve, and I am unable to listen to the contention that the mere fact of reserving a law-agent's lien under the 115th section of the Companies Act, 1862, *ipso facto* gives the law-agent a preference over the general assets of the Company, irrespective of such circumstances as I have narrated. I shall therefore sustain the liquidator's deliverance on claim No. 36, so far as the principle of his determination is concerned. But before I can deal with his deliverance in detail there must be an audit of the various business accounts involved. . . ."

¹ Drummond v. Muirhead & Guthrie Smith, 1900, 2 F. 585, *per* Lord Trayner, at p. 589.

² Ferguson & Stuart v. Grant, 1856, 18 D. 536, *per* Lord President McNeill and Lord Curriehill, at p. 538.

³ Renny & Webster v. Myles, 1847, 9 D. 619, *per* Lord President Boyle, at p. 625; Bell's Prin. 1438 and 1441.

⁴ Paul v. Mathie, 1826, 4 S. 420; Skinner v. Henderson, 1865, 3 Macph. 867, *per* Lord Justice-Clerk Inglis (addendum), at p. 869; Bell's Prin. 1441.

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a right to a preferable payment out of the proceeds of the subjects to which the title-deeds related. It had never been decided that the law-agent's claim could be made good against the whole estate.¹ In the present case, after satisfying the claims of the bondholders against whom the lien could not be pleaded, there was nothing left of the proceeds of this particular property, so that there was no fund out of which the agents could get preferable payment. The liquidator was in a judicial position. The question was not what he was entitled to plead, but whether his decision as judge in the first instance was correct. He represented all interested, and his duty was to see that everyone got what he was entitled to, and that no one got more.

At advising, on 8th February 1908,—

The opinion of the Court (LORD JUSTICE-CLERK, LORD STORMONT-DARLING, LORD LOW, and LORD ARDWALL) was read by

LORD ARDWALL.—On 16th January 1907 the Lord Ordinary in this liquidation required the reclaimers, Stevenson & Johnston, who are a firm of solicitors in Dundee, to produce the title-deeds of the heritable subjects which belonged to the Company, in terms of the 115th section of the Companies Act, 1862, "without prejudice to any lien which the claimants or their said firm might have over the said title-deeds, as provided by the said section," and the question raised by this reclaiming note is whether in respect of the said lien so reserved the reclaimers are entitled to a preferable ranking in the liquidation. The Lord Ordinary has held that they are not, and I agree with him in that opinion.

The mere reservation of a law-agent's lien under the section above quoted does not give him a preference over the general assets of the Company unless it can be shewn that had the titles not been ordered to be delivered up by the Lord Ordinary, he would have had an effectual lien over them for his account.

Now, as pointed out by the Lord Ordinary in his opinion, which clearly and carefully recapitulates the whole circumstances of the case, Messrs Stevenson & Johnston held these titles not only as agents for the Company, but also as agents for certain bondholders who had granted loans over the security of the subjects to which the titles refer. There were two bonds for £750 and £800 respectively, and these were guaranteed by the General Accident Fire and Life Assurance Corporation, Limited, and when it became perfectly clear that there was to be a deficiency in the heritable security, that Corporation paid up the sums contained in the bonds, and took assignments from the bondholders some time after the date of the liquidation. In addition to these bonds the Company had issued certain debentures, and in security of these the said subjects had been conveyed to trustees, of course under burden of the bonds. It appears that Messrs Stevenson & Johnston also acted as trustees for these bondholders, so here again they were holding the titles for postponed heritable creditors. Now, as pointed out by the Lord Ordinary, it is settled by the case of *Drummond v. Muirhead &*

¹ *Skinner v. Henderson*, 1865, 3 Macph. 867, per Lord Benholme and Lord Neaves, at p. 869; *Goudy on Bankruptcy* (3d ed.), p. 600; *Gloag and Irvine on Rights in Security*, p. 392; *Bell's Prin.* 1441.

Guthrie Smith,¹ that *Stevenson & Johnston*, though they might plead their lien with effect against their clients the borrowers, could not plead their lien with effect against their clients the lenders. Accordingly, either the bondholders or debenture-holders could have insisted on delivery of the titles at the date of the liquidation for the purpose of realising their security, and, indeed, the bondholders had taken steps towards such realisation by serving a schedule of intimation, requisition, and protest upon the liquidator on the 6th of February 1907. It was evident therefore that it was in the interest of all parties, both in the way of saving expense and otherwise, that the liquidator should be entrusted by the heritable creditors and bondholders with the realisation of these properties. With regard to the debenture-holders, they put all their rights and interests in the hands of the liquidator at a meeting held on 28th January 1907, and the subjects were exposed by the liquidator with the consent and concurrence of the said Corporation as heritable creditors, as appears from the minutes of exposure No. 109 of process. But in so exposing them he was acting not for the general body of creditors in the liquidation, but for these secured creditors, it being absolutely clear that there would be no reversion after satisfying their claims, so that the fact that the liquidator did make use of the titles in selling the properties does not in any way strengthen the reclaimers' case, and the suggestion that the properties were originally exposed at a price which would have left a reversion really does not matter, and, as I understand, is contradicted by the information which has been supplied to us since the discussion, and which shews that, in addition to bonds, the subjects were burdened with the debt due to the debenture-holders, amounting in all to apparently £1500.

Applying the principle of the case already quoted, it would appear that after the secured creditors were satisfied, there was nothing against which the reclaimers' lien over the titles could be made effectual, as, after the heritable creditors were satisfied, neither the liquidator, nor the shareholders, nor the ordinary creditors of the Company had any interest whatever in the titles, nor could they have made any use of them. The right of lien as existing in *Messrs Stevenson & Johnston* would have therefore become of no effective value whatever, for a law-agent's lien confers no active right, but merely entitles him to retain the papers until either his account shall be paid or a preferable ranking given him in case of bankruptcy or liquidation.²

And supposing there had never been an order pronounced ordaining the law-agents to deliver up the titles, they must have delivered them up to the bondholders and debenture-holders to enable them to effectuate a sale of the properties, and after that as the titles were of no value whatever either to the liquidator or those interested in the remaining assets of the Company as creditors or shareholders, the liquidator would have left them alone, and would never have come under an obligation to give *Stevenson & Johnston* a preferable ranking in return for the delivery of them. The lien would accordingly have been valueless, and it cannot now be treated as ever having been anything else. I am therefore of opinion that the reclaim-

¹ 1900, 2 F. 585.

² Bell's Prin. 1441.

Feb. 8, 1908. ing note should be refused, with expenses since the date of the Lord Ordinary's interlocutor.

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THE COURT adhered.

TAYLOR & RORIE, W.S.—T. F. WEIR & ROBERTSON, S.S.C.—Agents.

No. 79. THE LORD ADVOCATE (for and on behalf of the Commissioners of Inland Revenue), Pursuer (Reclaimers).—*Sol.-Gen. Ure—Hunter, K.C.—Munro.*

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Lord Advocate v. Caledonian Railway Co.

THE CALEDONIAN RAILWAY COMPANY, Defenders (Respondents).—*Clyde, K.C.—King.*

Stamp—Revenue—Conveyance on Sale—Property purchased under compulsory powers—Necessity of producing stamped conveyance—"Produce to the Commissioners"—"Completion of the purchase"—Railway—Compulsory taking of lands—Finance Act, 1895 (58 and 59 Vict. cap. 16), sec. 12.—The Finance Act, 1895, enacts, sec. 12, that where "in virtue of any Act . . . any person is authorised to purchase property, such person shall, within three months after . . . the completion of the purchase . . . produce to the Commissioners of Inland Revenue . . . an instrument of the conveyance of the property, duly stamped."

Held that this provision was not limited to the case of a statutory confirmation of a provisional agreement to purchase, but applied to a purchase of property by a railway company in pursuance of compulsory powers contained in a special Act of the company.

Held (1) that a conveyance which had been produced at the collector's office in order to be provisionally marked with the duty payable, and had thereafter been stamped with that duty, had not been "produced to the Commissioners of Inland Revenue duly stamped" in the sense of the Act; (2) that the date of the "completion of the purchase" was the date of the final payment of the price.

Exchequer Cause.
1st DIVISION.
Ld. Johnston.

ON 6th December 1906 the Lord Advocate, for and on behalf of the Commissioners of Inland Revenue, brought an action against the Caledonian Railway Company, in which he concluded for declarator that "under and in respect of section 12 of the Finance Act, 1895 (58 and 59 Vict. cap. 16),* the defenders, when authorised by virtue of any Act to purchase property, are bound to produce to the Commissioners of Inland Revenue, within three months after completion of the purchase, an instrument of conveyance of the property, duly stamped with the *ad valorem* duty payable upon a conveyance on

* The Finance Act, 1895 (58 and 59 Vict. cap. 16), sec. 12, enacts:—"Where, after the passing of this Act, by virtue of any Act, whether passed before or after this Act, either

(a) any property is vested by way of sale in any person; or

(b) any person is authorised to purchase property;

such person shall, within three months after the passing of the Act, or the date of vesting, whichever is later, or after the completion of the purchase, as the case may be, produce to the Commissioners of Inland Revenue a copy of the Act printed by the Queen's printer of Acts of Parliament, or some instrument relating to the vesting in the first case, and an instrument of conveyance of the property in the other case, duly stamped with the *ad valorem* duty payable upon a conveyance on sale of the property; and in default of such production, the duty, with interest thereon at the rate of 5 per centum per annum from the passing of the Act, date of vesting, or completion of the purchase, as the case may be, shall be a debt to Her Majesty from such person."

sale of the property ; and the defenders ought and should be decerned Feb. 19, 1908.
and ordained, by decree foresaid, to produce to the Commissioners of Inland Revenue the instrument of conveyance or disposition granted Lord Advo-
in favour of the defenders by Sir John Cheyne, Procurator of the Church of Scotland, and others, as trustees of the Gaelic Church of St Columba in Glasgow, and dated 24th, 25th, 27th, and 29th May and 3d June 1901, whereby the said trustees conveyed and disposed to the defenders the subjects in Hope Street, Glasgow, which are therein particularly described, and which were purchased from the said trustees by the defenders under the powers of the Caledonian Railway (General Powers) Act, 1899, 62 and 63 Vict. cap. ccxv., the said instrument of conveyance or disposition being duly stamped with the *ad valorem* duty payable upon a conveyance on sale of said subjects ; or in the event of the defenders failing to produce the said instrument of conveyance or disposition as aforesaid, they ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of £223, 10s. sterling, or such other sum as may be found to be the amount of the *ad valorem* duty payable upon a conveyance on sale of said subjects, and also interest on the said sum of £223, 10s. sterling, or such other sum as may be found to be the amount of *ad valorem* duty payable as aforesaid, at the rate of 5 per centum per annum, from 3d June 1901 until payment.”

The pursuer averred that under their special Act, the Caledonian Railway (General Powers) Act, 1899 (62 and 63 Vict. cap. ccxv.), the defenders were authorised to take and use, for purposes connected with their undertakings, *inter alia*, certain lands in the city of Glasgow situate on the east of Hope Street and Oswald Street ; in pursuance of the powers conferred upon them by the said Act, and the Acts incorporated with it, the defenders purchased certain subjects in Hope Street aforesaid which were vested in and held by certain persons as trustees of the Gaelic Church of St Columba in Glasgow ; and that the instrument of conveyance or disposition granted by the said trustees in favour of the defenders, conveying and disposing to them the subjects in Hope Street so acquired under statutory powers was dated 24th, 25th, 27th, and 29th May and 3d June 1901, and was the deed production of which was called for in the summons. The pursuer further averred :—“The stamps which the deed in question bears were impressed in Glasgow on 7th June 1901, when it was presented at the Collector's office there to be stamped, but the deed was not then nor afterwards produced duly stamped to the Commissioners of Inland Revenue in compliance with the provisions after mentioned of section 12 of the Act 58 Vict. c. 16. Had the deed been presented in order that it might be produced as a duly stamped instrument to the Commissioners in terms of that section, the Collector in Glasgow would have forwarded the deed to the Controller at Edinburgh, or have instructed the agent to do so himself.”

In answer the defenders set forth that, in pursuance of their special Act of 1899 they served a notice to treat, dated 25th November 1899, on the trustees of the Gaelic church, that arbitration for fixing the amount of compensation followed thereon, and that by award dated 22d March 1901 the arbiter fixed the amount at £44,690. “Following on that a conveyance was executed, the last date of which was 3d June 1901, and on 7th June 1901 it was produced by the defenders at the office of the Commissioners of Inland Revenue at Glasgow, and was then duly impressed with a stamp-duty of

Feb. 19, 1908. £223, 10s., being the amount of the *ad valorem* duty payable upon a conveyance on sale of the foresaid land or property, and on 8th June 1901 was recorded in the Division of the General Register of Sasines applicable to the County of the Barony and Regality of Glasgow. The defenders, by said production, satisfied the whole requirements of the after-mentioned section 12 of the Finance Act, 1895."

The pursuer further averred that the Commissioners had asked for information from the defenders as to deeds of conveyance of property acquired by them in recent years under powers conferred by statute, but that the defenders had declined to furnish such information.

In answer the defenders denied that they were bound to give such information, and further denied that the Finance Act applied to property scheduled in their special Acts for the purpose of conferring on the defenders power to take such property compulsorily.

The pursuer pleaded, *inter alia*;—(1) The defenders being bound to observe the provisions of the Finance Act, 1895, touching conveyances of property purchased under statutory powers, decree of declarator and for production of the instrument of conveyance called for ought to be pronounced. (2) In default of production, decree ought to be given for the amount of the *ad valorem* duty payable in respect of the said instrument of conveyance, with interest, as concluded for.

The defenders pleaded;—(2) The defenders are entitled to absolver, in respect that, upon a sound construction of the Finance Act, 1895, the pursuer is not entitled to decree in terms of the declaratory conclusions of the summons. (3) The defenders not being bound, in terms of the Finance Act, 1895, to make production of said conveyance, should be assoilzied. (5) *Separatim*, the defenders having made production of the said conveyance in terms of section 12 of the Finance Act, 1895, and having made payment of the sum of £223, 10s., being the amount of the *ad valorem* duty payable on the conveyance in question, should be assoilzied.

On 10th July 1907 the Lord Ordinary (Johnston) pronounced this interlocutor:—"Finds that the instrument of conveyance or disposition referred to in the summons has already been produced to the Commissioners of Inland Revenue in the sense of the Finance Act, 1895 (section 12), and therefore assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses," &c.*

* "OPINION.—This case is brought to test the duty of railway and other public companies and bodies under the 12th section of the Finance Act 1895 (58 and 59 Vict. cap. 16), or, perhaps more properly stated, to determine what the Inland Revenue may insist on as the due compliance by such companies, &c., with that enactment.

"To lead up to a consideration of the Act of 1895, it is desirable to examine the state of matters which preceded it. The object of the 12th section of that Act being ostensibly to secure the Revenue in the duties, expressing it generally, upon the transfer of property authorised to be purchased by railway companies, &c., by way of a general enactment of universal application, it is understood that the same object had previously been in use to be attained by special clauses, inserted at the instance of some public department, probably the Board of Trade, in all private Acts, where the necessity for such arose.

"At my request the defenders, who are the Caledonian Railway Company, have lodged in process specimens of such clauses." [His Lordship quoted certain of the clauses.]

"Now, it is here to be noted in passing that though two of these Acts at

The pursuer reclaimed, and the case was heard before the First Division on 14th January 1908. At the hearing it was stated to the Court on behalf of the pursuer that he would be satisfied with decree in terms of the declaratory conclusion of the summons, and did not press for any further decree.

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Argued for the reclaimers;—(1) The words of the section clearly covered the present case. The defenders here were “authorised to purchase property” “in virtue of” an Act, namely, the special Act containing the compulsory powers; and this was a purchase following on that authority. When the words of a statute were so clear and precise it was impossible to construe them in any other than their ordinary sense on the ground of an alleged historical reason for their introduction into the statute. The pursuer, therefore, was entitled to decree in terms of the declaratory conclusion of the summons. (2) This conveyance had never been “produced to the Commissioners of

least provide for the compulsory acquisition of lands in general terms, their enactments regarding the production of a duly stamped conveyance or copy of the Act apply only to the cases of statutory vesting, or statutory confirmation and sanction of provisional agreements for purchase. And it is patent that some such provision was necessary for the protection of the Revenue, because otherwise in the case of a statutory vesting no conveyance or transfer was necessary, and therefore nothing came into existence naturally requiring to be stamped; and in the case of lands acquired by provisional agreement scheduled to an Act, and expressly confirmed and sanctioned by it, there was always the risk that the Company would, at any rate for a period of years, if not altogether, rest content with possession on such an agreement with statutory confirmation and sanction, and take no feudal conveyance requiring to be stamped. It does not, therefore, appear to have been considered necessary, prior to 1895, to require production, under the same condition or penalty, of conveyances of lands taken in the ordinary way by compulsory purchase, where a feudal title by conveyance would follow, as in similar voluntary transactions.

“Subsequent to the passing of the Finance Act, 1895, these particular clauses in protection of the Revenue were dropped out of the defenders’ private Acts, and, I presume, out of all other similar Acts,—as, for instance, in the defenders’ Act of 1902, No. 12 of process, where (sec. 16) compulsory powers in ordinary form are given; (sec. 17) certain prior agreements for the purchase of lands are confirmed and sanctioned; and (sec. 34) certain subordinate independent undertakings are statutorily vested in the Company, and no provision in protection of the Revenue follows. Examples might be multiplied, but this example is a complete and comprehensive one.

“Now, the section of the General Finance Act, 1895, which I have to interpret and apply (sec. 12), is as follows” :—[His Lordship quoted the section.]

“What is meant by (a) a statutory vesting by way of sale, and how the want of a formal conveyance on sale in such a case is to be supplied, is quite clear, and needs no comment.

“But a question of some difficulty is raised on the interpretation of the alternative expression (b), ‘authorised to purchase property.’ The Department maintains that it covers every case of purchase by a railway or other company, &c., by virtue of statutory powers, whether by agreement receiving statutory confirmation and sanction, or by exercise of compulsory powers statutorily conferred. The defenders, on the other hand, maintain that it applies only to the case of statutory confirmation and sanction of an agreement to purchase.

“The defenders maintained with great force that the general provision was only the crystallising of the particular clauses in use to be inserted in

Feb. 19, 1908. *Inland Revenue, duly stamped.*" All that had been done was to produce it unstamped to the Collector in Glasgow. The fact that the stamp-duty was then fixed and paid was not material. The object of the provision was to enable the Commissioners to see that the deed had been properly and timeously stamped. The Commissioners had never had this deed before them, and so had never had an opportunity of considering these questions.¹ (3) The "completion of the purchase" must be the final payment of the price. It could not be the notice to treat, for the carrying through of the transaction and the fixing of the price (on which the stamp-duty would depend) might necessarily be delayed more than three months after that. Nor could it be the execution of the conveyance, for that would open the door to infinite evasions of the object of the Act by merely delaying the execution. What it must really depend on was the completion of the "fact" of purchase, viz., the payment of the price.²

private Acts; that the necessity was the same, and is the measure of the general, as it had been of the particular, provisions. I did not receive any explanation from the Department of a more extended necessity or purpose, leading to a more extended interpretation. The terms of this part of the provision are no more happily chosen than are those of another part to be immediately noticed, and I feel the full force of Mr Clyde's argument. If I found it necessary for the disposal of the case to determine this question, I should feel much hesitation, notwithstanding that the general expressions 'authorised to purchase,' 'in virtue of any Act,' are capable of covering more than merely confirmations and sanctions of provisional agreements, and might perfectly well cover acquisition by the exercise of statutory compulsory powers. My hesitation is not diminished by the impression that the extended construction is not necessary for the protection of the Revenue. There was a time in which instances occurred, and I remember more than one in my own practice, where the railway companies in Scotland were, in the earlier days of railway enterprise, dilatory in taking, or the landowners in granting, conveyances of land compulsorily acquired, and both rested on possession following on the exercise of compulsory powers and a settlement of the price. But I think that these days are past, and that railway companies and proprietors now treat compulsory purchases just like ordinary transactions, and that conveyances are taken and recorded in ordinary course.

"Nor is my hesitation diminished by the difficulty of interpreting the expression 'completion of the purchase.' This expression is vague, and the Crown have not assisted to elucidate it. They have evidently felt the difficulty, for they have not attempted distinctly to interpret it, but have in their summons somewhat vaguely assumed that at latest it must be the date of execution of a disposition of the lands acquired. Now, according to the generally accepted doctrine, the Act which confers compulsory powers is the equivalent of an offer of the property, and the Company's notice to treat is the acceptance, and on offer and acceptance, even when the consideration has to be fixed by arbitration, a purchase is completed, past resiling on either side. But as arbitration, failing agreement to fix the consideration, must follow in compulsory purchase, and often takes months, even years, to carry to an award, before which an execution of a conveyance on sale is not possible, it is evident that the statute cannot mean to fix the date of the notice to treat as the date within three months of which an instrument of convey-

¹ *Eastbourne Corporation v. Attorney-General*, L. R., [1904] A. C. 155, *per* Lord Lindley, 157; *Attorney-General v. Felixstowe Gas-Light Co.*, 1907, 97 L. T. 340; *Inland Revenue v. Irvine and District Water Board*, Dec. 5, 1905, 43 S. L. R. 649.

² *Lewis v. South Wales Railway Co.*, 1852, 22 L. J. Ch. 209.

Argued for the respondents ;—(1) The words of the statute did not apply to purchases following on compulsory powers, but only to purchases where statutory authority was interponed to privately arranged agreements to purchase. In private Acts interponing such authority it had been customary to insert a clause in this form, and there could be no doubt that the object and intention of the statute here was to embody these clauses in one general enactment. That the wide interpretation contended for by the pursuer could not be the right one was clear from the fact that there was no obligation on any purchaser to execute a conveyance ; he was entitled, if he chose, to rest content with possession on a personal title. (2) In any event, the conveyance here was duly produced. All that was necessary was that it should be produced and the duty paid, as had been done here. If the statute had meant that there was to be a second formal production it would have said so explicitly. Further, there was no

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ance of the property, duly stamped, must be produced to the Commissioners of Inland Revenue. It is not, however, easy to say what other date is intended. It must either be the arbiter's award, as I think the Crown are inclined to argue, or the execution of the conveyance. Now, once the notice to treat is given, either party can, under the Lands Clauses Act, compel arbitration proceedings resulting in the fixing of a price. And the landowner, after the award, may compel the Company to take a title—see *In re Carey, Elwes' Contract*, L. R., [1906] 2 Ch. 143. But the Inland Revenue cannot interfere to hasten the parties. It is difficult, therefore, to see, if this is the meaning and intention of the phrase, how in such cases the assumed object of the statute is attained, if that object is the more speedy collection of the revenue.

“ But assume the extended interpretation contended for by the Department, and that the completion of the purchase is, in the sense of the statute, the execution, and I think it must be added the delivery, of the conveyance, it falls now to be considered what it is that the Department demands. It is this, that conveyances on compulsory sale shall, in the matter of stamping, go through forms and ceremonies not required in the case of any other conveyances on sale.

“ To test the question, the Department have fixed on a certain conveyance to the Caledonian Railway Company by the trustees of the Church of Scotland, of St Columba's Gaelic Church, Glasgow, which followed on a compulsory taking and arbitration proceedings. The duty has been paid, and the document has been stamped in ordinary course. But the Department says to the defenders, you must produce the conveyance again, in order that it may be examined, and entered on a register we have instituted, and be marked with a certificate we have adopted accordingly ; and as a compulsion on the Company to bring the document back to the Department, they sue for the duty already paid, with 5 per cent interest, from the date three months after its execution, which took place six years ago.

“ I thought the demand unreasonable on my own knowledge of the practice of the Department. But as I could not trust to that, I thought it proper to remit to the Depute Keeper of the Signet to report. His report has confirmed me in thinking that, whatever view may be taken of the matters I have already referred to, the Department are not justified in their demand.

“ If all conveyances were in use to be written on paper already stamped, then, on their interpretation of the statute, the Department would be entitled and bound to demand production of such documents, and I do not think that the defenders would oppose the demand. But the practice is otherwise. For manifest good reasons, the practice has long prevailed, for which the internal arrangements of the Department provide, of writing conveyances and all more important documents on plain paper, and then hand-

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penalty clause for non-production, all the statute said was that the duty, with interest, should be a debt to Her Majesty. It was absurd to say that it could be a debt when it was already paid, or that interest could run where there was not a debt. That shewed that what was intended was production for the payment of duty, not a second formal production. (3) The "completion of the purchase" must be the delivery of the deed of conveyance. There were many stages in such a contract of purchase as this, and it was impossible to say that the transaction was completed until the final stage had been reached, namely, the due delivery of the deed of conveyance. There was no warrant in the statute for fixing on one of the intermediate stages and claiming that as the completion of the transaction.

At advising, on 19th February 1908,—

LORD PRESIDENT.—In this case two questions were argued to us. The first was the purely general question of whether the twelfth section of the

ing them in to be stamped with the proper stamp, and so giving opportunity to the party sending the document to be stamped and the Department to come to a *prima facie* agreement as to the stamp to be impressed. I refer to Mr Paul's report, the details of which I need not repeat. For my purpose the gist of it is this: A deed which it is desired to have stamped is handed to the 'deeds marker.' The ingiver pencils on the left-hand top corner the amount of duty which he proposes to pay. The deeds marker examines the deed sufficiently to satisfy himself whether he can pass it for the amount so proposed. If he can do so, he initials it and passes it on to be stamped. If he cannot, and cannot agree with the ingiver on an altered duty, he passes the deed on to the Solicitor's office for consideration—not for formal adjudication, unless that is desired and an extra fee paid—but that the superior officer of the department may consider the matter of the stamp. Whether the deed goes direct to the 'stamper' or through the 'check clerk' is immaterial for the present purpose. What is material is this: In Scotland the Controller of Stamps and Taxes represents the Commissioners of Inland Revenue, the 'deeds marker' is an official in the Controller's department. The Commissioners cannot act personally in the matter, nor can the Controller. If the conveyance is produced to the 'deeds marker' or (if he is not satisfied, and submits the deed to the Solicitor for his opinion) to the Solicitor, and if the deed remains in the hands of the Inland Revenue authorities until it is stamped *prima facie* to their satisfaction, it appears to me that the obligation to produce it duly stamped to the Inland Revenue is reasonably complied with, for the emphasis is not on the word 'duly,' but on the word 'produce.'

"Where one finds an enactment with a practical object drawn with some indefiniteness, and not altogether contemplating the customary practice alongside of which it has to be applied, I think that a reasonable application consistent with the object should be sought.

"Now, there is nothing in the matter of duty to differentiate conveyances to railway companies from any other conveyances. And the object of the enactment is not, I am persuaded, to enforce a compulsory adjudication of the stamp duty, as if the essence of the enactment was contained in the word 'duly.' For one reason, that however often the document is produced to the Commissioners, unless the stamp is formally 'adjudicated' and the adjudication fee paid, the mouth of the Inland Revenue is not closed. But, nevertheless, the document has been as 'duly stamped' as any other document which has passed through the mill of the Stamp Office, and the ingiver has done his *duty* on that behalf. The object of the enactment is to secure that the revenue from stamps is promptly collected; and if they choose, the Inland Revenue officials can secure all that, in my opinion, the Act intends

Finance Act imposes a duty upon persons, in the position of the Railway Company here, to produce, within a period of three months after the completion of the purchase, an instrument of conveyance of property, where that property is acquired in respect of the exercise of compulsory powers; and then there was the second question, whether a particular conveyance by which the Caledonian Railway Company acquired St Columba's Gaelic Church in Glasgow had been duly produced to the Inland Revenue authorities.

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The Lord Ordinary has discussed the first general proposition, but he has not actually come to a decision upon it. In his view, as the pursuer, the Department, was wrong upon the second question, he thought that that disposed of the conclusions of the summons; but he has, I think, indicated

when the document is in their hands for stamping; and before it is given out again duly stamped, if it has not been timeously stamped, they can exact interest on the duty. If they cannot trust to their 'deeds marker' to see to this, they have only to instruct him to pass on all such documents *per aversionem* to the Solicitor, or to some special official, as I presume they would be passed on if the Department were warranted in insisting on the system they seek to initiate.

"I have all sympathy for a public department which is in any way thwarted by members of the public in the execution of a statutory duty. But I cannot myself see, and, though I have asked for it, I have not received from the Department, any satisfactory reason for their insistence in the present demand. It appears to me that, in the present case, by bringing, according to practice, their conveyances to the Department for stamping, and, as I humbly think, for 'due stamping' in the sense of the statute, the defenders are putting the Department in a position to perform all their functions under the statute in a reasonable way, and that the Department is not justified in saying to them, you must take your deeds away out of this door, and you must bring them back again by that door, in order that we may keep certain registers, and write certain certificates, which have no statutory warrant, and, so far as I can see, no statutory or other effect.

"I am confirmed in this view when I consider the particular circumstances of the case and the conclusions of the summons.

"Notice to treat was served on 25th November 1899. The owners intimated their claim on 8th December 1899. The oversman pronounced his award on 22d March 1901. A conveyance was executed by the owners on 3d June 1901. The conveyance was handed in, the duty paid, and the stamp impressed in ordinary course on 7th June 1901. The conveyance was recorded on 8th June 1901, while the action was not raised till 6th December 1906. The duty was thus paid four days after the execution of the deed, and the action not raised till four and a half years after the duty was paid.

"Now, the logic of their position obliged the Department to say there has been default, the duty and interest is due in consequence, and for that we sue. But they cannot face up to this, for they know that the duty has been paid and accepted nearly six years ago, and that they cannot recover it twice over, and have no statutory warrant for suing for interest owing to delay in producing only. So they frame a conclusion, which, however reasonable from their point of view, is not in accordance with the situation which the enactment contemplated.

"I think I must therefore find that the instrument of conveyance or disposition referred to in the summons has already been produced to the Commissioners of Inland Revenue in the sense of the Finance Act, 1895, section 12, and therefore assolve the defenders from the conclusions of the summons, with expenses."

Feb. 19, 1908. in his opinion a certain amount of sympathy with the view of the defenders, namely, that the provisions in the statute were not really meant to apply to cases of property taken in the ordinary manner under compulsory powers, but were meant to embody in one general statute a class of provisions which, in the past, it had been customary to put into special statutes, where, for instance, some railway company, or other great corporation, took over by special statute the whole undertaking of some other company, and where, accordingly, the conveyance was really contained in the statutory enactment itself—a condition of circumstances which makes it unnecessary to execute a formal conveyance, which would, in the ordinary way, bear a stamp.

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It may be, and I daresay it is, true that the historical reason, so to speak, of this section of the Finance Act was to effectuate that general object, but your Lordships, I am afraid, cannot construe statutes, when their terms are plain, by consideration of the historical reason for which they were passed. No doubt the history of a statute may often throw light upon a disputed provision, but if the language is plain then there is nothing more to be done than to obey that language; and here it seems to me that the language is so exceedingly plain that it leaves no room for discussion. For reasons best known to itself the Legislature has gone beyond what was done before; but that it has included in perfectly plain terms not only the cases where a transference is made by virtue of a statutory provision, but also cases where transference follows upon the exercise of compulsory powers, is, I think, absolutely clear as soon as you read the words of the statute itself. The Lord Ordinary has set them forth very clearly in his note, and leaving out the parts that do not apply, you have it enacted that when any person is authorised to purchase property in virtue of an Act—that is the ordinary case of a railway company which has compulsory powers—such person shall within three months after the completion of the purchase produce to the Commissioners of Inland Revenue an instrument of conveyance of the property, duly stamped. That seems to me to end the whole matter so far as the first question is concerned.

I now come to the second question. If the Inland Revenue, in this case, had insisted upon the penalty, I think the case would have been one of considerable difficulty, and I confess I think I should have probably arrived at the same practical conclusion as the Lord Ordinary, although not perhaps precisely on the same grounds. But the Inland Revenue have, I think, very properly, conceded that they have no intention here of asking for the penalty in this case, because what happened in the case of this title to St Columba's Church was that the title was taken to the office in Glasgow with the view of having what is really a sort of preliminary marking put upon it as to what the stamp ought to be. We have had a long inquiry in the case, which I do not think I need detail, but it comes to this, that for the convenience of everybody—and I have no doubt it is most convenient and a perfectly proper plan—the Inland Revenue are in the habit of allowing persons to bring their deeds which are going to be stamped, and to have a sort of provisional opinion given as to what the stamp should be. It is only a provisional opinion, because everybody knows that it does not carry finality. If a person wants to be perfectly certain of the amount, and to be perfectly certain that that amount will never be questioned thereafter by

the Inland Revenue, there is a well-known and statutory way of doing it, Feb. 19, 1908.
namely, by asking for an adjudication stamp, and, of course, if he gets an
adjudication stamp, then the mouth of the Inland Revenue is shut for ever
upon the question of the amount of the stamp. But side by side with that
which is the method when it is wanted to make the thing absolutely certain,
there is the very convenient method which I have described. Now, when
the question had never been raised, it would perhaps have been rather hard
if a penalty had been incurred, when the deed had been brought in this
way and when it had been stamped, and, for aught seen, perfectly properly
stamped—but as the penalty is not insisted in, that question is not raised.

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But when we come to the question of what is to be done in the future, it seems to me that the Inland Revenue are entitled to make their own arrangements about what is a proper production in answer to the words of the statute. I do not mean to say that if they made utterly unreasonable arrangements they could not be interfered with; but, within reason, they are, I think, entitled to make their own arrangements; and I can quite understand, from their point of view, that it is not such a production as they wish, namely, this bringing of the deed before it is stamped at all in order to get a certain provisional view from the officials in the office as to what the stamp should be.

If you merely take the question literally, it is quite clear that the production of an unstamped instrument will scarcely fit the words of the statute, which puts a duty "to produce an instrument of conveyance duly stamped." And really I think all hardship is out of the matter, because there was a circular, which was brought before our notice in the case, which was sent out by the Inland Revenue and sent to the railway companies, drawing attention to the provisions of section 12 of the Finance Act, and putting it to them perfectly clearly that it would be necessary in the future for them to produce their conveyances, in the case of lands acquired compulsorily, within three months.

Accordingly, it seems to me that the proper disposal of the case is not to do as the Lord Ordinary has done, which is to assoilzie the defenders, but to pronounce a declaratory finding in the terms of the first conclusion, which, I confess, does nothing, except simply to shew that the case has been decided, because it is a mere echo of the statute, and then, in the circumstances, to find it unnecessary to dispose of the other conclusions of the case.

There is one other question which it is right we should make clear, and that is, what is the completion of the purchase? Now, the Lord Ordinary has given very cogent reasons why the completion of the purchase in cases of this sort cannot be taken to be the date of the notice. Upon the whole matter I come to the conclusion that the simple date to take as the completion of the purchase is the final payment of the price to the seller. That date seems to me to get rid of all real difficulties. It will never be too soon, because the railway company will take care that it does not pay the price finally until it gets a disposition from the seller. That it would do for its protection. On the other hand, it will never come too late, because we can be pretty sure that the seller will not be content to wait for an indefinite time for his money. Accordingly, I think that is the date

Feb. 19, 1908. that is meant by completion of the purchase. There was an authority quoted, *Lewis v. South-Western Railway Company*,¹ in which Lord Justice Turner seems to have come to the same conclusion upon a different matter, but he construed the same phrase in the same way. I do not really put that as an authority, but, at the same time, I think it does no harm to the conclusion at which I have independently arrived.

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LORD M'LAREN.—I concur in all that has been said by your Lordship in the chair. Upon the second point, it seems to me that the date of the transaction must either be the date of the contract of sale or the date of completing the execution of the contract. Now, it could not be intended that the date of the contract of sale should be taken, because it would not always be possible to have the transaction carried through and a stampable deed executed within three months of the contract. I see no intermediate point of time, and it is plain that the Company, in the case supposed, would not pay the price until they were put into possession of the subjects. In the general case they have possession of the subjects under their notice before the price is paid; so that, if the date of payment of the price were taken, that, necessarily, would be the date of the complete fulfilment of the reciprocal obligations under the contract.

LORD KINNEAR.—I concur.

LORD PEARSON was absent.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor: Find and declare in terms of the first conclusion of the summons; and in respect the pursuer does not now insist in the other conclusions of the summons, dismiss the same. . . ."

SOLICITOR OF INLAND REVENUE—HOPE, TODD, & KIRK, W.S.—Agents.

No. 80. CHARLES MERRILEES, Pursuer.—*Watt, K.C.—Lippe—Lyall Grant.*
SAMUEL CARMICHAEL AND OTHERS (Mrs Leckie's Trustees), Defenders.
Feb. 19, 1908. —*Crabb Watt, K.C.—R. S. Brown—W. J. Robertson.*

Merrilees v.
Leckie's
Trustees.

Expenses—Trustees—Taxation.—Circumstances in which a body of testamentary trustees—who had unsuccessfully defended an action for reduction of the trust-deed, and had, along with the trust-estate, been found liable in expenses—were allowed expenses out of the trust-estate, to be taxed as between agent and client; but not the expenses of an unsuccessful motion for a new trial.

1ST DIVISION. ON 3d June 1907, Charles Merrilees, dentist, Dublin, brought an action for the reduction of an alleged trust-disposition and settlement of his sister, the late Mrs A. G. Merrilees or Leckie, in which he called as defenders (1) Samuel Carmichael, grocer and wine merchant, John Robertson, solicitor, and George Bearhope Ritchie, doctor of medicine, the trustees nominated in the settlement; and (2) the beneficiaries mentioned in the settlement, including Mrs Magdaline M'Laren McCann or Beaton and her husband, Duncan Beaton.

No defences were lodged for any of the beneficiaries, but the action

was defended by John Robertson and George Bearhope Ritchie, Feb. 19, 1908. as the trustees acting under the settlement, the third trustee, Mr Carmichael, having declined to act. The circumstances under which the acting trustees came to be nominated as trustees were as follows:—Prior to 27th February 1907, the date of the settlement, both of them were strangers to the testatrix. On that date the defender, Duncan Beaton, whose wife was a niece of the testatrix, called on Mr Robertson, and asked him to give his services in making a will for his wife's aunt. Mr Robertson, on learning that the aunt was a lady of over sixty years of age, who was at the time confined to bed with a cold, requested that her doctor should be present to satisfy him as to her capacity. He was then informed that her late doctor had died, and she had not employed anyone in his stead. He therefore asked Dr Ritchie, whom he knew, and who lived near his office, to accompany him, and they all repaired to the testatrix's house. Dr Ritchie having examined the testatrix and being satisfied of her capacity, Mr Robertson proceeded to draft the will from her instructions. The testatrix having suggested Mr Carmichael as a trustee, was at a loss who to conjoin with him, and it was eventually agreed that Mr Robertson and Dr Ritchie should be nominated. That was accordingly done, and the will was thereupon extended, and signed by the testatrix in their presence.

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The following issues were approved for the trial of the cause:—“(1) Whether the pretended trust-disposition and settlement, dated 27th February 1907, of which No. 9 of process is an extract, is not the deed of Mrs Annie Gordon Merrilees or Leckie, who resided at 4 James Street, Portobello? (2) Whether, on or about 27th February 1907, the said Mrs Annie Gordon Merrilees or Leckie was weak and facile in mind and easily imposed upon; and whether the defenders, Duncan Beaton and Mrs Magdaline M'Laren M'Cann or Beaton, or one or other or both of them, taking advantage of her said weakness and facility, did, by fraud and circumvention, obtain from her the trust-disposition and settlement, dated 27th February 1907, of which No. 9 of process is an extract, to the lesion of the said Mrs Annie Gordon Merrilees or Leckie?”

The cause was tried before Lord M'Laren and a jury on 7th January 1908, and the following days. The jury returned a unanimous verdict for the defenders on the first issue, but by a majority of nine to three found for the pursuer on the second issue. After the verdict was returned, Lord M'Laren intimated that the verdict involved no reflection on Mr Robertson, “who seemed to have acted quite fairly in a very difficult case.” The defenders moved for a rule, but on 8th February 1908 the Court refused the motion, intimating that while the circumstances proved did not amount to fraudulent impetration, there was evidence of facility, of which advantage had been taken by the Beatons.

On 19th February 1908, on a motion to apply the verdict, the pursuer moved for expenses both against the trust-estate and the trustees. The defenders, the trustees, moved for their expenses, as between agent and client, against the trust-estate. The pursuer opposed that motion.

The trustees, in support of their motion, founded on certain allegations which they said had been made against their *bona fides* and professional conduct. The averments of the pursuer, so far as bearing on that point, were in substance as follows:—That Mr Robertson was

Feb. 10, 1908. *Merrilees v. Leckie's Trustees.* Duncan Beaton's solicitor, and that Beaton had taken him to Mrs Leckie's house for the purpose of having the settlement executed in favour of Beaton and his family. That previously a Mr S., a solicitor in Aberdeen, had acted as Mrs Leckie's solicitor, and that shortly after the making of the will a mandate was presented to him bearing Mrs Leckie's signature demanding that delivery of all her papers in his hands should be made to Mr Robertson. That as he doubted Mrs Leckie's capacity to grant a mandate he had declined at first to hand them over, but on Mr Robertson instructing an action to be raised against him at once, failing immediate delivery, he had given them up. That he had informed the pursuer, who was Mrs Leckie's brother, of this fact, and that the pursuer had come to Edinburgh to see his sister, but found that she had left her house, and that the house was shut up. That the pursuer had thereupon asked Mr Robertson to disclose where Mrs Leckie was, but that he had refused to do so. There was also this averment:—"The said pretended trust-disposition and settlement is not the deed of the said Mrs Leckie. . . . In point of fact she did not give instructions for the preparation of the said deed, but was induced by the Beatons to sign it, being unable to resist the pressure which they exercised to get her to sign the deed, especially when a lawyer and a doctor, who were both strangers to her, were brought with the deed."

Argued for the pursuer;—The trustees were not entitled to have their expenses paid out of the trust-estate. Trustees who had unsuccessfully defended an action of this sort were entitled to expenses out of the trust-estate only when they had been compelled to defend the action on account of imputations against their own conduct.¹ Here there were no imputations against the conduct of the trustees; the only imputations were against the conduct of the Beatons. The trustees had no interest to defend this action; the only parties with an interest to defend were the Beatons, and if the trustees chose to defend in the interest of the Beatons, and desired to keep themselves *indemnitis*, they should have obtained a guarantee for their expenses from the Beatons. In any event, they were only entitled to expenses as between party and party. These expenses fell to be treated in the ordinary way, as expenses of a litigation, for if the defenders obtained an order for them against the estate, they would really be paid, at least in part, by the other party to the litigation.

Argued for the defenders;—The authorities cited for the pursuer shewed that there was no fixed rule as to the allowance of expenses to trustees in such actions, but that it was always a question of circumstances. Here the circumstances shewed that this was a fair case to try, and that the trustees had acted reasonably in defending it. Therefore the principle applied in *Watson v. Watson's Trustees*,² where the circumstances were very similar to those in the present case, was applicable here, and the defenders should get their expenses. Further, there were averments here amounting at least to a charge of unprofessional conduct against the trustees which had been insisted in all through the trial, and even in the speech to the jury, and on

¹ M'Laren on Wills, sec. 2323; *Graham v. Marshall*, Nov. 22, 1860, 23 D. 41; *Munro v. Strain*, June 18, 1874, 1 R. 1039; *Watson v. Watson's Trustees*, Jan. 20, 1875, 2 R. 344; *Ross v. Ross' Trustees*, May 25, 1898, 25 R. 897; *Crichton v. Henderson's Trustees*, Oct. 26, 1898, 1 F. 24.

² 2 R. 344.

that ground alone they were entitled to the expenses of their defence Feb. 19, 1908.
out of the estate. If they were to receive their expenses they must
be taxed as between agent and client. They were really expenses ^{Merrilees v.}
incurred in the administration of the estate in their hands, and that ^{Leckie's}
was the only scale applicable to such expenses. Inquiry shewed that ^{Trustees.}
the expenses allowed in *Munro v. Strain*,¹ and *Ross v. Ross's Trustees*,²
had been taxed as between agent and client.

LORD PRESIDENT.—There are two motions here. The first, which is made on behalf of the pursuer, is to find him entitled to expenses not only against the trustees but also against the trust-estate. In the other, that on behalf of the defenders, who are the trustees and the unsuccessful parties in the action, we are asked to allow them their expenses out of the trust-estate. There is also a subsidiary question as to whether, if the trustees are allowed expenses, these expenses are to be taxed as between party and party or as between agent and client.

As to the first, there is no question that the pursuer is entitled to his expenses against the trustees, and, apart from any difficulty as to mere matter of form, it would seem that a finding for expenses against the trustees would carry liability against the trust-estate. In the present instance, however, I see no reason why the pursuer should not be allowed his expenses against both the trustees and the trust-estate.

As regards the defenders' expenses, it has been pointed out on several occasions that there is no absolute rule. While I am far from wishing to countenance the idea that when a will is challenged trustees are entitled to defend at the expense of the trust-estate no matter what the circumstances may be, there is one consideration which will weigh with the Court, and it is this, "What is said about the trustees?" Now, in the present case I do not think it necessary to pursue the inquiry minutely further than to say that both Lord M'Laren, who tried the case, and my brother Lord Kinnear and myself, who gave the case very careful and special consideration, think that the trustees should be allowed expenses.

As to the scale on which these expenses ought to be taxed, it seems to me that once the trustees have been allowed their expenses these expenses really become expenses of administration and not expenses of litigation. Accordingly, I do not see how we can apply to such expenses a scale which is appropriate to the domain of "litigation" and is not appropriate to the domain of "administration." No doubt the administration of an estate may have been so conducted as to disentitle trustees to any expenses, but in the present instance I see no reason why the trustees should not be allowed expenses as between agent and client.

LORD M'LAREN and LORD KINNEAR concurred.

LORD PEARSON was absent.

THE COURT found the pursuer entitled to expenses both against the compearing defenders (Mrs Leckie's trustees) and also against the trust-estate, and found the defenders entitled to

¹ 1 R. 1039.

² 25 R. 897.

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expenses as between agent and client (except the expenses in connection with the motion for a new trial) out of the trust-estate.

GARDINER & MACFIE, S.S.C.—JOHN ROBERTSON, Solicitor—Agents.

No. 81.

Feb. 7, 1908.

Wilson v.
Pottinger.

J. H. C. WILSON, Pursuer (Respondent).—*C. D. Murray—
W. T. Watson.*

JOHN POTTINGER, Defender (Reclaimier).—*D.-F. Campbell—
Constable.*

Property—Gable—Boundary—Dean of Guild—Building Condition—Acquiescence—Encroachment—Remedy.—In erecting a four-storey house, Pottinger obtained the permission of the neighbouring proprietor, Wilson, to build upon the gable wall of an adjoining two-storey house belonging to Wilson. The wall in question was only $9\frac{1}{2}$ inches thick, and in order to satisfy the requirement of the Dean of Guild that the thickness of the added portion should be 14 inches, the added portion was built in such a manner that, while it was flush with the original on the side next Pottinger's property, it projected $4\frac{1}{2}$ inches beyond the wall on Wilson's side. After the building operations were completed, Wilson raised an action concluding (1) for declarator that Pottinger had illegally encroached on his property, and (2) for removal of the encroachment.

The Court (*rev. judgment of Lord Guthrie*) *dismissed* the action, *per* the Lord President on the ground that Wilson had by signing plans consented to the encroachment, and *per* Lord M'Laren and Lord Kinnear on the ground that, when Wilson gave permission to build on his gable wall, the agreement was subject to the implied condition that the building was to be in such form as the Dean of Guild should direct, that it had been erected in accordance with his directions, and that accordingly there had been no unlawful encroachment.

Opinion per curiam that in any event compensation, and not removal, would have been the appropriate remedy.

Sanderson v. Geddes, July 17, 1874, 1 R. 1198; *Jack v. Begg*, Oct. 26, 1875, 3 R. 35; *Grahame v. Magistrates of Kirkcaldy*, July 26, 1882, 9 R. (H. L.) 91, *commented on*.

1st Division.
Lord Guthrie.

JOHN POTTINGER was proprietor of an old house in Main Street, Newhaven, bounded on the east by a two-storeyed house belonging to J. H. C. Wilson, the gable wall of which for a distance of about 20 feet from the street was $9\frac{1}{2}$ inches thick, and for the remainder of its length 14 inches thick. Pottinger desiring to erect a four-storey house on his ground, applied to Wilson for permission to build the two upper storeys on the top of his (Wilson's) gable. After an interview between the parties, plans shewing the proposed operations were submitted by Pottinger to the burgh surveyor. As originally prepared, the plans shewed that the eastern gable of the upper storeys of the new tenement was to follow the outline of the original wall, viz., that it was to be $9\frac{1}{2}$ inches thick for 20 feet from the street, and 14 inches thick behind. On the instructions of the burgh surveyor, and in order to conform with the rules of the Dean of Guild Court in Leith, the plans were altered so as to shew the gable 14 inches thick throughout its whole length. This was done by making it flush with the original wall on the side next Pottinger's ground, and by making it overhang Wilson's property to the extent of $4\frac{1}{2}$ inches on the other side for the 20 feet where the original wall was too narrow.

On 26th June 1906 Pottinger handed Wilson a letter in the following terms:—

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"Mr Wilson.

"127 Trinity Road,
Edinburgh, 26th June 1906.

"Dear Sir,—With regard to the gable between your house and my ground that I am to build upon, I am prepared to pay you whatever you're entitled to. The amount can be agreed on between you and myself, or any other party that we may appoint, on you approving of my plans.—Yours faithfully,

JOHN POTTINGER."

"I will make good any damage done to your property by my operations.

J. POTTINGER."

Thereafter the plans, altered as suggested by the burgh surveyor, were approved by the Dean of Guild, and the building operations commenced.

After the operations were completed, Wilson raised an action against Pottinger which concluded for declarator "*(Secundo)* that the defender has unwarrantably and illegally encroached upon the said property of the pursuer, by building beyond the west gable of the pursuer's said tenement, and above the ground heritably possessed by the pursuer to the extent of $4\frac{1}{2}$ inches or thereby"; and for decree ordaining the defender "to remove the said building erected by him, so far as it encroaches upon the property of the pursuer beyond the west gable of the pursuer's said tenement."

The pursuer averred:—(Cond. 6) "Shortly after [the letter of 26th June 1906] the defender proceeded with his building, and when he reached the top of the pursuer's upper storey he not only placed his wall upon the whole width and thickness of the pursuer's western gable, but began to overlap the gable on its eastern side to the extent of $4\frac{1}{2}$ inches or thereby. To enable him to do this he inserted transverse iron beams which projected to said extent to the east of the said western gable. Across said beams the defender laid another beam, upon which he erected the said addition to the thickness of said gable. The said overlapping of the pursuer's gable is made for a distance of 25 feet or thereby. The pursuer objected to the proposed encroachment upon his property, and called upon the defender to desist, but he refused to do so, and proceeded with the erection of his building, overlapping the pursuer's property to the above extent. The said proceeding was without right or warrant on the part of the defender, and is in gross breach of the pursuer's rights of property. The plans submitted to the pursuer did not shew the said encroachment upon the pursuer's property, and the projection of the defender's eastern wall beyond the western gable of the pursuer's tenement is not in accordance with the plans approved by the pursuer. The defender did not say or explain to the pursuer that he intended to extend his said wall to the extent averred, or to any extent beyond the said gable, and the pursuer never consented thereto. The present action has therefore been rendered necessary."

The defender answered that the alteration required by the Dean of Guild "was duly shewn on the defender's plans, and was fully explained to and understood by the pursuer at the interviews between him and the defender before he signed the plans."

The pursuer pleaded;—(2) The defender having wrongfully and illegally encroached on the pursuer's property as condescended on, the pursuer is entitled to decree in terms of the second and third conclusions of the summons, with expenses.

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The defender pleaded;—(2) The pursuer having agreed to allow the encroachment complained of, on payment of compensation as the same should be determined, failing arrangement, by arbitration, is barred from raising the present action.

On 1st April 1907 the Lord Ordinary (Guthrie), after a proof, decerned in terms of the conclusions of the summons, and thereafter, on 4th June 1907 (parties having failed to agree on any amount of compensation), ordained the defender to remove the encroachment complained of.*

* "OPINION.—The pursuer and defender are owners of adjoining buildings in Main Street, Newhaven. The pursuer built his house and shop of two storeys, with bakehouse and oven behind, in 1903, and the defender erected his four-storey premises in 1906. Both sites had been previously occupied by old buildings, jointly occupied on the lower floor, but divided by a wooden partition 9 inches thick. The pursuer's house lies to the east of the defender's.

"When the defender built in 1906, he used the pursuer's west gable as his east gable to its full height, namely, two storeys. At an interview on 26th June 1906, and by letter of that date, quoted in condescendence 5, it was arranged that the defender should obtain the further height required by him on the east by building on the top of the pursuer's west gable, compensation to be made as therein specified. Disregarding a stair, which, not being bonded into the wall, is not part of it, the breadth of the pursuer's west gable, for a distance of at least 20 feet back from the street, is $9\frac{1}{2}$ inches. The defender proposed to heighten that part of the gable by building on it to the same breadth, but the Dean of Guild Court in Leith insisted, through the burgh surveyor, that the additional height should be 14 inches broad. Instead of the defender making the necessary projection of $4\frac{1}{2}$ inches (being the difference between $9\frac{1}{2}$ inches and 14 inches) on his own side of the gable, he, unfortunately, resolved to build so that, while the additional height was flush on his own side with the gable, as built by the pursuer, it projected on the pursuer's side $4\frac{1}{2}$ inches—to that extent overlapping the pursuer's property. There were practical reasons in favour of this course, and the pursuer would have had no interest to refuse his consent had the matter been explained to him and his consent asked on a proper offer of compensation. But, as I hold on the evidence, the defender, without obtaining the pursuer's consent, proceeded to build his 14-inch extension, so as to project $4\frac{1}{2}$ inches beyond the original gable and over the pursuer's property. The pursuer objected, but the defender completed his operations in October 1906.

"The pursuer now asks removal of the building erected by the defender on the top of the pursuer's west gable to the extent, namely, $4\frac{1}{2}$ inches, to which that building extends beyond the thickness of the pursuer's original gable, and over the pursuer's property. He, however, intimated at the proof, through his counsel, that he does not propose to enforce the decree, but desires only to obtain compensation.

"The dispute is a lamentable one. The defender began the trouble by resolving to thicken the heightened part of the gable on the pursuer's side instead of on his own, and by proceeding to begin the encroachment without obtaining the pursuer's consent; and he put himself still further in the wrong by refusing to desist when remonstrated with by the pursuer. On the other hand, when the dispute arose, while the defender's agents accurately described it in correspondence as 'a trifling affair,' the pursuer and his agents, with great lack of perspective, failed to recognise how little interest the pursuer had to object to the defender's operations. Instead of endangering the stability of the pursuer's building, these operations probably made the pursuer's building more secure than if the increased breadth of the

The defender reclaimed.

The case was heard on 6th and 7th February 1908.

Argued for the defender;—(1) The pursuer had consented to the wall being built upon his gable, and had signed plans shewing the alteration as actually carried out. In these circumstances, he was barred from maintaining that there had been any encroachment. (2) Even if the pursuer had not in terms consented to the encroachment, he had given permission to the defender to build on his gable wall, and this meant permission to build in the only way possible, viz., under the conditions to be imposed by the Dean of Guild. (3) In any view, removal was not the proper remedy. The letter of 26th June, and the negotiations of parties, shewed that any prejudice suffered by the pursuer was to be compensated by a money payment. The defender had acted in good faith and on a reasonable view of the agreement.

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Argued for the pursuer;—The agreement between the parties was

gable had been on the defender's own side, and, although they involved occupation, for a breadth of $4\frac{1}{2}$ inches and a length of 20 feet, of air space belonging to the pursuer, this air space would require to have been occupied whenever the pursuer's building was heightened, in which event the defender's encroachment would have been available as a mutual gable for the pursuer's heightened building. The pursuer also erred in assuming that the defender was not willing to pay for the full damage to the pursuer caused by the defender's whole operations, including the admitted encroachment of $4\frac{1}{2}$ inches. As it now turns out, the decree of removing, which I am asked to pronounce, is only to be used as a preliminary to obtaining compensation, which the defender has all along been willing to pay. In short, the whole dispute between the parties could have been settled by arbitration in four hours instead of four days, and at an expense of as many pence as the case will cost the parties pounds. If arbitration failed before the case came into Court, the parties should have agreed to a judicial reference, or at all events to a judicial remit for a report.

"But I must decide the questions brought before me on their legal merits, protesting at the same time that if it were competent I should dismiss the summons, without costs to either party, on the principle *de minimis non curat prætor*.

"The condescendence and defences raise three questions:—First, was there in fact an encroachment of $4\frac{1}{2}$ inches? Second, if so, was this authorised by the pursuer? and Third, if not authorised, is the pursuer entitled to a decree of removing?

"As explained at the proof, although the defences do not make it clear, the defender admits that the pursuer's $9\frac{1}{2}$ -inch gable, so far as heightened by him and thickened to 14 inches, projects, to the extent of $4\frac{1}{2}$ inches, over the pursuer's property. But he disputed the pursuer's right to decree, in terms of his second declaratory conclusion, because he maintains that the encroachment was not unwarrantable or illegal.

"The defender claims the pursuer's authority for his operations, first, from what passed in conversation between them on 26th June 1906, second, on the terms of the letter of that date quoted in condescendence 5, and third, on the contents of the plans, No. 39 of process, approved by the pursuer's docquet. As to the conversation alleged by the defender, his account is directly contradicted by the pursuer. As to the letter, an arrangement for heightening a gable may, so far as consistent with safety, authorise building beyond the area of the gable, but only on the builder's own side. As to the plans, it is not proved that the alterations shewing the thickened gable were on the plans when shewn to the pursuer. But, even if they were, these alterations are not so drawn as to give reasonable notice of intended over-

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that the building should be built "on" the gable wall, and in breach of this agreement the defender had built beyond it. The pursuer had never seen, and had never consented to, the plans as altered.

LORD PRESIDENT.—This case arose out of the heightening of a small tenement in Newhaven. In order to heighten that tenement the person who is the defender in this case had of course to submit plans to the Dean of Guild Court. He proposed to make use of the gable which was between his property and that of his next-door neighbour on the east; but he seems to have been aware that, to say the least of it, there was great doubt, indeed I would be more correct to put it more strongly, and to say he knew, that the gable in question was not a mutual gable, and accordingly he approached his next-door proprietor for permission to build upon the gable. He was going to carry his own house to a height considerably greater than that of his next-door neighbour's, which only extended to two storeys; and the parties approached each other, and their negotiations were expressed in the following letter, which was addressed by the defender in this case to the pursuer on 26th June 1906:—"Dear Sir,—With regard to the gable between your house and my ground that I am to build upon, I am prepared to pay you whatever you're entitled to. The amount can be agreed on between you and myself, or any other party that we may appoint, on you approving of my plans.—Yours faithfully." It is not disputed by the pursuer that to that letter, whatever it means, he agreed. There is a controversy between the parties as to whether any plans had been shewn before that letter was written or not. I do not know that it matters. It is quite clear that at the time that letter was written the plans were before the Dean of Guild Court in their original condition; and to explain what that was, I must give your Lordships a short description of them and of the gable wall in question. The gable wall in question was a 14-inch wall for a number of feet measuring from the back of the tenement towards the front, but towards the front of the tenement the wall narrowed down from 14 inches thick to 9 inches. Now, it is undoubtedly the case that the defender's original idea was to utilise this gable wall as a mutual wall to the ground storey, and also as a support to the tall gable on to which he was going to build a tenement. He undoubtedly meant originally merely to carry the gable up, that is to say, that where it was 14 inches it would be 14 inches, and where it

lapping to a man like the pursuer, and the front elevation is inconsistent both with the '1, 2, and 3 flat plan,' and with the roof plan.

"The question of the appropriate remedy remains. Although reluctant to give decree of removal, I do not think the pursuer has done anything to bar himself from the remedy claimed. As I read the oral evidence and the correspondence, it is not proved that he ever consented to the defender's operations, or that he failed timeously to object to them, or that he led the defender to think that he would be content with compensation and would waive his legal right to removal. Thus I do not find the element of bar or acquiescence which, in one form or another, was involved in the series of cases commented on by Lord Watson in *Magistrates of Kirkcaldy v. Grahame*, 1882, 9 R. (H. L.) 91. To refuse the pursuer the remedy of removal would be, in Lord Watson's words, 'to give the wrongdoer compulsory powers to acquire part of his neighbour's property, which, in spite of remonstrance, he had illegally appropriated.'"

was 9 inches it would be 9. After he had got this consent the case proceeded before the Dean of Guild Court, who, acting upon what seems to be a general rule, insisted that, as the tenement in question was to be a four-storeyed tenement, the 9-inch portion of the wall would not do, and that a 14-inch wall would be necessary all along. The defender inserted brackets at each end of the 9-inch wall, on which he placed an iron beam running parallel with the top of the wall, and then he carried the gable up for the additional thickness which was necessary, making it a 14-inch wall right up to the top. Now, in doing so, this iron beam makes an overhang of $4\frac{1}{2}$ inches, which is over the pursuer's property; and the action is raised to have it declared that these $4\frac{1}{2}$ inches belonged to him, and to have the defender ordained to that extent to take away the wall of his building.

The Lord Ordinary has taken a view of the import of the letter which has prevented him from arriving at the conclusion which he has plainly indicated he wished to do. He says—"As to the letter, an arrangement for heightening a gable may, so far as consistent with safety, authorise building beyond the area of the gable, but only on the builder's own side." I do not think that is the proper view to take of the letter. Its construction is plain and simple. Looking to the whole surrounding circumstances, it seems to me perfectly clear that the meaning of the consent to the building on the gable was to a building on the gable of which the Dean of Guild Court should finally provide the authorised plans. Then there is no doubt the plans were altered, and I think it was clearly proved that the signature of the pursuer, which was adhibited to those plans, was adhibited after the alterations had been made. I agree that it may very well be that the pursuer, being a man unskilled in plans, did not, if I may use the cant expression, wake up to the fact that the alterations had been made, and that these $4\frac{1}{2}$ overhanging inches were upon his property; but I do not think he can take any benefit from that. If he chooses to put his signature to a plan authorised by the Dean of Guild Court, I think he takes his chance as to what this plan precisely shewed. In other words, I do not, as the Lord Ordinary has done, first of all conclude that the agreement was for a gable wall of 9 inches, and then that there was a new arrangement for a gable wall of 14 inches. I look upon the agreement as for such gable as the Dean of Guild authorises, and then I find that what the Dean of Guild authorised was fairly brought to the pursuer's notice by the production of the plans. It is quite true that these plans are not strictly accurate, especially they are inaccurate in two particulars. In the first place, being evidently desirous of economising space, they make one plan do for the first, second, and third floors, and the one plan does not shew the condition of each floor and its flooring level; and, in the second place, it is equally clear that the elevation is not accurately altered as it ought to have been, so as to make a corresponding alteration in the thickening of the wall. But although this minute criticism can be substantiated, at the same time I have no hesitation in saying that any man who understood a plan could see that it was meant to carry up a 14-inch wall which should overhang this space. I do not know that the pursuer understood that. He had no technical training, and plans are things that require a little training and some understanding; but if he chooses to sign a plan, he takes the risk of misunderstanding it.

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It seems to me that that ends the case. But I wish to say that, even if I were not of that opinion, the pursuer could not succeed. When you come to such a small question as the overlapping of a boundary wall by $4\frac{1}{2}$ inches, I think the jurisdiction of the Court is as has been illustrated in the leading case of *Sanderson v. Geddes*.¹ I do not find that Lord Watson throws the slightest doubt on *Sanderson v. Geddes*¹ in his judgment in *Grahame v. Magistrates of Kirkcaldy*.² On the contrary, what Lord Watson did not like was *Jack v. Begg*,³ and the issue in *Jack v. Begg*³ was very different from that in *Sanderson v. Geddes*¹; and *Sanderson v. Geddes*¹ was entirely different from the case of *Grahame v. Magistrates of Kirkcaldy*.² But the Lord Ordinary, in quoting Lord Watson's dictum, confuses *Sanderson v. Geddes*,¹ in which there was no transference of property at all, with *Begg v. Jack*,³ where there was, and ordains the defender to take down what has been put up. I think this is one of those cases (if I could project my mind a century or so after this, or if there is an earthquake, and the buildings are demolished) in which the boundary will remain as before. This operation does not alter the boundary, and it is out of the question for the pursuer to insist that the building should be taken down. The only possible remedy was by making application for interdict when the building was being erected, and it is no answer to that to say that the pursuer's agent was ill. Accordingly, even if I had not come to the conclusion at which I have arrived, I should have thought the remedy was not an appropriate one. I propose that we should recall the Lord Ordinary's interlocutor and dismiss the action. I think probably that is a preferable course to assoilzieing the defender. I do not wish this action to be held as fixing anything as to the rights of parties in the gable. I therefore propose that we dismiss the action, and find the defender entitled to expenses.

LORD M'LAREN.—As I agree with your Lordship, I have little to add. The agreement was one which entitled the defender to build upon the pursuer's gable, that is, to derive support for his upper storeys from the pursuer's gable; and it is evident that the parties were not in a position to determine at the time of the agreement what would be the precise value of the support that was to be given or the damage that might be done, because that was left to be determined by arbitration. These are expressed conditions. There was another thing which both parties, I must assume, knew, that all building plans are subject to the control of the Dean of Guild Court, and therefore the contract must have been affected by the implied condition that the building was to be in such form as the Dean of Guild Court should order. These conditions, expressed or implied, seem to me to cover the whole ground, and to leave nothing to be pointed out, explained, or proved, supposing a proof were competent. Then, on the other branch of the case, I think there is sufficient authority in the region of decision to shew that we have to a certain extent at least adopted the principle of the Roman law, that a person who builds in good faith on another man's property is not necessarily to be compelled to take down his building. If the value of the building greatly exceeds that of the ground he occupies, the case can be explicated

¹ 1874, 1 R. 1198.² 1882, 9 R. (H. L.) 91.³ 1875, 3 R. 35

by paying compensation, whatever may be the agreement. I should be Feb. 7, 1908. sorry if any doubt were thrown upon the doctrine that where there is an inconsiderable encroachment upon neighbour's land by buildings which are substantially and for all practical purposes upon the builder's own land, the law of the land will not compel him to take them down. If the law were altered in this particular case, it would be one in which the application would be, as I think, in the highest degree inequitable. To take down the gable would practically amount to the demolition of the whole house, by withdrawing from the other parts of the building the security which the gable affords, and altering the distribution of the weights and pressures of the house. It might make the house a complete wreck, and all this for 4½ inches. I most heartily indorse all that your Lordship has said upon that part of the case. I agree that the action should be dismissed.

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LORD KINNEAR.—I entirely agree upon this ground, that when the owner of house property within a burgh agrees to allow his neighbour to build upon the gable wall, there is a plain indication that the building is to be erected according to the conditions that may be imposed by the Dean of Guild Court. The thing cannot be done otherwise, as both parties must be supposed to have known, and therefore the pursuer, if he allows it to be done at all, allows it to be done in that way. I think the case does not rest there, because he was asked to allow the gable to be built upon according to the plans which were passing through the Dean of Guild Court, and he therefore knew they would be subject to supervision, and might be altered to satisfy the conditions which the Court might impose. On that ground I think he has failed entirely to shew that there has been any unlawful encroachment on his property. If there had been, I agree further, for the reason your Lordship has given, that the remedy would have been altogether inappropriate, and his claim would have been for compensation for any prejudice he might suffer. I wish to add that I think it must be admitted that some proof was necessary, because the letter which the defender wrote does not bind the pursuer unless he assented to it, and it was necessary to shew that there was an agreement upon which the one party consented that the other should act.

LORD PEARSON was absent.

THE COURT recalled the Lord Ordinary's interlocutor and dismissed the action.

M. J. BROWN, SON, & Co., S.S.C.—WALLACE & PENNELL, S.S.C.—Agents.

THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY, Appellants. No. 82.
—*Hunter, K.C.*—*Macmillan.*

ROBERT HUTCHISON AND OTHERS, Respondents.—*M'Lennan, K.C.*—Feb. 19, 1908.
Hon. W. Watson.

Police—Street—New Street—Petition for warrant to form new street—Petitioner not owner of solum of new street—Burgh Police (Scotland) Act, 1903 (3 Edw. VII. cap. 33), sec. 11.—The Burgh Police (Scotland) Act, 1903, enacts, sec. 11, "Every person who intends to form or lay out any new street . . . shall present a petition for warrant to do so to the

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Held that this section confers upon town-councils only a right to veto or regulate the formation of a new street on the property of the petitioner and of other persons consenting.

Petition by proprietors of feuing ground to a town-council for warrant to form and lay out a new street, which was objected to by the proprietor of part of the *solum* of the proposed street, dismissed as incompetent.

Police—Street—Private Street—Railway—Road forming “part of any railway”—*Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 4 (31).*—The *Burgh Police (Scotland) Act, 1892, sec. 4 (31)*, defines “street” as any road, &c., “not being or forming part of any . . . railway.”

An unformed road in a burgh, 40 feet in width, was bounded on one side by a line of railway from which it was separated by a wall. The *solum* of the road *ex adverso* of the railway to the extent of 30 feet of its width was the property of the railway company, who had acquired it by voluntary disposition under a power to purchase land for extraordinary purposes. Over the road there existed a public right of way for traffic of every description.

Held that the road was not “part of a railway,” but was a private street within the meaning of the *Burgh Police Acts*.

Police—New Street—Burgh—Dean of Guild—Burgh Police (Scotland) Act, 1903 (3 Edw. VII. cap. 33), sec. 11.—The *Burgh Police (Scotland) Act, 1903, sec. 11*, enacts, that every person intending to form a new street in a burgh shall petition the town-council for warrant to do so, and that the Dean of Guild shall not grant warrant for the erection of any buildings abutting on a new street until warrant for the formation of such street has been granted.

The owner of building ground within a burgh, abutting on an unformed private road over which there existed a public right of way for traffic of every description, presented a petition to the Dean of Guild for warrant to erect buildings on his ground. The Dean of Guild refused the petition on the ground that he had no power to entertain it until the town-council had granted warrant for the formation of the road in question into a new street.

Opinion that the erection of the buildings would not cause the road to become a “new street,” and (following *Mair v. Police Commissioners of Dumbarton*, Dec. 14, 1897, 25 R. 298), that the Dean of Guild was wrong in refusing the petition.

1ST DIVISION.
Town-Council
of Ayr.

ON 3d April 1905, Robert Hutchison, builder, Ayr, and certain others, being proprietors of feuing ground in the burgh of Ayr, presented a petition under section 11 of the *Burgh Police (Scotland) Act, 1903,** to the Town-council of Ayr, for warrant to form and lay out

* The *Burgh Police (Scotland) Act, 1903 (3 Edw. VII. cap. 33), sec. 11*, enacts:—“Every person who intends to form or lay out any new street, or to widen, extend, or otherwise alter any street, shall present a petition for warrant to do so to the town-council, and along with the same he shall lodge a plan of the street as proposed to be laid out or altered, with longitudinal and cross sections, shewing the proposed centre, building, and kerb lines, and also the inner lines of the footway where these differ from the building lines, shewing also the levels and means of drainage, specifying the proposed material and mode of construction, and having marked upon it the names of all persons owning the street or any ground abutting thereon affected by the proposal and appearing in the valuation-roll. A copy of said petition shall be served by the petitioner upon all such owners and also upon the burgh surveyor, and the town-council shall within fourteen days from the presentation of the petition afford the petitioner and

a new street on the line of an existing road known as Oswald Road or Oswald Avenue, Ayr, on which the feus held by them abutted. Feb. 19, 1908.
Objections were lodged to this petition by the Glasgow and South-Western Railway Company. Glasgow and South-Western Railway Co. v. Hutchison.

On 10th July 1905 the Town-Council of Ayr, sitting in Works Committee, pronounced a deliverance granting to the petitioners warrant and authority to form and lay out the new street specified in the petition in conformity with the plans, &c., produced. Against this deliverance the objectors, the Glasgow and South-Western Railway Company, appealed to the Court of Session.

The circumstances in which the petition was brought and the contentions of the objectors were thus narrated by Lord Pearson in an opinion delivered by him on 7th November 1906:—"This is an appeal by the Glasgow and South-Western Railway Company against a deliverance of the Town-Council of Ayr sitting as the Works Committee, in a petition by certain proprietors of feuing ground for authority to form and lay out a new street on the line of an existing road known as Oswald Road.

"These proprietors are desirous of building houses on their feus, and one of them applied to the Dean of Guild for warrant to erect buildings. But it is provided by the 11th section of the Burgh Police (Scotland) Act, 1903, that the Dean of Guild shall not grant warrant for the erection of buildings abutting on any new street until warrant for the formation of such new street has been granted. Accordingly the Dean of Guild refused to grant warrant to build until the proprietors petitioned the Town-Council under the same section to have Oswald Road at that part of it formed and laid out as a new street.

"Oswald Road runs in a southerly direction from the lands of Prestwick through what was formerly the burgh of Newton-on-Ayr (now merged in the burgh of Ayr), and thence to a place called Oswald Yard at Ayr Harbour.

"The petitioning feuars are frontagers to Oswald Road on the east side for a length in all of about one-third of a mile. The frontagers on the west side of the road are the appellants (the Glasgow and South-Western Railway Company) and Messrs Wylie & Company. Messrs Wylie & Company are owners and occupiers of chemical works and

all other parties interested an opportunity of being heard, and shall dispose of the application as soon as possible thereafter. If it shall appear to the town-council that the proposed street, or any portion thereof, or any of the details shewn on the said plan, does not fulfil the conditions required by the Burgh Police Acts, or is otherwise contrary to law or to private rights, the town-council may either refuse the said petition, or grant the same subject to such alterations and modifications on the plans or other lawful conditions as may be necessary in the circumstances. The Dean of Guild Court shall not grant warrant for the erection of any buildings abutting on any new street, until warrant for the formation of such street has been granted. The plans approved of by the town-council shall, except in so far as they may afterwards be altered in terms of this section by the authority of the town-council, be adhered to by the applicant and by every person erecting any building abutting on the street. In the event of no part of any new street, for which a warrant has been obtained, being formed or laid out within twelve months from the date of the warrant, the warrant shall lapse, and it shall be necessary before the street is formed or laid out to obtain a fresh warrant."

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stores extending along the west side of the road for about 400 feet. Their ground is practically all occupied by buildings, and they do not oppose the petition. The Railway Company, besides having a title to the road itself, as I will presently explain, are frontagers for a length of about 800 feet to the south of Wylie's works, and for a length of about 350 feet to the north of those works. For this length of 350 feet their property next the road is a field unbuilt on. For the length of 800 feet just mentioned, their railway line approaches the west side of the road. It is stated in a note to the deliverance appealed against that the line is a foot or two above the level of the road, and that there is a railway retaining and boundary wall running outside the railway and abutting hard on the proposed street.

"By section 61 of the Act of 1903, as adopted by the burgh of Ayr, it is not lawful to lay out or form any new street unless it has a width of 40 feet of carriage way and footpath, and 60 feet between the building lines. We are informed by the Town-Council that the Dean of Guild being directed by the statute to refuse to pass plans of buildings abutting on an intended new street until warrant for the street has been obtained, this in practice prevents buildings being put down so as to form a street until the line and level of the street has been fixed.

"Now, Oswald Road, as it exists, is an unformed road, 40 feet in width, and is used by carts and foot-passengers. The whole *solum* of the road, and, indeed, all the neighbouring ground, originally belonged to the old burgh of Newton. The road was at first only 30 feet wide; but at some date which does not clearly appear it was widened to 40 feet by the addition of a 10 foot strip along the east side. The original 30 foot road was acquired by the Railway Company in 1889 by disposition in ordinary form from Mr Oswald of Auchencruive, by whose ancestor it had been acquired in feu from the Magistrates of Newton in 1765, to be used as a wagon road from his coal pits to the harbour of Ayr. Both titles contain a reservation of minerals, and are granted subject also to this special provision and declaration—'that the freemen and other inhabitants of the said burgh of Newton, or others having their permission, shall not be stopped, barred, or impeded from crossing or passing over the said piece of ground hereby fewed out of the breadth foresaid from the march of the grounds belonging to the said burghs of Prestick and Newtown to the north dyke aforesaid, with their horses and carriages, leading dung to their lands, lime, sand, stones, or other materials for building, or for any other lawful purposes; and free liberty to the cattle pasturing upon the Newtown common to pass and repass over the same in all places. And also providing and declaring that there shall be at all times a free passage to the inhabitants of said burgh of Newtown of thirty feet wide betwixt the said north dyke and the said acre and fourteen falls of ground or thereby fewed out.'

"It further appears from the title that the road was acquired by them in virtue of the power to purchase land for extraordinary purposes conferred by section 38 of the Railway Clauses Act, 1845, and section 12 of the Company's special Act of 1865.

"By the decision under appeal, the Town-Council of Ayr, sitting as the Works Committee with powers, authorised the petitioning feuars on the east side of the road to form and lay out the road as a new street *ex adverso* of their feuing ground under section 11 of the Burgh Police Act, 1903, the Dean of Guild Court having, as I have

said, held this to be a necessary preliminary to granting the feuars a lining for their building operations. Feb. 12, 1908.

"The petition was opposed by the Glasgow and South-Western Railway Company, and they now appeal against the deliverance of the Town-Council. It does not appear that there were any objections stated in detail to what is proposed. The appellants' objections go to exclude altogether the laying out of a new street at the place proposed, and in particular the assuming as part of the new street of any portion of their thirty foot road. Their position is that that is private property; that it is part of their railway; that they have already set apart and used other portions of Oswald Road for railway purposes, and that they will from time to time so dedicate and use the part of the road now in question, though they have not yet done so; and that if the feuars desire to have a new street laid out they must themselves supply the ground."

On 7th November 1906 the First Division allowed parties a proof of their averments, the opinion of the Court (consisting of LORD M'LAREN, LORD KINNEAR, and LORD PEARSON) being delivered by

LORD PEARSON.—(After the narrative above quoted)—The appellants point to the provision in section 11 to the effect that if the proposed street does not fulfil the statutory conditions, "or is otherwise contrary to law or to private rights," the Town-Council may refuse the petition or alter the proposed plans. In the first place, they maintain that the proposal is contrary to law, on the ground that section 11 applies only where a proprietor seeks to have the whole thing done on his own property. Now, while the section plainly does apply to a case where a proprietor petitions for authority to make operations *in suo*, it is not confined to that case; and I have no doubt that where feuing ground is bounded by a road (as we are told is the case with the titles of all the feus belonging to the petitioners), this lets in the possibility of including that road in the new street to be laid out, unless there is some specific reason for excluding it. Such reason the appellants find in the definition of the term "street" in the Burgh Police Act, 1892, section 4, subsection 31, which enacts that "street" shall include any road, &c., within the burgh used either by carts or foot-passengers, and "not being or forming part of any harbour, railway or canal, station, depot, wharf, towing-path, or bank." This road, or the portion of it in question, is (the appellants say) part of a railway, acquired by private agreement for extraordinary railway purposes; and to lay it out as a new street or part of a new street is contrary to law, seeing that it falls within the exception, and is thereby excluded from the definition of "street" in section 4. But obviously a piece of ground is not "part of a railway" merely because it belongs to a railway company; and, on a sound construction of the section, this ground does not appear to me to fall within any of the categories set forth in the words of exception. Nor do I think that the question can be solved in favour of the appellants by their statement that, as their traffic requirements demand, this road will be dedicated to and used for railway purposes, if it is clearly shewn that this is not within their power. Now this, which I think is the crucial part of the case, involves matter of fact on which the parties differ widely in their averments. They are substantially agreed as to the legal attributes of the road so far as these depend on

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Feb. 19, 1908. the titles ; but as to all beyond that they are entirely at variance. There are two possible results flowing from the petitioners' averments, if these are established. Either the portion of the road now in question is subject to a public right of way ; or, short of that, it is subject to a servitude of way so wide and indefinite as to make it practically impossible to restrain the public from using the road. If the former alternative were set up, it might have an important bearing on the position of the Railway Company on all the matters raised on the record ; and even if the lesser alternative were established, it might affect the position of the Company upon their plea that they are still entitled to dedicate this part of the road to railway purposes. I indicate no opinion as to whether or how far the position of the appellants will really be affected in these various events. I only say that it may be materially affected ; and I think this is clearly a case in which we should not decide upon the appeal until the parties have an opportunity of laying the facts before us by proof or admissions."

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Lord Pearson.

Thereafter proof was led before Lord Pearson and reported by him to the First Division. The material facts established by the proof, as summarised by the Lord President in his opinion, *infra*, were as follows :—Oswald Road belongs, as far as the western portion of 30 feet is concerned, to the Railway Company. It is not occupied by lines, and is in fact shut off from the railway sidings or yard at that place. Over Oswald Road there exists a public right of way for traffic of every description.

Counsel were heard in argument on the proof on 13th and 17th December 1907.

Argued for the appellants ;—This petition should have been refused, because (1) section 11 was not applicable in respect that it only provided for permission being given for the formation of a new street on the petitioner's own property, and not for the authorisation of the formation of a new street on the property of someone else. (2) Section 11 was not applicable for the further reason that the road in question was not a "street" within the meaning of the Burgh Police Acts, but was expressly excluded therefrom as forming "part of a railway."¹ This road was "part of a railway," for it had been acquired by a railway company, and a railway company could only acquire land for railway purposes. The fact that it had not yet been utilised for railway purposes was immaterial, for although land compulsorily acquired for ordinary purposes might lapse if not utilised within ten years, that did not apply to land acquired, as this was, by voluntary agreement for extraordinary purposes and not included in the book of reference.² In point of fact all the land acquired by this agreement had been gradually utilised for railway purposes except this remaining strip, and that might also be utilised in the future. That fact was not affected by the existence of the alleged right of way. The doctrine of dedication to public uses did not apply, for this land had never been handed over for public purposes, and therefore any public rights in it must be held to have been acquired by prescription, which did not oust the owners from its enjoyment.³ The rights of the public

¹ Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 4 (31).

² Caledonian Railway Co. v. City of Glasgow Union Railway Co., July 17, 1869, 7 Macph. 1072, aff. July 22, 1871, 9 Macph. (H. L.) 15.

³ Dyce v. Lady James Hay, May 28, 1852, 1 Macq. 305.

were not inconsistent with its use for railway purposes.¹ The owners of the *solum* of a road over which there was a public right of way were entitled to use it as they pleased so long as they did not interfere with the public right. This was a private road which had never been subject to public administration as a street, and therefore the owners of the *solum* had a higher right than the public. (3) Even if section 11 was applicable the petition should have been refused on the ground that it transgressed the proviso in the section that the formation of the street must not be "contrary to law or to private rights." It was contrary to law, for the land had been acquired for railway purposes, and this was a proposal to divert it from these purposes. And it was clearly an invasion of private rights, for it would prevent the appellants from using the land, as was their right, for the purposes of their railway. (4) In any event, the petition was unnecessary, for these buildings could be erected without converting this private road into a new street; and the Dean of Guild was wrong in making that a ground for refusing to grant the original petition for lining.²

Argued for the respondents;—This was the formation of a new street within the meaning of section 11,³ and the Dean of Guild was right in refusing the petition for lining until the warrant of the Town-Council was obtained. The Town-Council were justified, in the exercise of their discretion, in granting that warrant, for the road in question was not "part of a railway," nor would the formation of the street be contrary to law or to any private rights of the Railway Company. The test of whether this road formed part of a railway depended on occupancy and not on ownership,⁴ and there was no suggestion of occupancy here. Although the Railway Company had a right of ownership in part of the road they had not an unlimited right of occupancy, for the road was subject to a right of way in favour of the public, and when a public right of way existed the ground could not be used for a railway.⁵ Assuming that, if the land had been acquired by compulsory powers for the purposes of the railway, the public right of way would have disappeared, yet this land was not acquired by compulsory powers; it was acquired by voluntary disposition. The only rights acquired were those granted by the disposition, and in the disposition the public right of way was expressly excluded. *Esto* that in *The Magistrates of Edinburgh v. North British Railway Company*⁶ it was held that a right of way could not be acquired over land held for railway purposes, there was no question of the acquiring of such a right here; it already existed when the land was disposed to the railway, and was expressly excluded from the disposition. In fact the road was dedicated to public purposes, and all the railway got was the land subject to that dedication. Further, whatever the rights in this

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¹ *In re Gonty and Manchester, Sheffield, and Lincolnshire Railway Co.*, L. R., [1896] 2 Q. B. 439; *Grand Junction Canal Co. v. Petty*, L. R., 21 Q. B. D. 273.

² *Stewart v. Marshall*, July 20, 1894, 21 R. 1117; *Mair v. Police Commissioners of Dumbarton*, Dec. 14, 1897, 25 R. 298.

³ *Robinson v. Barton Local Board*, L. R., 21 Ch. D. 621, aff. 8 App. Cas. 798; *Attorney-General v. Rufford & Co., Limited*, L. R., [1899] 1 Ch. 537.

⁴ *North British Railway Co. v. Greig*, March 20, 1866, 4 Macph. 645; *Adamson v. Edinburgh and Glasgow Railway*, June 11, 1855, 2 Macq. 331.

⁵ *Stewart v. Greenock Harbour Trustees*, June 8, 1864, 2 Macph. 1155; *Matson v. Baird*, L. R., 3 App. Cas. 1082; 5 R. (H. L.) 211.

⁶ March 17, 1904, 6 F. 620.

Feb. 19, 1908. road might have been prior to 1862, by section 3 of the Act of that year¹ it became a private street.² Once a road became a private street the public could acquire rights in it which would prevent the owners from dealing with it as they liked.³

At advising, on 19th February 1908,—

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LORD PRESIDENT.—The circumstances under which the present appeal is brought have been detailed in the opinion delivered by Lord Pearson when a proof was allowed. We have now the proof before us, and have to dispose of the petition. In my opinion the result of the proof and admissions of parties is to establish the following propositions: Oswald Road belongs, as far as the western portion of 30 feet is concerned, to the Railway Company. It is not occupied by lines, and is in fact shut off from the railway sidings or yard at that place. Over Oswald Road there exists a public right of way for traffic of every description. The result of this in law is I think, first, that the 30 feet of roadway is not “part of a railway” in the sense of the exception to the 31st subsection of section 4 of the Burgh Police Act, 1892, and that accordingly, second, by the combined operation of that subsection, and of section 103, subsections 5 and 6, of the Burgh Police Act of 1903, the road in question is a private street within the burgh of Ayr.

This makes it necessary to decide the case purely and simply on the applicability of the 11th section of the Act of 1903, under which the petition was presented. After repeated consideration I have come to the conclusion that that section does not give any powers whatever, and that it is therefore improperly invoked by one person against another. It is to be observed that although not actually so expressed there can be no doubt that it and the succeeding section were meant to replace sections 146 *et seq.* of the Act of 1892. This is made clear by the repealing schedule to section 104, which repeals sections 146-150 inclusive, and also section 153. This seems to me to let in as authority the case of *Mair v. Police Commissioners of Dumbarton*,⁴ decided by the Second Division. The opinion of Lord Young on the point is quite clear. Speaking of the applicant who had been told he ought to have applied to lay out a new street under section 146, Lord Young says, “he was not in a position to do so.” And Lord Moncreiff says,—“I am inclined to think section 146 is confined to the case of a proprietor who intends to construct a street on his own land.”

Apart from authority I think the whole phraseology of the clause leads to this conclusion. There is no indication in it of doing what no doubt the Legislature might do, but which it is never presumed it will do,—giving to one person a right to proceed to do something on the property of another

¹ General Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. cap. 101).

² *Campbell v. Leith Police Commissioners*, June 21, 1866, 4 Macph. 853 (reversed on a separate point, 8 Macph. (H. L.) 31); *Kinning Park Police Commissioners v. Thomson & Co.*, Feb. 22, 1877, 4 R. 528; *Neilson v. Borland, King, & Shaw*, Feb. 28, 1902, 4 F. 599.

³ General Police Act, 1862, secs. 3, 150; Burgh Police Act, 1892, secs. 4 (28) (31), 133; Burgh Police Act, 1903, secs. 103 (6), 104 (2) (d).

⁴ 25 R. 298.

in invitum. The whole structure of the clause points to veto and regulation, not to authorisation. It need not be strictly confined to the petitioner's own property, for there is certainly the case where there is the consent of other parties, and there might be the case of including an existing road where there was no one with rights in the *solum* of the road who came forward and objected. There is a sentence in the opinion of Lord Pearson which might be construed as going beyond this; but it is only the more limited construction that on the maturer consideration of the case was held as the judgment of the Court.

The result of this is that I think the present petition is in the circumstances incompetent, and ought to be dismissed. It follows, I think, that the Dean of Guild was wrong at an earlier stage in refusing *de plano* to grant warrants of lining. In fact I think that part of his judgment is not in accordance with *Mair's case*,¹ which probably was not brought before his notice. We were much pressed by counsel for the respondents with the English case of *Robinson v. Local Board of Barton*,² decided by the Court of Appeal and partially affirmed in the House of Lords. I do not think that a matter which depends purely upon statutory enactment in a complicated set of provisions can ever be much helped by decisions on quite a different statute with other provisions. The statute must be taken as a whole to see its scheme. Further, there is a great difference between applying provisions to a street when a street becomes so in fact, and applying them to a place which is only a street by virtue of definition. An instance of the difficulties which arise is well shewn by the variation made by the judgment of the House of Lords on that in the Court of Appeal. It must also be remembered that the result of our decision is not to relegate Oswald Road to a state of perpetual quagmire. As it is by virtue of definition a private street, that lets in the whole *fasciculus* of sections beginning at section 133, and partly amended by the 1903 Act, under which the municipal authorities have very considerable powers.

LORD M'LAREN.—I concur.

LORD KINNEAR.—I also agree with the Lord President's opinion.

LORD PEARSON was absent.

THE COURT pronounced this interlocutor:—"Sustain the appeal: Recall the interlocutor of the Town-Council of Ayr; . . . Dismiss the petition as incompetent, and decern: Find the appellants entitled to expenses," &c.

JOHN C. BRODIE & SONS, W.S.—DALGLEISH, DOBBIE, & CO., S.S.C.—Agents.

¹ 25 R. 298.

² L. R., 21 Ch. D. 621, and 8 App. Cas. 798.

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Ld. President.

No. 83. AIRDRIE, COATBRIDGE, AND DISTRICT WATER TRUSTEES AND ANOTHER,
 Appellants.—*Blackburn, K.C.—King.*
 Feb. 19, 1908. ASSESSOR FOR LANARKSHIRE, Respondent.—*Orr Deas.*

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 bridge, and
 District Water
 Trustees v.
 Assessor for
 Lanarkshire.

Valuation Acts—Subjects—“Lands and Heritages”—Slag Heap—
Valuation of Lands (Scotland) Act, 1854 (17 and 18 Vict. cap. 91), sec. 42.
 —A large slag heap, owned by trustees and deposited on ground belonging
 to them, was let to a railway company under a lease by which the company
 had, on payment of a royalty or fixed rent, right to remove and use the
 slag for the purposes of their railway.

Held that the slag heap was a heritable subject, and that the trustees
 and the railway company had rightly been entered in the Valuation-roll as
 respectively the proprietor and the tenants thereof.

Lands Valua-
 tion Appeal
 Court.
 Lord Low.
 Lord Dundas.

AT a meeting of the Valuation Committee for the Middle Ward of
 Lanarkshire, held on 10th September 1907, the Airdrie, Coatbridge,
 and District Water Trustees and the Caledonian Railway Company
 appealed against the following entry in the Valuation-roll for the
 year ending Whitsunday 1908, viz. :—

Case 254.

Description and Situation of Subject.	Proprietor.	Tenant.	Occupier.	Yearly Rent or Value.
Slag lordship Chapelhall.	Airdrie, Coatbridge, and District Water Trust, per John B. Allan, Treasurer, Airdrie.	Caledonian Railway Company, per J. Drynan, 302 Buchanan Street, Glasgow.	Same.	£648 1 0

The appellants craved that the entry should be deleted from the roll.

The Valuation Committee having dismissed the appeal, the appellants obtained a case.

The case set forth as follows :—

“The subject in respect of which the appeal is raised is known as the Chapelhall slag heap, and consists of a large deposit of slag owned by and lying on a piece of ground belonging to the appellants the Airdrie, Coatbridge, and District Water Trustees.

“The predecessors of the Water Trust had in connection with the acquisition of the water rights to acquire the ground and the slag heap for a valuable consideration.

“The appellants the Caledonian Railway Company have entered into an agreement with the other appellants the Airdrie, Coatbridge, and District Water Trustees, a copy of which is appended hereto,*

* The agreement bore as follows :—

“This lease, entered into between the Airdrie and Coatbridge Water Company, incorporated under Act of Parliament, hereinafter referred to as the first party,—*of the First Part*; and the Caledonian Railway Company, incorporated under Act of Parliament, hereinafter referred to as the second party,—*of the Second Part*;

“Witnesseth as follows, viz. :—The first party hereby let to the second

for the right to use the slag for purposes in connection with their railway, and they do so use it mainly in the construction and repair of the permanent way as ballast for the rails, breaking it up by machinery erected at the slag heap so as to make it useful for this purpose. The Railway Company pay a royalty of 2d. per ton for the slag so used, the proprietors of the slag heap, the Airdrie, Coatbridge, and District Water Trustees, having elected to take that option in the agreement rather than the alternative of a fixed rent of £130. Feb. 19, 1908.
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"It is only the slag that is let to the Railway Company, and should iron be found in the heap the Railway Company have no right to it under the agreement.

"The sum entered in the Valuation-roll is the amount of the royalties for the past year, and there is no dispute as to the amount of the entry should it be decided that the subject falls to enter the Valuation-roll.

"Slag is the residuum left from the manufacture of ore into iron and steel, and in the present case the appellants stated, and the Assessor was not in a position to deny, that the ore originally treated at the works which produced the slag heap did not necessarily come from the locality, but may have been in whole or in part foreign ore imported into this country from Spain and elsewhere.

"Both appellants concurred in appealing on the grounds (1) that slag, from its nature and composition, is not a mineral, and being therefore not a heritable subject, no entry should be made in the Valuation-roll in respect of the sum received from its sale; and (2) that even if it were a heritable subject, there is no let of the subject, the arrangement being merely a bargain as to sale of a commodity.

"In addition the appellants the Caledonian Railway Company contended that the entry, so far as relating to them, should be expunged, on the ground that the subject is already included in the Valuation-roll made up by the Assessor of Railways," &c.

The Valuation Committee held "(1) that slag was a mineral, or, alternatively, that the slag heap was a quarry in the sense of the Valuation Acts; (2) that the Railway Company are in the sense of the Valuation Acts tenants or occupants of the slag heap; and (3) that the fact that the valuation of the slag is dealt with by the Railway Assessor in computing the value of the undertaking, does not operate against its inclusion in the local Valuation-roll. They accordingly dismissed the appeal."

Argued for the appellants;—(1) A slag heap did not fall within the term "minerals" in section 42 of the Valuation Act, 1854.* The

party, and the second party take in lease from them, All and Whole the slag heaps deposited upon that part of the first party's lands at Chapelhall, within the parish of Bothwell and county of Lanark, delineated and coloured red on the plan or tracing annexed and signed as relative hereto, with free ingress and egress to and from the said slag heaps, and liberty to remove and carry away the same in the ways and roads least hurtful to the first party's remaining lands, and likewise with liberty to erect a crusher or crushers, with the necessary engine or engines, on a suitable site on the first party's ground to be approved by the first party, but excepting and reserving all iron in the said slag heaps, and that for the period and on the terms and conditions following, viz.," &c.

* The Valuation of Lands (Scotland) Act, 1854 (17 and 18 Vict. cap. 91), enacts:—Sec. 42. "The expression 'lands and heritages' shall extend to

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word "minerals," as used in the Act, meant something that was taken from the ground in its natural state. Slag was a manufactured, and not a mineral. Slag was in the same position as the iron which had been extracted from the ore which produced the slag, and it could not be suggested that the iron simply by being stored in a heap for the market became a heritable subject to be entered in the Valuation-roll. The slag might have been sold and used as it was produced, in which case it would have been impossible to value it as a separate subject. If each particular piece of slag was a moveable subject, as it certainly was, it was difficult to see why, or at what time, a number of pieces of slag became heritable by being accumulated together. Clay, stone, and slag had been held not to be minerals within the meaning of certain statutes.¹ (2) The agreement here was really not a lease; it was a sale of slag at the rate of 2d. per ton. (3) At all events the entry should be expunged in so far as the Railway Company was concerned, for the slag was used as ballast for the Company's permanent way, and was valued as part of the Company's undertaking. The effect of the Assessor's contention would be that the slag would be valued three times, first, in the form of iron ore when taken from the earth, second, as a slag heap, and third, as ballast for the Company's permanent way.

Argued for the Assessor;—(1) Slag was undoubtedly a mineral, but the question here was not, Was a slag heap a "mineral" in the sense of section 42 of the Act? The question was, Did a slag heap fall within the expression "lands and heritages"? Blaes had been held to be assessable.² That case was exactly in point. A heap of blaes or of slag became a subject to be entered in the roll, as soon as the heap was of sufficient size to be of marketable value. It made no difference that the slag had been artificially deposited, or that the iron ore from which it was made had come from abroad.³ Kelp likewise, washed up on to the shore, was a proper subject for entry in the roll,⁴ which shewed that subjects *sua natura* moveable might be "lands and heritages" within the meaning of the Act. (2) The agreement here was, what it bore to be, a lease. (3) If the slag heap was properly entered *quoad* the Water Trustees, it was also properly entered *quoad* the Railway Company. It was simply a case of landlord and tenant.

LORD LOW.—I do not regard the slag heap in question as being either "minerals" or a quarry within the meaning of the Valuation Act; but it seems to me that it is undoubtedly a heritable subject which is let for a yearly rent. It is therefore liable to assessment. In the case slag is

and include all lands, houses, . . . ferries, piers, harbours, quays, wharfs, docks, canals, railways, mines, minerals, quarries, coal-works, water-works, lime-works, brick-works, iron-works, gas-works, factories, and all buildings and pertinents thereof, and all machinery fixed or attached to any lands and heritages. . . ."

¹ Magistrates of Glasgow v. Farie, Aug. 10, 1888, 15 R. (H. L.) 94; Nisbet Hamilton v. North British Railway Co., Jan. 15, 1886, 13 R. 454; Scott v. Midland Railway Co., May 13, 1897, 13 T. L. R. 398.

² Assessor for Stirlingshire v. Stein & Co., Feb. 24, 1900, 2 F. 596.

³ Wallace v. Assessor for Wigtownshire, March 15, 1902, 4 F. 515.

⁴ Gordon, Feb. 5, 1866, 4 Macph. 1141; British Seaweed Co., Feb. 5, 1866, 4 Macph. 1139.

described as "the residuum left from the manufacture of ore into iron and steel," and we all know very well how in practice such a residuum is treated. A suitable piece of ground is obtained and the slag is deposited on that piece of ground. In course of time a large hill is formed, and, when that hill comes to be profitable, I fail to see why it should not be assessed. It is undoubtedly heritable, and is a subject capable of being let and yielding a rent.

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I am accordingly of opinion that the decision of the Valuation Committee must be upheld.

LORD DUNDAS.—I am of the same opinion ; and I should not have added anything to what your Lordship has said but that the question is an interesting one, and we have had a good argument upon it. It is not, in my judgment, necessary to decide whether this slag heap is, or is not, "minerals" in the sense of section 42 of the Lands Valuation Act, 1854. If it were necessary to do so, I should be disposed to answer that question in the negative, because the word "minerals" occurring, as it does, between the words "mines" and "quarries," seems to relate to something in the nature of mineral which is being wrought out from its native place in the ground. I am further of opinion that the slag heap is not a "quarry" in the sense of the Act. Then, there is a question whether the document which forms the contract between the parties (appellants) is clearly and absolutely a lease, or may be regarded as an agreement of sale. I must say that, although the form of the document is not necessarily conclusive, the contract is very like a lease. It bears to be a lease ; it is stamped as such ; and it contains provisions not only for payment of lordships, but of a stipulated fixed rent.

But however that may be, I agree in thinking that the real point in the case, and a safe and sufficient basis for our decision, is that this slag heap is heritage—a heritable subject—a corporeal hereditament—capable of yielding, and in fact yielding, an annual return ; and is therefore a fit subject of assessment. We are not, I think, called upon to decide the precise point of time at which the slag heap became such a heritable subject ; but it seems clear enough that it did so at least as soon as, if not before, the time when the agreement or lease was entered into. We heard very little argument in support of the third point raised by the Railway Company, to the effect that the slag being in fact used by them in the construction of their permanent way, the value of which is otherwise assessed, the Company were in danger of double assessment. This argument is, in my judgment, clearly untenable, and I say no more about it. Upon the whole matter, I agree with your Lordship that the determination of the Valuation Committee is right.

THE JUDGES were of opinion that the determination of the Valuation Committee was right.

HOPE, TODD, & KIRK, W.S.—ROSS SMITH & DYKES, S.S.C.—Agents.

No. 84.

MELROSE GAS COMPANY, LIMITED, Appellants.—*C. D. Murray.*ASSESSOR FOR ROXBURGHSHIRE, Respondent.—*Party.*

Feb. 20, 1908.

Melrose Gas
Co., Limited,
v. Assessor for
Roxburgh-
shire.

Valuation Acts—Principle of Valuation—Revenue Principle—Whether income to be taken on an average of years.—In valuing a gas company's undertaking the Assessor adopted the "revenue" principle, and took as the revenue the average income for the preceding five years, in one of which the income was exceptionally large.

Held that the Assessor had rightly estimated the income by taking an average of years; that five years was a fair period to average; and that the circumstance that the income for one of the five years was exceptionally large was not a ground for treating the case exceptionally.

Lands Valua-
tion Appeal
Court.
Lord Low.
Lord Dundas.

Case 253.

At a meeting of the Valuation Committee of Roxburghshire held on 10th September 1907 the Melrose Gas Company, Limited, appealed against the entry in the Valuation-roll for the year ending Whitsunday 1908 of the subjects comprised in their undertaking at the yearly rent or value of £456, and craved that the subjects should be entered at £248.

The Assessor reached the valuation entered in the roll upon the "revenue principle," and he took as the income, not the income for the past year, but the average income for the past five years.

The Gas Company admitted that the revenue principle was the proper principle to apply, but they maintained that the income ought to be taken at the income actually earned during the past year.

The Valuation Committee were of opinion that the Assessor was right.

The Gas Company obtained a case, which set forth that the revenue of the Company was £371 in 1903; £871 in 1904; £399 in 1905; £442 in 1906, and £248 in 1907. The values entered in the rolls for the first four years were not reached on the revenue principle.

Argued for the appellants;—The parties were agreed that the revenue principle was the proper method of valuation; the question was—In applying that method, was the revenue to be taken on the basis of an average of years, or at the actual income for the past year? In some cases, taking an average might be proper enough, *e.g.*, in deducting on account of depreciation of machinery,¹ but the income was to be taken at the actual income for the year.² No doubt the result might be that the annual value would fluctuate from year to year, but in the *Falkirk* case³ Lord Fraser, when he laid down the revenue principle as the proper method of valuing such an undertaking as the present, expressly anticipated that that method would lead to such fluctuation, and he held that that was in exact conformity with the Act. If an average was to be taken it ought not to be an average of five years. There was no special virtue in an average of five years; the Income-Tax authorities took an average of three years, and five years in this particular case worked injustice, for the five years included £871, the exceptionally high income for 1904, after which there was a sudden drop to about half that amount, and

¹ Coatbridge and Airdrie Electric Supply Co. v. Assessor for Coatbridge, 1907, S. C. 780, *per* Lord Low, at p. 789.

² Assessor for Falkirk v. Falkirk Gas Co., Feb. 24, 1883, 10 R. 651; Kinross and Milnathort Gas Co., Limited, v. Assessor for Kinross-shire, May 30, 1890, 17 R. 850.

³ 10 R., at p. 655.

the fall was likely to be permanent, in consequence of the competition of an electric lighting company. A possible purchaser of the appellants' undertaking would never offer a price on the basis of taking the income for 1904 into account.

The Assessor argued;—Taking the income upon an average of years was sound in principle and in result, because in that way excessive and unnatural fluctuations were avoided. Five years was a fair period to take.

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LORD LOW.—I have no doubt the Assessor is perfectly right in arriving at his valuation by taking the results of trading on an average of years, because, as Lord Fraser pointed out in the *Falkirk* case,¹ the hypothetical tenant would, in considering what rent he could afford to give, inquire what had been the revenue upon an average of years.

I am further of opinion that an average of five years is a fair period, and indeed is generally recognised in practice to be a fair period to take. The only difficulty is that in the five years taken is included the year 1904, when the Company seems to have had an abnormally large income, and it is said that a change of circumstances has occurred since that time which has materially diminished the demand for gas. There may, however, for anything which appears to the contrary, again be a change of circumstances which may increase the income of the Company. And although I have a good deal of sympathy with their objection to the year 1904 being included in the average, I do not think that we would be justified in taking the average of a smaller number of years, or in estimating the income of the year 1904 at a less amount than that which was actually earned.

For these reasons I am of opinion that we should hold that the determination of the Committee was right.

LORD DUNDAS.—I am of the same opinion.

THE JUDGES were of opinion that the determination of the Valuation Committee was right.

ROBERT SIMSON, W.S., Agent.

CHARLES JENNER & COMPANY, Appellants.—*Blackburn, K.C.—King.* No. 85.
ASSESSOR FOR EDINBURGH, Respondent.—*Orr Deas.*

Feb. 21, 1908.

NORTH BRITISH AND MERCANTILE INSURANCE COMPANY, Appellants. Jenner & Co.
—*Blackburn, K.C.—King.* v. Assessor for
ASSESSOR FOR EDINBURGH, Respondent.—*Orr Deas.* Edinburgh.

Valuation Acts—Value—Subjects unlet—Shop in occupation of proprietor—Valuation by comparison with rent of neighbouring shops let—Valuation by floorage area—Re-valuation where no change of circumstances.—Jenner & Co. were the owners and occupiers of a large block of buildings in Edinburgh fronting Princes Street on the south, St David Street on the east, and Rose Street on the north. The whole buildings were occupied in connection with Jenner & Co.'s business of drapers, &c., the main floors being used as shops and saloons, and the upper floors as workrooms, and a boarding residence for the employees. The building had been recently erected, and down to

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Feb. 21, 1908. 1907 it was entered in the Valuation-roll at the yearly rent or value of £7250. In 1907 the Assessor entered the buildings at £8780, a sum reached by taking the floorage area of each floor and applying thereto a varying rate per square foot, the rates being based upon an analysis of rents actually paid for neighbouring shops in Princes Street. Jenner & Co. v. Assessor for Edinburgh. Jenner & Co. appealed and maintained that the re-valuation was not justified by any change of circumstances. The Magistrates reduced the valuation to £8000. Co. v. Assessor for Edinburgh. Held that the Magistrates were wrong, and that the valuation should be reduced to £7250.

Valuation Acts—Value—Subjects unlet—Insurance Office—No similar office in same street—Valuation by comparison with shops.—A large recently built office in Princes Street, Edinburgh, belonging to and occupied by an insurance company was entered by the Assessor at £5500, a sum reached by taking the floorage area, and applying thereto varying rates per square foot, the rates being derived from an analysis of rents actually paid for shops in Princes Street. There was no similar insurance office in Princes Street. The Company appealed and maintained that the valuation ought to be on the basis of the valuation of other insurance offices in Edinburgh, e.g., in George Street or St Andrew Square.

The Magistrates reduced the valuation to £5000.

On appeal the Judges declined to interfere with the determination of the Magistrates, as it was not shewn to be unreasonable.

Lands Valuation Appeal Court.
Lord Low.
Lord Dundas.

At a meeting of the Magistrates of Edinburgh on 12th September 1907, Charles Jenner & Company, silk mercers, &c., 47 Princes Street, and the North British and Mercantile Insurance Company, 64 Princes Street, appealed against the entries in the Valuation-roll of their premises respectively, for the year ending Whitsunday 1908.

Cases 255
and 256.

I. Charles Jenner & Company.

The entry in the Valuation-roll was in the following terms:—

Description and Situation of Subjects.		Proprietor.	Occupier.	Feu-duty.	Yearly Rent or Value.
Description.	Situation.				
House, Shop, &c.	47, 48, and 49 Princes Street.	Charles Jenner & Co., Silk Mercers,	Proprietors.	£12 16	£8780

The appellants craved that the yearly rent or value should be reduced to £6000.

The Magistrates fixed the yearly rent or value at £8000.

The appellants obtained a case for appeal. The Assessor accepted the Magistrates' valuation.

The case set forth as follows:—

"The following facts were admitted or were held by the Magistrates to be proved, or within the knowledge of the Magistrates:—

"1. The appellants are owners and occupiers of a large block of buildings fronting Princes Street on the south, St David Street on the east, and Rose Street on the north. The buildings have a frontage to Princes Street of about 80 feet, to St David Street of 230 feet, and to Rose Street of 99 feet. The main portion of the building, viz., that fronting Princes Street and extending northwards along St David

Street for about three-fourths of the distance to Rose Street, was erected in or about the year 1895. The premises forming the back portion were completed in 1905. The area covered by the buildings extends to 2324 square yards; the total floorage area of the buildings is 106,490 square feet; and the cubic contents 2,000,000 cubic feet.

" 2. The main portion of the building consists of nine floors, including a basement and a mezzanine floor. The back portion consists of eight floors, including a basement floor. The appellants occupy the whole buildings in connection with their business of drapers, silk mercers, &c. The main floors are used as shops and saloons and the upper floors as workrooms and a boarding residence for the firm's employees.

" 3. The cost of erecting the buildings exclusive of the cost of embellishments was £70,000.

" 4. The main portion of the building was completed in 1896, and the total assessment at that time was £6450, being £6000 for the newly-erected portion and £450 for the old buildings on the site now occupied by the back portion. The valuation remained at that figure till 1904, when it was reduced to £6000 in respect that the old buildings were being removed and the present back portion was being erected. After this reconstruction was completed in 1905 the valuation was fixed by the Assessor and acquiesced in by the appellants at £7250—£1250 being added for the then new buildings. The Assessor raised the valuation for the year ending Whitsunday 1908, because on a comparison with premises in Princes Street actually let he was of opinion that the valuation of £7250 was quite inadequate.

" 5. There are in Princes Street ninety shops and offices actually let and thirty-two shops and offices occupied by proprietors. The valuation of many of the latter has not been considered in recent years, and the rents of premises let in Princes Street have undergone considerable increase within the last few years. The Assessor is in course of scrutinising the assessable value of all the subjects occupied by proprietors with a view to bringing the whole premises in Princes Street to one level of valuation, but he has not yet overtaken the reversal of the whole of such premises.

" The Assessor arrived at his valuation of £8780 by taking the floorage area of each floor of the appellant's premises and applying thereto varying rates per square foot. These rates were based upon an analysis of the rents actually paid for the premises in Princes Street referred to in the Assessor's evidence.* . . . The Assessor further took as a check upon the sum thus arrived at the figure yielded by taking percentages upon the site value and the cost of the buildings, and he found that this figure exceeded the sum of £8780."

The determination of the Magistrates was in the following terms:—

" 1. That the appropriate method of arriving at the valuation of the appellants' premises for the purposes of the Valuation of Lands (Scotland) Acts is by comparison with such other premises in Princes Street as most nearly resemble them in situation, character, and accommodation, provided such other premises are actually let, and that an important factor in instituting a comparison with such other premises is by means of ascertaining the rate per square foot of floorage space for each floor or part of a floor of such similar premises and

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* See *infra*, p. 606, note.

Feb. 21, 1908. applying these rates to the floorage areas of the present premises, subject to such variations as may be necessary to give effect to the specialties of the present case, and in particular the advantage of having a frontage to three streets and the disadvantages connected with the large number of floors.

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"2. That while, as an alternative to the method of ascertaining the value by comparison with other premises, it is sometimes expedient, where the owner has erected buildings for his own occupation, and there are no similar let properties in the neighbourhood available for comparison, to inquire what interest or return an owner might reasonably expect upon his outlay if the building had been erected for letting to a tenant, and regard this as an equivalent of rent, it is not necessary or appropriate to adopt this alternative in the present case.

"The Magistrates, taking the whole circumstances into account, and acting in accordance with the opinions above set forth, resolved to fix the rental in the Valuation-roll at £8000."

The appellants contended;—"Their premises not being let, but being in their own occupation, the fair method of arriving at their annual value was by a comparison with the rental or assessed annual value of other similar premises in the immediate vicinity. The appellants' premises consisted of a front portion abutting on Princes Street, 784 square yards in area, a middle portion, 1018 square yards in area, and a back portion, 522 square yards in area, the front and middle portions having been erected in 1895, and the back portion in 1904. As regards the new back portion, this had been valued in 1905, immediately after its erection, at £1250, and had remained at this figure in 1906, but although no change of circumstances had taken place, the Assessor proposed to supersede this recent valuation and value the back portion at £1514, 16s., an increase of £264, 16s. As regards the middle portion it was conceded that this portion fell to be entered at half the rate fixed for the front portion. The main controversy was as to the valuation of the front portion, and comparison with similar neighbouring premises shewed that the Assessor had valued this portion at an excessive figure. The neighbouring premises which were most nearly comparable with the front portion of the appellants' premises were those of Messrs Cranston & Elliot, Limited, assessed at £3000; Messrs John Wight & Company, presently let at £1400; Messrs Henry, Darling, & Company, let at £875; and Messrs Cowan & Strachan, let at £850. All of these premises were situated in Princes Street, and were occupied in each case by a single firm from roof to basement, as was the case with the appellants' premises. If the front portion of the appellants' premises were valued at the same rate proportionally to area as the premises mentioned, the middle portion at half that rate, and the back portion at £1250, the valuation would not exceed £6000. If this result were tested by taking the rate per square foot of the floorage area, and per cubic foot of the cubical contents of the premises compared, and applying the same to the appellants' premises, a figure practically identical would be reached. . . . While the appellants' premises had the advantage of a frontage to South St David Street, this was counterbalanced by the fact that the proportion of floorage area to frontage to Princes street was very much larger in the case of the appellants' premises than in the case of any of the premises compared. A large amount of back floorage, proportionally to street

frontage rendered premises much less marketable. Moreover, in the particular case of Messrs Cranston & Elliot, Limited, the frontage to Princes Street exceeded the appellants' frontage by 13 feet.

"The appellants further contended that the Assessor had erred in the method of comparison adopted by him. He had merely taken the average floorage rates of a number of other premises in Princes Street, and applied these rates to the corresponding floors in the appellants' premises. Apart from the objection that floorage rates by themselves afforded no satisfactory guidance, the average rates which the Assessor had taken were in no case derived from premises occupied by a single firm from roof to basement. On the contrary, his floorage rates for the street or shop floor were taken, with a single exception, from premises where the occupier occupied only that floor. As the street floor was by far the most valuable, and if let separately commanded a much higher rent proportionally than if let along with, and as part of a whole tenement, the rates selected by the Assessor for comparison afforded no criterion for the valuation of the street floor of the appellants' premises, which were occupied as a *unum quid* from roof to basement.

"While the method of taking a percentage on cost was not regarded by the Court as a sound system of valuation, the appellants' premises had been greatly over-valued by the Assessor on this basis also. The site had been independently valued within two years at £100,000, and the cost of the buildings, apart from embellishments, it was agreed, might be taken at £70,000 or thereby. At the rate of 3 per cent on the site value and 4 per cent on the structural cost, which were fair rates in the case of so large and unmarketable a concern, the figure of £5800 was reached.

"The appellants' premises, after their completion in 1905, had been valued at £7250, which the appellants considered excessive, but against which they did not at the time appeal, and the proposed increase of £1530 on this very recent valuation was not justified by any change of circumstances whatever. If the valuation of Princes Street premises generally was to be revised, it was appropriate that the valuations of old standing should first be dealt with, and, in any event, it imposed an unfair burden on the appellants in competition with their trade rivals to single out their premises for increased valuation this year, in place of proceeding by way of a comprehensive and simultaneous scheme of re-valuation of all business premises in Princes Street."

The Assessor answered;—

"As many of the valuations in Princes Street had not been revised for many years, it was proper for him to undertake the revisal of these as early as possible.

"The best criterion for assessing the value of the appellants' property in Princes Street is a comparison with the subjects actually let in the vicinity.

"In Princes Street ninety of the premises are actually let, while thirty-two are in the occupation of proprietors. The Assessor, therefore, analysed each separate let subject and arrived at figures or rates applicable to each flat of the different tenements, which rates having been taken from many varied subjects gave a fair indication of the values applicable to each flat of all the tenements in the street. He was then, he considered, in a position to proceed by comparison to adjust the value of the appellants' subjects.

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Feb. 21, 1908. "The Assessor, though unable to overtake the complete re-valuation of the whole street in this year, was able to revise a considerable number of the valuations of subjects lying between the east end of Princes Street and Hanover Street. In all, the Assessor has revised nine such valuations. After conference with the Assessor, Messrs Thomas Methven & Sons, 15 Princes Street, Andrew Elliot, 17 Princes Street, Sun Fire Office, 40 Princes Street, John Dickson, 63a Princes Street, Edinburgh Café Company, 70 Princes Street, and H. C. Baildon & Sons, 73 Princes Street, acquiesced in valuations practically on the basis proposed by the Assessor in this case. Further, the valuation of Messrs Forsyth's new premises at the corner of Princes Street and St Andrew Street, based on the rates applied in making the valuation of the appellants' premises, was accepted by them. Messrs Romanes & Paterson, who appealed to the Magistrates, have acquiesced in their decision, which applies the Magistrates' decision in this case proportionately to their smaller premises, and are not to proceed further.

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"The Assessor contends that he has adopted the only method for valuing a large block of buildings such as that of the appellants, viz., by comparison and applying floorage rates taken from premises actually let.* He has arrived at his valuation by taking rates from subjects actually let and in the immediate vicinity of the appellants' premises, whereas the appellants found upon instances of valuations—as distinguished from lets—and of subjects which lie at a considerable distance from the premises in question.

"The appellants' premises have been the subject of two previous separate valuations—one after the front portion was completed in 1895 and the other after the back portion was completed in 1905. When the last-mentioned valuation was made the sum arrived at was

* The Assessor deponed, *inter alia*, as follows:—"I based my valuation on certain rates I have given, and applied them to the floorage area. These rates I justify by comparison with actual lets in Princes Street. The figure of 10s. which I give for the street floor in my valuation of Jenner's I justify by a comparison with the nine cases I gave. The case of Mackay & Chisholm brings out 9s. 10½d.; Goodson's, 10s. 2d.; Dow, 12s. 8d.; Duncan, 10s. 9d.; Lennie, 10s.; Stanley, 10s. 6d.; Crouch, 10s. 9d.; Milne, 10s. 8d.; Rentons, 11s. These are all for street floors. These are all in Princes Street, but they are not all back 50 feet. In each of the nine cases the premises are let. Roughly speaking, the rates I have taken apply to the floorage given in each of the nine cases of rent. With reference to the other rates I apply to Jenners, if required I can by reference to one or other of these nine cases shew that in each case my rate is warranted, with the exception of the basement, which in my estimate of Jenner's is too low. Coming to the nine cases which are actually let, I have applied my rates in each one of the cases. In the case of Mackay & Chisholm I have applied my rates and got £905, 14s. 6d., and the rent is £905. Applying my system to the case of Goodson's I get in my rates £1001, and the let price is £1000. In the case of Dow my rates give £501, whereas it is let at £500. In the case of Duncan my rates give £551, and it is let at £550. In the case of Lennie the figure comes out exactly. In the case of Stanley my rates applied give £1232, and the rent is £1235. In the case of Crouch my rates are £374, actual let £375. In the case of Milne my rates give £302, and they let at £300. That leaves only the case of Renton. In the case of Renton my rates work out at £2237, whereas the let is £2210. My view is that the system I have taken as evidence is fair when applied to the premises let, as it shews exactly the same as the rent."

simply added to that of the former. . . . The appellants' premises cannot in any case be considered as having any back portion, as the so-called 'new portion' and 'back portion' have very valuable frontage to St David Street. He does not admit that the building should be charged at half rates, nor does he admit that the 'back portion' should be taken at a fixed value of £1250. This sum is apparently taken because of its being the valuation placed upon the last-erected portion of the premises, and when this sum was fixed it was simply added to the former valuation of the older erection. The Assessor contends that the premises must be valued as a whole, and further, that the appellants cannot assume the value, of the back premises taken in connection with and as a part of an entire building to be £1250, unless they were able to shew that that sum represented the true value, and this they made no attempt to prove.

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"As an additional test of the valuation arrived at as above pointed out, the Assessor applied the test of cost, and this worked out, as shewn in his evidence, at £9500, and this sum was spoken to by his witnesses, and was arrived at by them as explained in their evidence. In making this additional test the Assessor assumed the value of the area to be £150,000, and the building £70,000, exclusive of any consideration for embellishments. The appellants virtually admit the latter sum to be correct, and the Assessor submits that his valuation of the site is justified by the values spoken to in the proof as having been actually paid for sites in the vicinity, and other evidence.

"Taking the figures assumed by him, the Assessor took 4 per cent, on the value of the site,	£6000
and 5 per cent on the buildings, exclusive as above mentioned,	3500

"Making	<u>£9500</u>
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"He was thus satisfied that his method of valuation by comparison and application of rates of floorage, . . . was reasonable, and he accepted the lower figure in the table in fixing the valuation.

"The Assessor further contends that the usual percentage rate applied in Scotland is 4 per cent on land and 5 per cent on buildings. The percentages of 3 per cent and 4 per cent spoken to as having been applied in two cases in England are not applicable to the present case.

"The Assessor further contends that he cannot be expected to revise the whole of such an extensive street as Princes Street in one year, and he does not admit that he is bound by any particular mode of procedure such as the appellants point out, in dealing with subjects coming into his valuation, or that he ought to withhold any number of valuations from the roll from year to year until he has completed a street. The logical issue of such a principle would require him to hold over the valuation until a district, or even the whole of the city, was revised and put on the same footing. He contends that so soon as he is satisfied that the valuation of any single subject in the city requires to be altered he is bound to enter such new valuation in the roll. He further contends that any arguments drawn from comparison with unrevised premises in Princes Street being obsolete valuations fall to be disregarded."

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II. *North British and Mercantile Insurance Company.*Jenner & Co.
v. Assessor for
Edinburgh.

The entry in the Valuation-roll was in the following terms:—

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Description and Situation of Subjects.		Proprietor.	Occupier.	Fen-duty.	Yearly rent or value.
Description.	Situation.				
Office.	64 Princes Street.	North British and Mercantile Insurance Company, per James Chatham, manager.	Proprietors.	£6 6 2	£5500

The appellants craved that the yearly rent or value should be reduced to £2000.

The Magistrates fixed the yearly rent or value at £5000.

The appellants obtained a case for appeal.

The case set forth as follows:—

“ The following facts were admitted or held by the Magistrates to be proved, or within the knowledge of the Magistrates:—

“ 1. The appellants are owners and occupiers of the premises forming No. 64 Princes Street, the building of which has been completed since the Valuation-roll for the year 1906-7 was made up. The building is rectangular in shape, having a frontage of 102 feet to Princes Street, and extending northwards 114 feet to Rose Street Lane. The area covered by the buildings is 1632 superficial yards in extent, and the gross floorage area of the building is 49,175 square feet. The building consists of three sections, viz., (1) a front block facing Princes Street, containing a basement floor, a street floor, and three flats and an attic flat above; (2) a centre block containing a ground floor and basement under; and (3) a back block adjoining Rose Street Lane containing a basement floor and three storeys above. The front wall of the section facing Princes Street is separated from the street by a recess or area, and the ground floor of that section is raised 4 feet 6 inches above the level of the street.

“ 2. The whole building is occupied by the appellants for the purposes of their business of a fire and life insurance company. The street and upper flats of the front section contain a board-room and accommodation for the officials and clerks of the Company, the middle section is used as a public office, and the back block as offices, lunch-rooms, cloak-rooms, and lavatories. The basement floors consist of storage accommodation, safes, &c.

“ 3. The value of the site upon which the buildings are erected is £82,000, and the cost of the buildings, excluding the cost of embellishments, is £48,000.

“ 4. Prior to the erection of the present buildings the site was covered by old buildings, consisting of four storeys owned by the appellants, and occupied partly as shops let to tenants and partly as offices used by the appellants for the purposes of their business. The shops occupied about one-half of the frontage to Princes Street on the ground floor. The whole buildings were then assessed at £3025, of which £1400 represented the rent paid for the shops.

“ 5. There are in Princes Street ninety shops and offices actually let

and thirty-two shops and offices in the occupation of proprietors. Feb. 21, 1908.
 The valuations of many of the latter have not been considered in recent years, and the rents of premises let in Princes Street have undergone considerable increase within the last few years. The Assessor is in course of scrutinising the assessable value of the subjects occupied by proprietors with a view to bringing the whole of the premises in Princes Street to one level of valuation, but he has not yet overtaken the revisal of the whole premises, and in particular has reconsidered none of the premises in the section of Princes Street west of Hanover Street.

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"The Assessor arrived at his valuation of £5500 in the following manner. He took the floorage area of each floor of the appellants' premises and applied thereto varying rates per square foot. The rates were based upon an analysis of the rents actually paid for the premises in Princes Street referred to in the Assessor's evidence, after allowing for the differences in construction, character, and purpose. This method gave a valuation of £5273. . . . He then calculated the value on the basis of taking percentages upon the value of the site and the cost of the buildings, and this gave a valuation of £5680. The figure inserted in the Valuation-roll was arrived at by taking the average of these two sums."

The determination of the Magistrates was in the following terms:—

"1. That the appropriate method by which to arrive at a valuation of the premises in question, for the purposes of the Valuation of Lands (Scotland) Acts, was by comparing them with other premises in Princes Street, and that an important factor in instituting a comparison of other premises in Princes Street with the present premises is by means of ascertaining the rate per square foot of floorage space for each floor, or part of a floor, of such other premises as are actually let, and applying such rates to the corresponding floorage areas of the appellants' premises, subject to such variations as may be necessary to give effect to the specialties of the present case, particularly the use made of the premises, the fact that the frontage to Princes Street is recessed, and that the ground floor is raised above the level of the street, and the number of flats occupied by the appellants.

"2. That in respect there are no very similar premises available for comparison with the building in question, the Magistrates are entitled to inquire what interest or return should reasonably be expected upon the value of the site and the outlay on the buildings if the buildings had been erected for letting to a tenant, and regard the result not as the rental to be inserted in the Valuation-roll, but merely as a check upon the result obtained by the comparison of floorage rates above specified. If the method now indicated were adopted, it would give a larger sum than the valuation appealed against.

"The Magistrates, taking the whole circumstances into account, and acting in accordance with the opinions above set forth, resolved to fix the rental in the Valuation-roll at £5000."

The appellants contended:—

"The yearly value put upon their premises is excessive, and is arrived at upon an erroneous principle and by an improper method of valuation.

"The Assessor proposed to value the said premises at £5500 yearly. This figure he reached by applying to the floorage area of the appel-

Feb. 21, 1908. lants' premises a rate per foot obtained from the rental, not of offices, but of shops in Princes Street—that is to say, by considering what rental the appellants' buildings would yield if converted into shops; and by arbitrarily dividing the difference between the figure so arrived at—£5273—and a sum equal to four per cent on the estimated cost of the site and five per cent on the estimated cost of the buildings—£5680. There is no principle on which this method of valuation can be justified. In the first place, it has been frequently decided that the cost of the subjects forms no good guide for determining the yearly rent which they would bring, and further, the rate selected by the Assessor of four and five per cent on site and buildings respectively is purely arbitrary, and is excessive. In the second place, it is an erroneous method of valuation to take into account what the premises would yield if turned to some other use from that to which they are presently applied. Both of these tests of yearly value were expressly disapproved in the case of the *North British Railway Hotel*.¹ It was impossible therefore to reach any proper conclusion by arbitrarily splitting the difference between the results arrived at through these two erroneous methods of valuation. Further, it is notorious that premises in Princes Street, let as offices, would not yield the rental which they would obtain if let as shops, and instances may readily be found in the Valuation-roll shewing that banks and offices in Princes Street are assessed at less than similar premises occupied as shops. The appellants do not expect or obtain any advantage as shops do from passing traffic; their premises are designed only for offices, and by reason of the fact that the building is recessed from the street, and that the first floor is built several feet above the street level, they could not conveniently be used for shops. . . .

“But even if it were legitimate to take the rental of shops in Princes Street as the basis of comparison, the examples founded upon by the Assessor afford no guide for the valuation of the appellants' premises. In most cases they consist of shops occupying only a ground floor, which are universally highly rented as compared with shops containing several floors, and yield rents which could not be obtained in the same proportion for premises like those of the appellants, which, from floor to roof, are in one occupancy. In some cases, again, they are shops of little depth from the street and afford no ground of comparison, because the less the depth in proportion to the frontage the higher is the rent. Further, while in the case of shops extending to a greater depth than 50 feet from the street, the Assessor diminishes the rate by one-half on the further back portions of the buildings, he makes no such diminution in the case of the appellants' premises. Finally, all the rates put upon the different portions of the premises selected by the Assessor are purely arbitrary, and are founded upon no ground of fact.

“The appellants contend that the most reliable basis for the valuation of their subjects is to be found in the valuation of similar buildings used as one tenement for the same purposes. Such examples are to be found in the cases of the Standard Insurance Office and the Scottish Equitable Insurance Office. If the rate of valuation per foot of the floor area of the first of these offices were taken, the appellants' premises would be valued at £2088, and if the rate of the second

¹ *North British Railway Co. v. Assessor for Edinburgh*, March 10, 1905, 7 F. 435.

were applied the result would be £2007. The offices referred to are Feb. 21, 1908. respectively in George Street and St Andrew Square; but insurance offices obtain no advantage from being in Princes Street, and there is no ground for assuming that insurance companies would pay a higher rent for offices in the one street than in the others. In the case of the Life Association Insurance Offices, which are in Princes Street, the rent at which they are let on the first floor is 1s. 4d. per foot, and of the shops on the ground floor 4s. 5d. per foot. Similarly, the offices on the first floor of the Palace Hotel buildings fetch a rent of 1s. 5d. per foot. If these rates were applied to the appellants' premises the total rental would be under £2200.

"No buildings in any way similar to those of the appellants are entirely occupied as offices in Princes Street. The nearest examples of similar blocks of building occupying similar sites are the New Club, the Conservative Club, and the University Club. Taking the present valuation of these Clubs, the yearly value per foot of floor area works out at 10·02d. per foot in the case of the New Club, 10·23d. per foot in the case of the Conservative Club, and 8·45d. per foot in the case of the University Club. If these rates were applied to the appellants' premises they would give valuations of £1932, £1972, and £1731 respectively.

"The appellants accordingly contend that in accordance with these figures, and the evidence adduced by them, their premises should not be entered in the Valuation-roll at more than £2000."

The Assessor answered:—

"The Assessor in the absence of any buildings quite analogous in Princes Street submits that he acted correctly in applying the principle of floorage space, checked by cost. This he submits was a correct basis, and in so far as it bore hardly on the appellants, was amply corrected by the deduction made from his valuation by the Magistrates."

Then followed contentions and statements similar to those contained in the first four paragraphs of the Assessor's answers in Charles Jenner & Company's case, *supra*, pp. 605-6.

"The application of the rates before mentioned to the appellants' premises brings out, as shewn in the Assessor's evidence, a total of £5273, 11s. 9d. The Assessor proceeded to check the result on the 'cost' principle. He accepted the figures supplied to him by the manager of the appellants' Company, viz.:—

Site,	£82,214	0	0
Say £82,000 at 4 per cent,	£3,280	0	0
and buildings £52,000—less allowance for embellishments £4000—£48,000 at 5 per cent,	2,400	0	0
Making,	£5,680	0	0

and in fixing the valuation of £5500 he split the difference between the result obtained by measurement and that obtained by cost, making practically £5500.

"The Assessor refers to his evidence, in which he distinctly stated that his valuation was based on the 'floorage' principle, and that he used the 'cost' principle as a check. He did not value the appellants' premises at what they might bring if turned to some other use than that for which they were specially designed and intended, and

Feb. 21, 1908. he did not base his valuation on the 'cost' principle, although he considers he was justified in using that principle as a check on the figures otherwise arrived at by him.

Jenner & Co.
v. Assessor for
Edinburgh.

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and Mercan-
tile Insurance
Co. v. Assessor
for Edinburgh.

"Under the former valuation, prior to the erection of the new building, the assessments stood at £3025. The additional value of the new building brings the valuation up to at least £5000.

"The Assessor believes that a sum of about £52,000 was spent in demolishing the old buildings and erecting the new ones. He submits that this being so the subjects fall to be entered as at least £5000.

"The Assessor does not admit that premises in Princes Street let as those premises were do not yield the same return as shops. Such subjects as are let for offices yield as high rents as similar subjects when otherwise occupied.

"The analogy of insurance buildings elsewhere than in Princes Street has, the Assessor submits, no bearing, and the valuation of clubs in Princes Street—whose values are as yet unrevised by him—are, he submits, of no value at all."

LORD LOW.—These cases have been extremely well argued, and as I have formed an opinion on both of them, in which I understand your Lordship agrees, I think it is best that we should dispose of them at once.

Taking, in the first place, the case of Jenner & Company, I agree with the statement of the Magistrates that the appropriate method of valuation "is by comparison with such other premises in Princes Street as most nearly resemble them in situation, character, and accommodation."

Now, it happens that there are a number of premises in Princes Street which are as similar in character, situation, &c., as one is likely to find. I refer to those of Wight & Company, Cowan & Strachan, Henry, Darling, & Company, Renton & Company, and Cranston & Elliot. A comparison with these has made on my mind a strong impression that the amount at which the appellants' premises have stood in the Valuation-roll for some time, viz., £7250, is a fair yearly value for them in their present condition.

It is said that the main part of the building has stood at the same figure (namely, £6000) in the roll for twelve years. Now, that is true, but then in 1905 the valuation was reviewed by the Assessor and fixed at the above-mentioned sum of £7250.

Now, I confess I can find no evidence of change of circumstances to warrant the increase which the Assessor proposes to put on the premises for the present year. But, on the other hand, no circumstances have been stated to warrant their being entered at a lower figure than formerly. I propose, therefore, that we hold that the determination of the Magistrates is wrong, and that the premises should be entered in the roll as formerly at £7250.

Coming to the case of the North British and Mercantile Office, the first observation which I desire to make is that it appears to me that the figure of £2000 suggested by the Insurance Company is altogether inadequate. It is difficult to find a basis for assessing the value of this subject, as there are no other premises in Princes Street, used as offices, at all comparable with it. I entirely agree with the Assessor that you cannot value premises

in Princes Street at a value put on similar subjects in George Street or Feb. 21, 1908. St Andrew Square. This much may be said—that insurance offices Jenner & Co. v. Assessor for Edinburgh. should be valued at a somewhat lower rate than shops, because the same rent would not be got for an office as for a shop.

The valuation made by the Assessor was £5500, and the Valuation Committee have reduced that figure to £5000. I confess that I should have been very well pleased if the Committee had fixed a smaller amount, because my impression is that £5000 is a full valuation. Still, this is one of those cases in which it is impossible to do more than make an approximate estimate of the value, and I think that it is impossible to say that the estimate made by the Committee is not reasonable. I am therefore of opinion that we would not be justified in interfering with their determination. North British and Mercantile Insurance Co. v. Assessor for Edinburgh.

LORD DUNDAS.—I agree in regard to both the cases for the reasons which your Lordship has stated, and I have nothing to add.

In the case of Charles Jenner & Company the Judges were of opinion that the determination of the Magistrates was wrong, and that the valuation should be reduced to £7250.

In the case of the North British and Mercantile Insurance Company the Judges were of opinion that the determination of the Magistrates was right.

DUNDAS & WILSON, C.S.—ANDREW M'DOUGALL, Solicitor—Agents.

FRANCIS WEBSTER & SONS AND OTHERS, Appellants.—*Hunter, K.C.*—No. 86.
Munro.

ASSESSOR FOR ARBROATH, Respondent.—*D.-F. Campbell—Chapell.* Mar. 4, 1908.

Valuation Acts—Values—Subjects unlet—Spinning Mills—Estimated capital value—Criterion of value—Recent sales of similar property in vicinity.—In fixing the capital value of spinning mills, in the occupation of their owners, as the basis for reaching the yearly rent or value of the mills, it is legitimate to take into consideration the prices obtained at a number of recent sales of these and similar mills in the same town. Webster & Sons v. Assessor for Arbroath.

Valuation Acts—Appeal—Appeal against recent valuation by the Judges—New evidence.—In 1902 the Lands Valuation Appeal Judges fixed the yearly value of the Alma spinning mill, Arbroath (occupied by the owners) at £1293, and in succeeding years the Assessor continued to enter the mill at that sum. In 1907 the owners appealed against the entry, and adduced evidence that since 1900 nearly all the similar mills in Arbroath had been sold, and at prices which shewed that the Assessor's valuation of these mills was over 50 per cent too high. The Valuation Committee (with the exception of £130, which they allowed for depreciation) confirmed the Assessor's valuation on the ground that there was no change of circumstances since the value was fixed in 1902.

Held by the Judges, on appeal, that the evidence (which was not before the Court in 1902) as to the recent sales of other mills justified a reconsideration of the value of the mill in question, and reduced the valuation to £923.

At a meeting of the Valuation Committee of the burgh of Arbroath, Lands Valuation Appeal Court. held on 11th September 1907 (1) Francis Webster & Sons, Alma Works, Arbroath; (2) The Netherward Spinning and Weaving Company, Netherward Works, Arbroath; and (3) Anderson & Chalmers, Brothock Mill, Arbroath, appealed respectively against Lord Low. Lord Dundas. Case 258.

Mar. 4, 1908. the following entries in the Valuation-roll for the year ending Whit-sunday 1908, viz. :—

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(1) *Alma Works.*

No.	Description and Situation of Subjects.	No. on Roll.	Yearly Rent or Valuation as estimated by Assessor.
1	Mill and factory, Alma Works, Millgate,	3347	£900 0 0
2	Office, Millgate,	3348	22 0 0
3	Warehouse, do.,	3349	9 0 0
4	Office, do.,	3355	9 0 0
5	Auction mart and yard, Millgate,	3350	105 0 0
6	Office, Millgate,	3351	16 0 0
7	Shop, do.,	3352	17 0 0
8	House and Office, Millgate,	3353	17 0 0
9	Store, Millgate,	3356	3 0 0
10	House, 20 Park Street,	1708	3 5 0
11	Yard, Park Street,	1709	2 0 0
12	Warehouse, do.,	1710	130 0 0
13	Hackling shop, Park Street,	1711	60 0 0
			<u>£1293 5 0</u>

(2) *Netherward Works.*

No.	Description and Situation of Subjects.	No. on Roll.	Yearly Rent or Valuation as estimated by Assessor.
1	Mill and factory, Guthrie Port,	4825	£530 0 0
2	Warehouse, 81 Guthrie Port,	4826	200 0 0
			<u>£730 0 0</u>

(3) *Brothock Mill.*

No.	Description and Situation of Subjects.	No. on Roll.	Yearly Rent or Valuation as estimated by Assessor.
1	Mill, Brothock Bridge,	2509	£527 0 0
2	Warehouse, do.,	2510	60 0 0
3	Warehouse, do.,	2511	65 0 0
4	Warehouses, do.,	2512	75 0 0
5	Hackling Shop, East Grimsby,	2519	15 0 0
6	Warehouse, 13 North Grimsby,	2573	51 0 0
7	Warehouse, 7 do.,	2574	15 0 0
			<u>£808 0 0</u>

The appellants Francis Webster & Sons, The Netherward Spinning and Weaving Company, and Anderson & Chalmers, asked respectively that the valuations should be reduced *in cumulo* to (1) Alma Works, £783, 5s.; (2) Netherward Works, £260; (3) Brothock Mill, £337, 10s. Mar. 4, 1908.

Webster & Sons v. Assessor for Arbroath.

A proof was led. The evidence shewed that all the spinning mills in Arbroath except two had been the subject of sale within the last twenty years. The appellants produced an abstract of particulars, the material portions of which are quoted below.* It was admitted that 18/32ds was the proper proportion of the capital value applicable to heritage.

As set forth in the case for appeal after mentioned, the appellants Francis Webster & Sons and the Netherward Spinning and Weaving Company contended "(1) that the method of valuation adopted by the Assessor was not in accordance with the true meaning of the Valuation Acts. (2) That the true annual value of the subjects cannot be ascertained by taking a percentage on the structural cost, or by placing an arbitrary rate on the floorage, or number of spindles

* Abstract of particulars of Spinning Mills in Arbroath.

Name of Mill.	If Sold or Let.	Date of Sale or Let in Open Market.	Proportion (18/32) of Price plus Feu-duty, capitalised at 4 per cent, applicable to Heritage.	Annual Value of Heritage, 7½ per cent on Price plus Feu-duty.	Annual Value of Heritage as fixed by Assessor.	Approximate Capital Value of Heritage represented by Assessor's Annual Valuation.
Brothock Mill	Sold	January 1907	£4500	£337 10 0	£208	£10,773 Note.— Assessor states this at £11,010
Stanley Mills	Sold	1892	Price . . £1970 0 0 Feu-duty capitalised 1137 10 0 £3107 10 0	£147 15 0 45 10 0 £193 5 0	£554	£7,937
Lowson's Mills— Green's Mill John Street Mills Lindsay Street Mills No. 3 Inch Mill No. 1 and 2 do.	Sold	1900	Price . . . £15,073 Feu-duty capitalised . 3,200 £18,273	£1129 0 0 128 0 0 £1257 0 0	Assessor's Valuation £3211 Valuation Committee's do. £2860 Fixed by Court £1258	£39,626
Netherward Works	Sold	1888	Price . . . £3445 Feu-duty capitalised . 242 £3687	£258 6 0 9 13 11 £267 19 11	£700	£9,450
Abbot Street Works	Sold	March 1907	Price . . £562 16 0 Feu-duty capitalised 468 15 0 £1031 5 0	£42 3 9 18 15 0 £60 18 9	£150	£2,218
Burnside Works	Sold	January 1907	Price . . £5000 0 0 Feu-duty capitalised 1151 11 3 £6151 11 3	£375 0 0 46 1 3 £421 1 3	Assessor's Valuation £866, 10s. Valuation Committee's do. £500	£12,090

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and looms in the concern. (3) That the true method of valuing the subjects in question was by ascertaining their annual value as compared with other buildings admittedly similar, whose value had been fixed by sales or leases in the open market. (4) That the assumed capital values on which the valuation of the Assessor is based are inconsistent with every case of a long series of sales and leases in the open market of similar subjects extending over the last twenty years, and including a number of recent transactions. (5) That the method of valuation by the Assessor was contrary to the principle of valuation fixed by the Court with reference to the subjects of *Andrew Lowson, Limited—Andrew Lowson, Limited, v. Assessor for Arbroath*.¹ (6) That the valuation of the Assessor was excessive and contrary to the evidence led."

The Assessor replied:—"That the particular circumstances attending the sale of the mill properties, which had recently changed hands, were such as to render the prices an unreliable basis for valuing the subjects of these appeals,—*inter alia*, both the Brothock Mill and the Burnside Works had been standing idle for some time before they were sold. The latter had been depleted of machinery, and the former was largely fitted with a class of machinery for which there was little demand at the time. That the Assessor's method of valuation was in accordance with usage in the centres of the flax trade and with the Valuation Acts. The principle laid down in *Andrew Lowson, Limited, v. Assessor for Arbroath*,¹ did not apply, the case being ruled by *Webster & Sons v. Assessor for Arbroath*,² which was an appeal dealing with the same subjects as the present ones. In that case the valuation of the Committee was sustained on appeal, and the principle of valuation adopted by the Assessor was upheld. That no material change affecting the value of the subjects had occurred since 1902."

Besides putting forward contentions similar to contentions (1), (2), (4), (5), and (6) of the other appellants, the appellants *Anderson & Chalmers* contended:—" (3) That the subjects having been sold in open market (after being duly advertised for private and public sale) for £8000, and this price being consistent with the other transactions which have taken place in the open market, the price must be held to be the full capital value of the subjects, and should be taken as the basis for arriving at the annual value. (4) That it having been agreed that 18/32ds of the total capital value of the subjects shall be taken as the proportion applicable to heritage, £4500 (being 18/32ds of £8000) is the capital value in the present case, and this at 7½ per cent, being admittedly the highest percentage charged, shews the annual value to be £337, 10s."

The Assessor replied:—

"That in the case of the Brothock Mill the purchase price, while it ought to be considered *quantum valeat*, was not, taken by itself, a reliable basis on which to value the works of the appellants *Messrs Anderson & Chalmers*, but that there should be taken into consideration the recent history of the subjects and all the other available data. That the circumstances under which the sale took place were such that the sale price did not reflect the true value of the subjects for the purposes of the Valuation Acts. That the market for mill property in Arbroath is a very small one, being confined to the manufacturers carrying on business within the burgh,

¹ Feb. 13, 1901, 3 F. 466.

² Feb. 4, 1902, 4 F. 539.

and having the requisite technical knowledge and capital. That a period of dull trade had diminished the demand for mill property, and that, on the other hand, two or three mills had come into the market at the same time. That the effect of this was the absence of that competition among purchasers which would be found attending an exposure to public auction under normal conditions. That while trade had begun to improve when the purchase took place, this improvement had not had time to affect the purchase price, and that the position of the sellers, a body of private trustees, disabled them from taking advantage of the improvement, and gave the purchasers an undue advantage over them. That the purchase price was lowered owing to the subjects standing idle. . . . If due weight were given to all the circumstances his valuation would be found to be a fair one."

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The determination of the Valuation Committee was in the following terms, viz. :—

"Arbroath, 28th September 1907.—These appeals by the appellants, Francis Webster & Sons and the Netherward Spinning and Weaving Company, appear to the Valuation Committee to be on all-fours, and they have therefore been considered and dealt with together.

"The Alma Works and the Netherward Works have for many years been in possession of the present proprietors, who appealed against the Burgh Assessor's valuation of the respective premises in 1901, and their appeals being refused by the Valuation Committee, the appellants craved a case for the opinion of His Majesty's Judges, and on 11th February 1902 the Judges were of opinion that the determination of the Valuation Committee was right, and that the appeals should be refused.¹ A good deal of evidence was adduced before the Committee in reference to the declining state of the flax industry in Arbroath, and the Committee are satisfied that the Arbroath flax and linen trade as a whole has, for several years, not been prosperous. In the case of these particular works, however, there has been no evidence placed before the Committee to shew that there has been any change of circumstances to warrant the Valuation Committee in departing from the existing valuation, as confirmed by the Judges in 1902, with the exception that, in one respect, there is some depreciation of the subjects which may be properly kept in view." The Committee then reduced the valuation of the Alma Works to the extent of £130, and of the Netherward Works to the extent of £100, in respect of depreciation of engines and boilers.

"In the case of this appeal by Messrs Anderson & Chalmers the valuation of the Brothock Mill, &c., was £808, being the amount at which it had stood for many years when belonging to the late Mr David Corsar. . . . The mill had been unoccupied from February 1904 to the date of Mr Corsar's death in December 1904, and from that date till February 1907, when it was purchased by Messrs Anderson & Chalmers, the appellants. . . . It appears from the evidence placed before the Committee that Mr Corsar's trustees, after his death, used every endeavour to realise the property, but the state of trade was such that no one was found to make any offer for it. An improvement in the Arbroath trade began to appear about September 1906, and this improvement having continued, Messrs Anderson &

¹ Webster & Sons v. Assessor for Arbroath, Feb. 11, 1902, 4 F. 539.

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Chalmers, the appellants, made, in January 1907, an offer to purchase the property at the price of £8000. Mr Corsar's trustees resolved to accept that offer. From their knowledge of the local trade the Valuation Committee believe that if Mr Corsar's trustees had been less anxious to sell, they could have got a considerably better price by waiting a few months longer; but as they did not feel in a position to work the mill themselves, and as to hold it implied a very considerable loss in interest, exclusive of the actual outlay in keeping a mill with valuable machinery in good order, it is not surprising that when they got an actual offer they resolved to accept it.

"The appellants Messrs Anderson & Chalmers have asked that the valuation of £808 be reduced to £337, 10s. The Assessor has been unable to accept this, and the Committee are of opinion that the Assessor is to a large extent correct; but looking to all the circumstances of the case, and to the evidence which was submitted in regard to the trade of Arbroath, the Committee do not think that the valuation of £808 can be properly continued. . . . The Brothock Mill had been standing for upwards of two years; the workpeople had been all dispersed, and could not easily be brought together again, or their places filled by others. The Committee are satisfied that in normal circumstances such a mill as the Brothock Mill, after being closed for some time, the connection broken up, and the workpeople dispersed and probably removed elsewhere, could not be worked during the first year except at a loss, and as it was not suggested that the mill was being worked at a loss, the Committee take that as further evidence of the very great improvement which has taken place in the spinning trade in Arbroath. On the other hand there is the fact that these works were formerly let at £850, and that the appellants Messrs Anderson & Chalmers did not contradict the suggestion made by the Assessor, that, although they had acquired the property for £8000, they had now insured the buildings and machinery against loss by fire for £20,000 or upwards. Taking all the circumstances into consideration, the Committee . . . fix the valuation of the whole Brothock Mill properties at £600."

The appellants obtained a case for appeal.

The Assessor acquiesced in the determination of the Committee.

The contentions in the case sufficiently shew the nature of the arguments before the Judges.¹

At advising,—

LORD LOW.—There is no doubt that the evidence upon which the appellants mainly found is very striking. It appears that all the spinning mills in Arbroath, except apparently two, have been the subject of sales, and that in no case has the price actually obtained been within 50 per cent of the capital value estimated by the Assessor. It is true that two of the sales took place many years ago, one being in 1888 and the other in 1892. All the other sales, however, have taken place since 1900, and therefore, in my judgment, furnish important evidence of the market value of spinning-mills in Arbroath at the present time.

It was said that in the autumn of 1906 there was an improvement in the trade, and that seems to have been the case, but whether it has continued

¹ Cited by the Appellants :—Lowson's Judicial Factor v. Assessor for Arbroath, March 20, 1900, 2 F. 608.

or not is doubtful. It was also said that while trade was very good during Mar. 4, 1908. the continuance of the South African war, there was great depression when Webster & the war came to an end. That may be so, but it is significant that sales Sons v. made during the war in 1900 shew substantially the same result as sales Assessor for Arbroath. made after the war, namely, that the price actually obtained was at least 50 Lord Low. per cent below the Assessor's estimate.

It is, however, to be remembered that we do not know the precise circumstances of all the sales, but several of them were more or less forced sales of mills which had ceased working. I therefore do not think that it would be safe to take the actual prices as fixing the capital value for the purpose of ascertaining the yearly rent—I mean that the capital value must be taken at something more than the prices; but, on the other hand, the result of the sales seems to me to shew that the capital value estimated by the Assessor is much too high.

That is the view which has been taken by the Valuation Committee in regard to the Brothock Mill, and accordingly they have reduced the Assessor's valuation of £808 to £600. If the Committee had fixed the value at a still lower figure I should have agreed with them, but (especially in view of the fact that they have local knowledge which we have not) I am not prepared to say that the amount at which they have valued the mill is not reasonable, and therefore I do not think that we would be justified in interfering with their determination.

In regard to the Alma Works and the Netherward Works, the Committee have reduced the Assessor's valuation in respect of depreciation of engines and boilers, but otherwise they have allowed the valuations to stand. The chief ground upon which the Committee have proceeded is that these works were the subject of an appeal in 1902, when this Court sustained the determination of the then Committee fixing the yearly value of the works at the amount at which they have ever since appeared in the Valuation-roll. The Committee in the present case say that no evidence has been placed before them to shew that there had been any change of circumstances to warrant them in departing from the existing valuation as confirmed by the Judges in 1902, except as regards the engines and boilers.

Perhaps no substantial change of circumstances has been proved, but I think that we have evidence before us which was not before the learned Judges in 1902, especially in regard to the sales which have taken place. Accordingly, I think that it is quite competent for us to reconsider the valuation of 1902.

I am not sure how many cases of sales of mills were brought to the notice of the Court in 1902; but, however that may be, Lord Kyllachy, after saying that if a "multitude" of sales had been before the Court a general depreciation of mill property might have been made out, proceeded to describe the actual evidence thus:—"But that is a different thing from having before us—which is all we have here—one or two isolated cases of leases or sales—some of them as far back as in 1888, others of them in 1892, and, I think, two more recently."

I do not think that a similar description could be given of the evidence adduced in this case, which includes sales which have taken place since 1902, and which, as I have already indicated, appears to me to be entitled

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to great weight; and I repeat that the fact that additional and apparently more precise evidence has been led justifies us in reconsidering the value of the mills in question.

Of course the allowance which the Committee have made in respect of depreciated plant and machinery must receive effect, but in addition to that I am satisfied that the appellants are entitled to a substantial reduction of the valuation. I therefore propose that the value of the Netherward Works should be reduced to £500, and of the Alma Works to £923, 5s., that is to £577, 10s. for the 1st item, and £97, 10s. and £45 for the 12th and 13th items respectively, which is a reduction very nearly proportionate to that allowed by the Committee in the case of the Brothock Mill.

LORD DUNDAS.—I concur.

THE following was the opinion:—"We are of opinion (1) that the determination of the Valuation Committee as regards the Brothock Mill is right; (2) that their determination as regards the Netherward Works and Alma Works is wrong; (3) that the valuation of the Netherward Works should be reduced to £500; and (4) that the valuation of the Alma Works should be reduced to £923, 5s., the valuation of the 1st item thereof being reduced to £577, 10s., that of the 12th item to £97, 10s., and that of the 13th item to £45."

GORDON, FALCONER, & FAIRWEATHER, W.S.—WEBSTER, WILL, & Co., S.S.O.—Agents.

No. 87.

Mar. 4, 1908.

Assessor for
Lanarkshire
v. Clyde
Navigation
Trustees.

ASSESSOR FOR LANARKSHIRE, Appellant.—*Cooper, K.C.—Dunbar.*
CLYDE NAVIGATION TRUSTEES, Respondents.—*D.F. Campbell, K.C.—*
Hunter, K.C.—Black.

Valuation Acts—Value—Subject unlet—Harbour—Method of valuation.
—In 1863 it was held by the Court of Session that the Clyde Navigation Trustees were not assessable as proprietors of the waterways of the port and harbour of Glasgow, the incorporeal right of harbour not being vested in them, and that they were assessable only as proprietors of the wharfs, quays, and other structures in the harbour. In 1866 the Valuation Appeal Judges in fixing the yearly value of the undertaking of the Clyde Trustees gave effect to the judgment of the Court of Session by deducting from the dues payable to the trustees a proportion as being applicable to the waterways of the port and harbour. The undertaking continued to be valued on that basis for more than forty years.

In 1908 the Assessor for Lanarkshire proposed to value the portion of the undertaking within the county either (a) on the basis of taking into account the whole or a much larger proportion of the dues paid to the trustees, or (b) on the "contractor's" principle, i.e., by taking a percentage on the structural cost of the quays, &c.

Held (a) that there was no such change of circumstances as to warrant a change in the method of dealing with the dues, and (b) that the contractor's method was inapplicable.

Lands Valua-
tion Appeal
Court.
Lord Low.
Lord Dundas.

AT an adjourned meeting of the Lands Valuation Committee for the Lower Ward of Lanarkshire, held at Glasgow on 26th September 1907, the Clyde Navigation Trustees appealed against the following entries by the Assessor in the Valuation-roll for the county of Lanark for the year ending Whitsunday 1908, viz. :—

Case 257.

Description and Situation of Subject.	Proprietor.	Occupier.	Yearly Rent or Value.
Prince's Dock, quays, sheds, &c., . . .	The Trustees of the Clyde Navigation.	Proprietors.	£56,260
Quays, &c., Plantation,	Do.	Do.	10,260
Mavisbank Quay, &c., .	Do.	Do.	3,510
Quays at Graving Docks,	Do.	Do.	1,235
Shieldhall Wharves, .	Do.	Do.	4,726
			£75,991

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The Clyde Trustees craved that the valuations of the several subjects be restricted to £33,522, £6113, £2092, £736, and £1039 respectively, or £43,502 *in cumulo*.

The Valuation Committee sustained the appeal and restricted the total valuation to £43,502.

The Assessor obtained a case for appeal, which set forth as follows:—

“The Trustees of the Clyde Navigation are a body of statutory Trustees, incorporated under the Clyde Navigation Consolidation Act, 1858, as amended by subsequent Acts, and having the power and duty of carrying into effect the provisions of these Acts.” *

* The following sections of the Acts were set forth in the case:—

The Clyde Navigation Consolidation Act, 1858 (21 and 22 Vict. cap. cxlix.), enacts:—

Sec. 75. “The limits of the River Clyde shall include the whole channel or waterway of the said river forming the harbour, and as far down the said river as to a straight line drawn from the eastern end of Newark Castle on the south shore of the said river to the mouth of Cardross Burn on the north shore of the said river, and the whole works within the said limits for the improvement of the navigation of the river constructed or authorised to be constructed by or under the charge of the Clyde Trustees or the Trustees appointed by this Act, and the whole lands acquired for the purposes of such works, or occupied by the Trustees in connection with the navigation of the said river.”

Sec. 96, after empowering the Trustees to sell surplus lands, proceeds as follows:—“Provided that nothing herein contained shall authorise the Trustees to sell or dispose of any land which now is or heretofore was within or part of the alveus or channel of the river or of the shores thereof below high-water mark, without the consent, in writing, of the Commissioner or Commissioners for the time being in charge of Her Majesty's Land Revenues in Scotland; and in the event of any such consent being given the said Commissioner or Commissioners shall, from time to time, be a party or parties to the deed or conveyance or disposition for the purpose of granting to the purchaser the estate and interest of Her Majesty in the land sold or disposed of, and the purchase or consideration money arising from any such sale or disposition shall, upon or previously to the execution of any such deed, be from time to time paid into the Royal Bank of Scotland to the account of the Commissioners of Her Majesty's Woods, Forests, and Land Revenues.”

Sec. 97. “Subject to the provisions of this Act it shall be lawful to the Trustees to levy on and in respect of all vessels entering or using the river or harbour the rates specified in the schedule (G) to this Act annexed, and all such rates shall be paid by the owner, agent, master, consignee or other person in charge of such vessels.”

Sec. 98. “Subject to the provisions of this Act it shall be lawful for the

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"In a series of actions extending from 1857 till 1866 the question as to the liability of the Clyde Trustees to pay poor-rates in respect of the lands and heritages belonging to and occupied by them under their Acts of Parliament was under the consideration of the Court. These actions were as follows":—

Adamson v. Clyde Navigation Trustees, 1860.¹

Adamson v. Clyde Navigation Trustees, 1863.²

Clyde Navigation Trustees v. Adamson, 1865.³

Clyde Navigation Trustees (valuation case), 1866.⁴

"Under these cases the Clyde Trustees are liable to be assessed in respect of the quays, wharves, buildings, and other heritable subjects belonging to and occupied by them; they are not liable to be assessed as proprietors or occupants of the River Clyde in respect of dues payable for the navigation or use of the said river, and they are not owners or occupiers of the River Clyde, or of any other lands and

Trustees to levy on and in respect of all goods shipped or unshipped in the river or harbour the rates specified in the first and second columns of part 1 of the schedule (H) to this Act annexed, and on all animals and carriages shipped or unshipped in the river or harbour the rates specified in part 2 of the said schedule (H), and all such rates shall be paid by the owner of such goods, animals, and carriages."

Sec. 99. "For the more equitable payment of the rates hereinbefore granted leviable below the Stockwell Bridge, formerly called the Old Glasgow Bridge, that part of the river shall be divided into three stages, *videlicet*:—The first stage, comprehending that part of the river lying above the Old Ferry of Renfrew, being about 660 yards to the east of the present Ferry; the second stage, extending from the said Old Ferry of Renfrew to the mouth of Dalmuir Burn; and the third stage, extending from the mouth of the said Dalmuir Burn to the Castle of Newark; and all vessels and goods, animals, and carriages whatsoever, passing in or upon the river or any part thereof within the limits aforesaid shall pay the said rates in manner and in the proportions following, and at such stations on the river as the trustees shall appoint,—That is to say, in passing upon or going down the river on any part of the first stage as aforesaid, two-third parts of the aforesaid rates; on any part of the second stage as aforesaid, one-sixth part of the aforesaid rates; and on any part of the third stage as aforesaid, one-sixth part of the aforesaid rates, and shall pay the same proportion of the rates aforesaid on passing upon or coming up the river; provided that the Trustees shall be entitled to levy the whole amount of the said rates on all vessels, goods, animals, and carriages passing or being conveyed along, or into the three stages or any parts thereof."

The Clyde Navigation Act, 1883 (46 and 47 Vict. cap. cxc.), enacts:—

Sec. 46. "And all tolls, rates, and charges levied by the Trustees under the authority of this Act, and all other money in the nature of revenue received by the Trustees, shall be applied in or towards carrying into execution the purposes of the recited Acts and this Act, and the undertakings thereby authorised, to which revenue is properly applicable, and to no other purpose whatsoever."

The Clyde Navigation Act, 1904 (4 Edw. VII. cap. ccxlii.), enacts:—

Sec. 43. "Section 74 of the Act of 1858, section 32 of the Act of 1883, and section 12 of the Act of 1884, are hereby repealed, and in lieu thereof the following provisions shall have effect; the harbour of Glasgow shall for all purposes (including the rating purposes of the Trustees) mean and include

¹ Jan. 27, 1860, 22 D. 606.

² June 26, 1863, 1 Macph. 974.

³ June 22, 1865, 3 Macph. (H. L.) 100.

⁴ July 25, 1866, 4 Macph. 1143.

heritages, except specific wharfage ground, quays, wharves, sheds, cranes, ferry and house property. Mar. 4, 1908.

"The decision of the Court of Session was appealed to the House of Lords by the Clyde Trustees so far as it determined their liability to be assessed, but the pursuer, Adamson, representing the city of Glasgow Parochial Board, did not appeal against the other findings of the Court, and the interlocutors, so far as appealed, were affirmed. Assessor for Lanarkshire v. Clyde Navigation Trustees.

"In the valuation case *Clyde Navigation Trustees*, 1866,¹ the Valuation Judges, on an appeal from the local Commissioners, applied the decision of the Court of Session. They adopted what they considered in reference to the whole circumstances of the case an equitable principle of adjustment, viz.—To deduct from the proportion of the dues applicable to the first (or upper) stage² (being that containing the wharves, &c.) one-third thereof, as being fairly assignable to that portion of the subjects which is not assessable. They thus wholly excluded the two-sixths of the dues applicable under the Act of 1858 to the use of the waterway of the two lower stages, extending from Renfrew Old Ferry to Port-Glasgow, and assigned two-thirds of the remaining two-thirds, being the dues for the first (or upper) stage, to the use of the quays and wharves, which were lands and heritages owned and occupied by the Trustees. This decision has been given effect to and acted upon by the various Assessors and Local Authorities since 1866.

"The valuation put forward by the Clyde Trustees is the proportion of the total valuation on that basis, as ascertained for convenience and with the acquiescence of other Assessors by the Assessor for the city of Glasgow, to be applicable on an apportionment according to the length of quayage to the quays and wharves within the county of Lanark and beyond the city of Glasgow. . . .

"The apportionment of the valuation according to length of quayage as followed since 1866 is also approximately in accordance with the revenue derived from the parts of the harbour in separate jurisdictions."

The Clyde Trustees contended that there had "been no alteration in the circumstances since the Court of Session found that the Clyde Trustees were not owners or occupiers of the waterway of the River Clyde within their jurisdiction, and that the dues payable for the use of that waterway by ships and goods passing upon it could not be taken into account in valuing the quays, wharves, &c. It is therefore submitted by the Clyde Trustees that the proper method to value the Trustees' quays and wharves is to take the revenue of the Trust remaining after excluding the proportion of the dues applicable to the two lower stages, and at least one-third of the dues applicable

the River Clyde between Albert Bridge (formerly Hutchesontown Bridge) and a line drawn across the River Clyde in line with the western termination of the Shieldhall Wharf, as authorised by and delineated on the plans deposited relative to the Act of 1884, and also the whole docks, quays, wharves, piers, yards, buildings, erections, and other works and conveniences belonging to the Trustees, constructed or which may hereafter be constructed or used in connection therewith, within the said limits for the purposes of their undertaking; and the bye-laws, rules, and regulations of the Trustees are hereby extended, and shall apply to the harbour as in this section defined."

¹ July 25, 1866, 4 Macph. 1143.

² See Clyde Navigation Consolidation Act, 1858, sec. 99, *supra*, p. 622.

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to the upper stage, and to make the appropriate deductions from the revenue as so ascertained in accordance with the Lands Valuation Acts as interpreted by the Valuation Judges in a series of decisions."

The Assessor maintained that the decision of the Court of Session in *Adamson v. Clyde Navigation Trustees*, 1863,¹ in so far as it dealt with the question of the treatment of the dues, was not affirmed by the House of Lords, and was overruled by the decision of the House of Lords in *Leith Dock Commissioners v. Miles*.² "If the decision stands, the true reading of the judgment of the Court of Session in *Adamson v. The Clyde Trustees*³ is that resort should be had to the contractor's principle, since it is impossible for the Assessor to shew what parts of the dues, rates, &c., are payable in return for the use of and accommodation afforded by the quays; that it appeared also from the interlocutor deciding the valuation case of 1866 that the Judges called for particulars of the expenditure on the quays presumably with the view of applying the contractor's principle of valuation, but probably from insufficiency of information finally had recourse to taking a proportion of the dues as the basis of valuation.

"The Assessor contended that although this might have been an equitable solution of the problem in 1866 it is not necessarily so at the present time, when very large extensions of the quayage have been made, and the water area in docks, which did not exist in 1866, has to be dealt with. He stated that under that method the amount deducted as applicable to the lower 13 miles of river had grown from £33,011 to £134,838, and the amount for the waterway in the upper stage from £22,007 to £89,892, a total of £224,730, the increase of nearly £170,000 being out of all proportion to the expenditure on the waterway in the interval. He also objected to the deduction in respect of the second and third stages of the river of one-third of the dues levied, and of a further proportionate deduction for the waterway in the first stage.

"The Assessor stated that he had made a survey and valuation of the subjects situated in the county, and estimated the cost of the Prince's Dock and accessories, including the *solum*, at . £1,125,230
Mavisbank Quay at 70,240
Plantation Quays, 205,240
Graving Dock Quay, 24,700
Shieldhall Wharves, 94,520
on which sums his valuations were based at five per cent. The Assessor considered that it was incumbent on him to shew that the subjects produced a revenue sufficient to pay these rents, and stated that he had prepared from the accounts of the Trustees, for the year ending 30th June 1906, a statement, which, after disallowing certain expenditure which would fall on the Trustees as proprietors of the heritable subjects, brought out a balance of £367,090, and from the account of capital expenditure to the same date a statement shewing that five per cent on the capital expenditure of the Trustees in respect of the heritable properties producing this revenue did not nearly exhaust that balance."

The Assessor further maintained that if the decision in *Adamson v. Clyde Trustees*¹ "is not to be taken as authoritative, and therefore the subjects are to be dealt with as *unum quid*, the Clyde Navigation

¹ 1 Macph. 974.

² March 12, 1866, 4 Macph. (H. L.) 14.

³ 1 Macph. 974, *per* Lord Justice-Clerk Inglis, at p. 986.

Trustees' undertaking is one which extends into more than one parish, Mar. 4, 1908. and it would therefore be competent for them to apply, under section 23 of the Valuation Act, 1854, for a valuation of the undertaking by the Assessor of Railways and Canals; that they had not exercised their power of making this application, and that in these circumstances it is proper for the local Assessor to apply the rules laid down in the Valuation Act for valuing such subjects. He further stated that the statement prepared by him, already referred to, brings out a balance available for the valuation of the whole undertaking, excluding the graving docks, timber yards, and let subjects, which are separately entered in the Valuation-rolls of the several parishes, of £367,090; that he had also inquired into the cost of the several subjects in the parish of Govan (outwith the burgh of Glasgow), and estimated the cost, including the *solum*, at the sums previously stated, on which amounts the valuations are calculated at five per cent, in accordance with sections 21 and 22 of the Valuation Act, 1854, and that from the printed statement of capital expenditure by the Trustees he had also prepared a statement of the value of the various works over which the valuation falls to be spread, bringing out a value of £3,931,751, five per cent on which is £196,587, leaving a balance of £170,503 from the rental, £367,090, arrived at in his previous statement."

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The determination of the Committee was in the following terms:—

"1. That while from their personal knowledge of the subjects they considered that their cost was moderately estimated at the sums stated by the Assessor, there was no authority for adoption of the 'contractor's' principle by the Assessor in valuing these subjects.

"2. That while they were of opinion, looking to the altered circumstances since 1866, that there was no equitable reason why from the total dues paid by ships using the harbour of Glasgow the proportion of the dues, which would have been paid had they not entered into the upper stage of the river, should be wholly excluded in computing the revenue of the undertaking, the Assessor was not, standing the decisions upon which the Clyde Trustees "rely, entitled to adopt the rules laid down in sections 21 and 22 of the Valuation Act, 1854, but was bound to follow the method adopted by the Judges in the *Mavisbank*¹ valuation case, 1866.

"3. That the valuation and allocation prepared by the Assessor for the burgh of Glasgow were in general conformity with the method adopted in that case.

"The Committee accordingly sustained the appeals and restricted the valuations as craved. It was agreed, at the request of both parties, that the *cumulo* valuation of £43,502 should be divided as follows, and the Committee found accordingly, viz. :—

Princes Dock, quays, sheds, &c.,	£31,336
Quays, &c., Plantation,	7,521
Mavisbank quay, &c.,	2,591
Quays at graving dock,	1,015
Shieldhall Wharves,	1,039

£43,502 "

¹ 4 Macph. 1143.

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At the hearing before the Judges the undernoted additional authorities were cited.¹

At advising,—

LORD LOW.—The main question in this case appears to me to be whether the judgment in *Adamson v. Clyde Navigation Trustees*² was overruled by the House of Lords in *Leith Dock Commissioners v. Miles*,³ in so far as it was held in the former case that the Trustees were not assessable as proprietors of the port and harbour of Glasgow as something separate and distinct from the wharfs, quays, and other structures of which physically the harbour consisted.

I am of opinion that that question must be answered in the negative. The report of the *Leith Docks* case³ in the House of Lords does suggest that the noble and learned Lords were under the impression that the Second Division had held in *Adamson's* case² that a harbour was not an assessable subject. That, however, was a misapprehension. What was decided was that upon a sound construction of the Clyde statutes there was not (I quote from the opinion of Lord Justice-Clerk Inglis) “any *jus incorporale* vested in the defenders” (the Clyde Navigation Trustees) “by which they can be said to be, in the common law sense, the proprietors of the right of harbour. . . . I think that the subjects in respect of which the defenders are liable to be assessed as constituting the port or harbour of Glasgow are the subjects embraced in the minute” (that is, the wharfs, quays, and other structures), “and that there is no other subject in respect of which they can be assessed under the name of the port and harbour of Glasgow.”

It seems to me that the Lord Justice-Clerk there plainly recognises that a harbour is an assessable subject, but that his view was that, apart from the quays and other works, the trustees were not owners of any harbour. Therefore, in my opinion, the judgment in *Adamson*² was in no way inconsistent with that of the House of Lords in the *Leith Docks* case,³ or in the *Mersey Docks* case,⁴ which was there followed.

The reason why the appellants attempted to shew that the judgment in *Adamson*² had been overruled by the subsequent decisions in the House of Lords was that it was held in *Adamson*² that the rates and dues, which the Clyde Trustees were by these statutes authorised to levy, could not be taken into account in estimating the yearly value of the subjects in respect of which they were assessable, in so far as these rates and dues were paid for the navigation of the river, including that part of it which the statutes described as being within the limits of the harbour of Glasgow. The

¹ *Black v. Irvine Harbour Trustees*, May 19, 1893, 30 S. L. R. 660, *per* Lord Wellwood, at p. 661; *Ayr Harbour Trustees v. Assessor for Ayr*, May 25, 1904, 21 R. 807; *St Cuthbert's Co-operative Association v. Assessor for Edinburgh*, March 20, 1896, 23 R. 681; *Edinburgh Parish Council v. Assessor for Edinburgh*, March 10, 1906, 8 F. 521; *Burghhead Harbour Co. v. George*, June 26, 1906, 8 F. 982; *Mersey Dock and Harbour Board v. Jones*, June 22, 1865, 3 Macph. (H. L.) 102; *New Shoreham Harbour Commissioners v. Lancing*, 1870, L. R., 5 Q. B. 489; *Blyth Harbour Commissioners v. Churchwardens of Newsham*, L. R., [1894] 2 Q. B. 675.

² 1 Macph. 974.

³ 4 Macph. (H. L.) 14.

⁴ 3 Macph. (H. L.) 102.

appellants' argument accordingly was that, *Adamson*¹ having been overruled Mar. 4, 1908. by the *Mersey Docks* case² and the *Leith Docks* case,³ and it having been held in the latter cases that a harbour was an assessable subject, the rates and dues paid for the navigation of that part of the Clyde within the statutory limits of the Glasgow harbour should be brought into computation.

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It seems to me to be a complete answer to that argument that the judgment in *Adamson*¹ has never been overruled; that it was a judgment pronounced by the Inner-House in an action of declarator brought for the very purpose of determining the rights and obligations of the parties in regard to assessment for poor-rates; and that it has been acted on, so far as I know, without challenge for more than forty years.

Lord Low.

The case of *Adamson*¹ was decided in 1863, and in 1866 the question of valuation came before this Court. The learned Judges who then constituted the Court, in fixing the yearly value of the undertaking, gave effect to the decree of declarator which had been pronounced, and they did so by deducting from the proportion of the dues applicable to the first of the three stages into which the Clyde is divided by the statutes (that being the stage with which alone we are concerned in this appeal) one-third thereof as being fairly assignable to that portion of the subjects which the Second Division had held not to be assessable. The rule so laid down has been followed until the present time as the basis upon which the subjects fall to be valued, but I do not say that the apportionment of the dues made in 1866 must be regarded as *res judicata*, and cannot be revised. If it could be shewn that, owing to a material change of circumstances, the apportionment was no longer fair and reasonable, I think that it would be quite competent for this Court to reconsider it. But no such question was submitted for our determination, although the appellants' counsel did refer to the great change which had taken place during the last forty years, both as regards the extent of the works and the amount of the dues.

I have already said that the main contention of the appellant was that the whole dues should be taken into account in estimating the yearly value, and I have expressed the opinion which I have formed upon that point. The appellant, however, contended alternatively that instead of the principle of valuation which has hitherto been followed, what has come to be known as the contractor's principle should be adopted—that is to say, that the yearly value should be arrived at by taking a percentage upon the structural cost of the quays and other works. That appears to me to be a method of valuation which is not appropriate to the kind of subject in question. Indeed the only reason which can be suggested, so far as I can see, for adopting the contractor's principle is that it would get rid of the limitation placed by the judgment in *Adamson*¹ upon the revenue which may be taken into account, and would make it possible to value the subjects at a much higher amount than under the method which has all along been followed, and which I take to be the approved method of valuing such subjects. I have therefore no hesitation in rejecting the argument that the contractor's method of valuation should be adopted.

¹ 1 Macph. 974.

² 3 Macph. (H. L.) 102.

³ 4 Macph. (H. L.) 14.

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Upon the whole matter, therefore, I am of opinion that we must hold that the determination of the Valuation Committee was right.

LORD DUNDAS.—In the year 1866 our predecessors in this Court (Lord Kinloch and Lord Ormidale) laid down a rule for the valuation of the Undertaking of the Clyde Navigation Trustees,¹ which has ever since been acted upon by the various Assessors and Local Authorities. It is obvious that strong grounds would be required to warrant us in now upsetting this uniform practice of about forty years, following upon the decision to which I have referred. But the appellant's counsel undertook to establish the existence of such grounds. They maintained that the Valuation Court in 1866 merely followed a judgment of the Second Division, which the House of Lords subsequently declared to be erroneous. It is true that the decision of the Valuation Judges was really executory of the interlocutor of the Second Division in the declarator *Adamson v. Clyde Navigation Trustees*.² But I am satisfied that, as your Lordship has pointed out, the appellant's argument proceeds upon a misapprehension; and that nothing was said or done in the *Leith* case³ to warrant the assertion that the House of Lords expressed or entertained any opinion adverse to what was really decided by the Second Division in 1863, as explained in the clear opinion of Lord Justice-Clerk Inglis. It may be worth while to point out that the same Lord Ordinary (Jerviswoode) decided in the Outer-House the case of *Adamson*² and the *Leith* case,³ and that, looking to the respective dates of decision, it would appear that the Valuation Judges on 25th July 1866³ must have had in contemplation the judgment of the First Division in the *Leith* case (17th June 1864⁴), if not also that of the House of Lords in the same case (12th March 1866⁵). I have had an opportunity of reading your Lordship's opinion, and entirely concur with all that you have said on the points argued.

THE JUDGES were of opinion that the determination of the Committee was right.

ROSS SMITH & DYKES, S.S.C.—WEBSTER, WILL, & Co., S.S.C.—Agents.

No. 88.

CHARLES GORDON GILLESPIE, Pursuer (Respondent).—

Hunter, K.C.—Constable.

Feb. 20, 1908.

MISS LOUISA MARGARETTA RIDDELL, Defender (Reclaimer).—

Dickson, K.C.—Hon. W. Watson.

Gillespie v.
Riddell.

Entail—Powers of heir in possession—Lease—Outgoing—Obligation in lease to take over sheep stock—Transmission of obligation against succeeding heir of entail—Custom.—In an action brought by the tenant of a sheep farm on an entailed estate in Argyllshire, on the death of his landlord, against the next heir of entail, for declarator that the landlord's obligation in the lease to purchase the tenant's stock of sheep at its termination was binding on the defender, the pursuer averred that from time immemorial such obligations had been a universal condition of sheep farm leases in the north and west of Scotland, founded on the considerations (1) that sheep stock in

¹ 4 Macph. 1143.

² 4 Macph. (H. L.) 14.

³ 1 Macph. 974.

⁴ 2 Macph. 1234.

that part of the country requires to be acclimatised to a particular farm or district, and (2) that stock habituated to a certain holding do not wander beyond the boundaries, and thus enable march fences to be dispensed with. Feb. 20, 1908.
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The Lord Ordinary (Salvesen) held that the pursuer's averments were relevant and allowed a proof.

The defender having reclaimed the Court assoilized the defender, *holding* that although the lease (being followed by possession and conferring a real right under the Act 1449) was an alienation struck at by the fetters, it was valid as a necessary act of administration, binding on the estate, but that the obligation to purchase the sheep was a personal obligation, which did not burden the estate, and was not binding on the next heir of entail.

Process—Summons—Defender—Succession—Claim against general estate of testator—Competency of suing individual legatee.—Held that an individual legatee cannot be called upon to discuss the validity of a claim against the testator's estate, which may or may not affect his legacy, in an action to which the general representatives of the testator have not been made parties.

AT Whitsunday 1903 Charles Gordon Gillespie, Strontian, Argyll-shire, entered upon possession of the farm of Ardery, on the estate of Sunart, Argyllshire, under a lease dated 26th May and 6th June 1903, between himself and Sir Rodney Stuart Riddell, Baronet, heir of entail in possession of the estate of Sunart. The lease, which was for fifteen years from Whitsunday 1903, with an option in favour of either party to terminate it at the end of the fifth or tenth year, contained the following clause:—"He" (*i.e.*, the tenant) "shall deliver at the end of the lease to the landlord or incoming tenant, as far as possible, not more than the same number of sheep, and the same classes, as he receives on his entry, and the proprietor agrees that the second party (*i.e.*, the tenant) or his representatives shall receive the same prices as he paid on his entry, providing always that the landlord or incoming tenant shall not be bound to take over more ewes, ewe hogs, or tups than the tenant took over at his entry; and, further, the proprietor or incoming tenant will not be bound to take over more than fifty of the following three classes, namely:—One, two, or three years old wedders, over and above the number of stock the tenant took over at his entry."

Sir Rodney Riddell died on 2d January 1907, and was succeeded in the entailed estate of Sunart by the next heiress of entail, his sister, Louisa Margaretta Riddell, in virtue of the destination contained in the deed of entail affecting the estate of Sunart.* Shortly after succeeding to the estate Miss Riddell intimated that she repudiated the obligation undertaken by her predecessor to take over the sheep stock at the termination of the lease, and also gave notice that she would exercise the option of terminating the lease at the end of the fifth year, *viz.*, Whitsunday 1908.

On 7th September 1907 Charles Gordon Gillespie brought an action against Miss Louisa Margaretta Riddell, heritable proprietrix of the estate of Sunart, "as such proprietrix and also as an indi-

* The deed of entail which was executed in 1851 by the late Sir James Milles Riddell, provided, *inter alia*:—"It shall not be lawful to or in the power of me, the said Sir James Milles Riddell, or of the said heirs of entail, to set tacks of any part of the said lands and estates for a longer period than twenty-one years, or for a grassum or beneficial interest other than the rent, or under the highest rent that can be got for the time from a good and responsible tenant."

Feb. 20, 1908.

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vidual," in which he concluded (first) for declarator that by the terms of the lease with the pursuer, the late Sir Rodney Riddell "undertook a binding obligation" that on the termination of the lease the sheep stock would be taken over at the prices mentioned; (second) for declarator "that the said obligation is binding upon the defender as heiress of entail in possession of the said lands and estate in succession to the said Sir Rodney Stuart Riddell," or, alternatively, in the event of it not being so found, that the pursuer should be granted certain specified facilities for removing and disposing of his stock; (third) for declarator "that the whole heritable and moveable estate of the deceased Sir Rodney Stuart Riddell is liable for the said obligation"; (fourth) for declarator that the defender, who was a special legatee to certain moveables, as a beneficiary under Sir Rodney Riddell's trust-disposition, was liable for the said obligation to the extent of her beneficial interest in that estate, or was liable to that extent *subsidiarie* after the trustees and executors had been first discussed.

The pursuer averred, *inter alia*;—(Cond. 9) "An obligation binding the tenant to deliver the sheep stock on his farm at the termination of his lease to the landlord or incoming tenant, and a corresponding obligation on the landlord to pay for the stock at a fixed or valued rate, is, and has from time immemorial been, a universal condition of sheep farm leases in the north and west of Scotland, and is founded on the considerations (1) that sheep stock in that part of the country requires to be acclimatised to a particular farm or district, and (2) that stock habituated to a certain holding do not wander beyond the boundaries, and thus enable march fences to be dispensed with. For these reasons the condition is one entirely in the interest of estates and of the successive proprietors thereof, who would find their estate holdings practically unlettable if the stock were dispenished at the termination of each lease. These general considerations apply particularly to the estate of Sunart, the leases on which, including those granted by the entailer, have always contained the said condition, and they apply to the farm of Ardery, and to the obligation with regard to stock in the pursuer's lease. Without the said condition the said farm could not have been let in terms of the deed of entail for 'the highest rent that can be got from a good and responsible tenant.' The said obligation was accordingly a condition *inter naturalia* of the lease, and is binding upon the defender, who has adopted the lease and insisted upon payment of the rent due thereunder."

The pursuer also averred that on his entry in the lease he had taken over the sheep stock at the price of £1319, 1s. 11d., and that the only period of the year at which it was possible to remove and realise sheep stock, except at a ruinous loss, was between the months of August and October. He further set forth the extent to which the defender was a beneficiary under the will of the late Sir Rodney Riddell, and averred that as Sir Rodney's trustees and executors were resident in England and refused to accept the jurisdiction of the Scotch Court, he had been unable to make them parties to the action.

The pursuer pleaded in support of the first two conclusions of the summons;—(1) The late Sir Rodney Stuart Riddell, having undertaken a valid obligation in his lease with the pursuer that the pursuer would be paid for his sheep stock at the termination of his lease, the pursuer is entitled to decree of declarator in terms of the first con-

clusion of the summons. (2) The obligation in question being *inter naturalia* of the lease under which the defender is now landlord, *et separatim*, the defender having adopted the lease, the pursuer is entitled to decree in terms of the first alternative of the second conclusion of the summons. He also stated pleas in support of the other conclusions of the summons. Feb. 20, 1908.
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The defender pleaded, *inter alia*;—(1) The trustees and executors of Sir Rodney Riddell not being parties to the action, the defender is entitled to have the third and fourth conclusions thereof dismissed as incompetent against her. (2) The averments of the pursuer are irrelevant and insufficient to support the conclusions of the action, which should be dismissed. (4) There being no obligation to take over the sheep stock at the termination of the lease founded on which is prestatable against the defender, either as heiress of entail in possession or *separatim* as an individual, she is entitled to be assoilzied from the conclusions of the action. (5) In respect that the obligation to take over the sheep stock could not be made to affect the entailed estate, it cannot affect the defender as heiress of entail in succession to the grantor of said obligation.

On 4th December 1907 the Lord Ordinary (Salvesen) pronounced this interlocutor:—"Sustains the first plea in law for the defender, and dismisses the third and fourth conclusions of the action, and decerns: *Quoad ultra* repels the second plea in law for the defender, and allows to the parties a proof of their respective averments. . . ."

* "OPINION.—The pursuer in this case is the tenant in possession of the farm of Ardery under a lease entered into between him and Sir Rodney Stuart Riddell. The duration of the lease was fifteen years from Whitsunday 1903, with an option to either party to terminate the lease at the end of the fifth or tenth years thereafter on twelve months' notice. The farm of Ardery is part of the entailed estate of Sunart, in the county of Argyll, to which the defender succeeded on 2d January 1907 as heiress of entail on the death of her brother, Sir Rodney. Shortly after her succession her agents gave notice terminating the lease at Whitsunday 1908; and the pursuer does not deny that the lease will come to an end as at that date.

"When the pursuer entered upon the farm he was required to take over the sheep stock from the outgoing tenant as valued by arbiters; and the total price he paid for it amounted to £1319, 1s. 11d. The lease contains a clause with regard to the delivery of stock at its termination, which is quoted in cond. 2. It takes the tenant bound to deliver to the landlord or incoming tenant, as far as possible, not more than the same number of sheep of the same classes as he received at his entry, and the proprietor agreed that the pursuer should receive the same prices as he paid on his entry for the stock so delivered. The defender's agents, soon after she succeeded to the entailed estate, intimated to the pursuer that she repudiated any obligation to take over the sheep stock; and the leading conclusion of the action deals with this matter. The pursuer seeks declarator that the obligation undertaken by Sir Rodney Stuart Riddell is binding on the defender as heiress of entail in possession of the said lands in succession to him. This declarator proceeds on the assumption of the defender surviving the term of Whitsunday 1908, when the obligation, if there be one, becomes prestatable. But it is obviously convenient that the question of law should be decided before the actual arrival of the term, so that parties may be able to make arrangements for the disposal of the sheep stock; and although the defender pleads that some of the other conclusions are premature, there is no corresponding plea with regard to the first two conclusions. The argument for the defender was accordingly substantially directed on this point to the

Feb. 20, 1908. The defender reclaimed. The case was heard on 16th and 17th January 1908.

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Argued for the defender and reclaimer;—The Lord Ordinary was wrong. This was an effort to saddle a succeeding heir of entail with a personal obligation. That was incompetent, for an heir of entail did not take as representing his immediate predecessor, he took as heir of the entailer. The sole obligations undertaken by the preceding heir for which he was responsible were such as had been made to affect the estate. An obligation could only be made to affect the estate if it fell within the exceptions to the prohibitions against burdening the estate with debt, and such an obligation as this was not within these exceptions. The analogy from meliorations bore out this view.¹ There was no force in the argument that the succeeding heir of entail had adopted the lease with all its stipulations. She had only adopted it so far as binding on her.² The fact that the Entail

second, fourth, and fifth pleas in law. These pleas raise the general question whether an obligation by an heir of entail in possession of a sheep farm to take over the sheep stock at the termination of a lease to which he is a party is binding on the succeeding heirs of entail.

“Before considering the law, it is necessary to advert to the averments which the pursuer makes, and of which he asks a proof. He says that an obligation binding the tenant to deliver the sheep stock at the termination of the lease and a corresponding obligation on the landlord to pay for the stock at a fixed or valued rate, is ‘and has from time immemorial been a universal condition of sheep farm leases in the north and west of Scotland, and is founded on the considerations (1) that sheep stock in that part of the country requires to be acclimatised to a particular farm or district, and (2) that sheep stock habituated to a certain holding does not wander beyond the boundaries, and this enables march fences to be dispensed with. For these reasons the condition is one entirely in the interest of the estate and of the succeeding proprietors, who would find their holdings practically unlettable if the stock were dispenished at the termination of each lease. Without this condition the farm could never have been let in terms of the deed of entail for ‘the highest rent that could be got from a good and responsible tenant.’ The term of entry and the ish of the lease were also fixed in accordance with the condition that the stock was to remain on the ground, as it is impossible to remove sheep from such a farm at the term of Whitsunday, when lambs are too young to travel, or to realise sheep stock at that term except at a ruinous loss. He further avers that the leases on the estate of Sunart, including those granted by the entailer, have always contained a similar condition. These averments are denied by the defender, who further maintains that they are irrelevant. She admits that the obligation would have been prestable against Sir Rodney Riddell if he had survived the termination of the lease, and might also possibly be binding on his executors, but maintains that they cannot affect an heiress of entail, who

¹ Dillon v. Campbell, Jan. 14, 1780, M. 15,432; Webster v. Farquhar, 1791, Bell's 8vo Cases, 207; Taylor v. Bethune, 1791, Bell's 8vo Cases, 214; Todd v. Moncreiff and Skene, Jan. 14, 1823, 2 S. 113, aff. May 27, 1825, 1 W. & S. 217; Fraser v. Fraser, June 7, 1825, 4 S. 73, 5 S. 722, 8 S. 409, aff. Feb. 25, 1831, 5 W. & S. 69; M'Gillivray's Executors v. Masson, July 18, 1857, 19 D. 1099; Earl of Breadalbane v. Jamieson, March 16, 1877, 4 R. 667; Learmonth v. Sinclair's Trustees, Jan. 23, 1878, 5 R. 548; Fraser v. Maitland, March 9, 1824, 2 Shaw's App. 37; Sandford on Entails, p. 210.

² Kerr v. Redhead, Feb. 5, 1794, 3 Pat. App. 309; Mackenzie v. Mackenzie, Feb. 15, 1849, 11 D. 596.

Amendment Act of 1878¹ made succeeding heirs of entail liable for obligations for improvement expenditure only emphasised the view that thitherto they had not been liable for any such obligations, and there was no statutory provision imposing on them liability for such an obligation as this. The pursuer's only remedy here, if he had one, was against the representatives of the granter of the lease.² If he desired to have the succeeding heir bound he should have seen that the obligation was made a burden on the estate. Lord Kyllachy took the true view of the matter in *Panton v. Mackintosh*.³ If the argument for the defender here was sound it could not be upset by evidence that such a stipulation was often inserted. To reach such a result the evidence must amount to proof that the custom was clear and universal,⁴ and there were no averments here to support so wide a proof.

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Argued for the pursuer and respondent;—The pursuer did not

takes the estate by singular title, and is not liable for the personal contracts of predecessors; and she says that the obligation to take over the sheep stock is merely a personal contract, and not the less so because it occurs in a lease of heritable subjects.

"It is singular that this question has not hitherto been made the subject of direct decision; and I think it may be assumed in the pursuer's favour that heirs of entail in possession have not hitherto disputed the binding character of similar obligations, though undertaken in leases granted by their predecessors. In some cases, perhaps, they might have no interest to do so, but in others, especially during the last thirty or forty years, when such obligations are supposed to have become specially onerous owing to an alleged practice of valuers to overvalue sheep stock in a question with a landlord; it cannot but have been to the interest of heirs of entail in possession to repudiate such obligations if they thought that they could do so successfully; and if the pursuer's averments as to the custom of inserting similar clauses in leases of sheep farms is to be accepted, such cases must have been very numerous.

"I was referred to various authorities, from which I think it appears to be indisputable that a lease granted by an heir of entail as an act of ordinary administration is binding on a succeeding heir if it has been made real by possession before the succession opened. Now, I think if the pursuer's averments are established, the lease in question was an act of ordinary administration in connection with such a subject as a sheep farm. On the same assumption the obligation which is objected to must, in the general case, be one which it is to the interest of an heir of entail in possession that he should be able to grant, whether he happens to survive the termination of the lease in which it occurs or not. It may be presumed that the rent payable by the tenant depends, at least in part, on the landlord undertaking this obligation, and would have been less if there had been no such obligation—if indeed the subjects would have been lettable at all, as a sheep farm, for a period of five years. It may be that in certain circumstances a burden may be imposed on a succeeding heir of entail for which he receives no corresponding advantage; but that is not conclusive against the burden being one which runs with the lands. In the case of *Queensberry*, 18th February 1814, F. C., it was held lawful for an heir of entail to stipulate

¹ 41 and 42 Vict. c. 28, sec. 1.

² *Earl of Galloway v. Duke of Bedford*, June 10, 1902, 4 F. 851; *Duke of Bedford v. Earl of Galloway's Trustee*, July 8, 1904, 6 F. 971.

³ *Vide note infra*, p. 647.

⁴ *Stewart v. MacLaine*, Nov. 24, 1899, 37 S. L. R. 623, Lord Shand, at p. 626.

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found on the power of an heir in possession to burden the estate, nor on any liability of the succeeding heir as representing his predecessor. He founded solely on the relationship between landlord and tenant, and the right of a tenant in possession under a lease to insist that obligations in connection with ordinary acts of administration by the landlord should be binding on his successors in the estate. Such an obligation as this would unquestionably transmit against singular successors of the landlord,¹ and the question was whether an heir of entail could escape that obligation. An heir of entail was bound by acts done in the due administration of the estate,² and the undertaking of this obligation was such an act. In that part of the country such an obligation was not only customary in the case of leases of sheep farms, but it was quite impossible to let sheep farms without such an obligation. Therefore the undertaking of this obligation was an act done in the course of the due administration of the estate; it

for forehand rents in corn farms, so as to deprive the succeeding heir of the right which would have been otherwise competent to him in preference to executors if the legal and conventional terms had been the same; and the subsequent case of *Breadalbane v. Jamieson*, 4 R. 667, shews that an heir of entail may, by an act which is not in contravention of the entail, impose a burden on the succeeding heir, from which the latter receives no corresponding benefit. The particular act that had this effect was the destruction of the existing mansion-house, which to the extent of its value must have diminished the value of the entailed estate, and the rebuilding of which had only been commenced when the heir of entail died.

"Other burdens which might be undertaken in a lease by an heir of entail, and yet be made to affect the succeeding heir to his disadvantage, may easily be figured. In the lease in question for instance, there is an obligation by the lessor to put the fences and gates in a proper state of repair, and to re-roof the old farm buildings with corrugated iron. This obligation might not have been implemented before the death of the granter, although the tenant had made his right real by entering to the farm; but I apprehend that as an ordinary act of administration the burden would then have fallen to be discharged by the succeeding heir—subject possibly to any right of relief he might have against the executors of his predecessor, if the obligation ought, in ordinary course, to have been implemented before the succession opened.

"I was referred by the defender to a series of cases with regard to ameliorations which are summarised by Lord Deas in his opinion in the case of *Breadalbane v. Jamieson*, at p. 675. In all these it was held that an obligation by a lessor of entailed lands to pay his tenant for buildings erected by him, or ameliorations made by him during the currency of the lease, was not binding on a succeeding heir of entail who was in possession when the lease expired. These decisions rest upon the principle that an heir of entail is not bound by the personal contracts of his predecessor; and that such an obligation, although occurring in a lease, is to be treated as 'extrinsic of its character as a real right, and not even essential to its object as a contract.' See Lord Deas' opinion in *M'Gillivray's Executors*, 19 D. 1106. I was also referred to the two recent cases of *The Earl of Galloway v. The Duke of Bedford*, 4 F. 851, and 6 F. 971, in which the law on this subject was fully discussed in the First Division. In the earlier of these two cases

¹ *Fraser v. Maitland*, 2 Shaw's App. 37; *Bell v. Lamont*, June 14, 1814, F. C.; *MacLaine v. Stewart*, 36 S. L. R., 233, 37 S. L. R. 623.

² Case of the *Queensberry Leases*, 1819, 1 Bligh, 339, Lord Eldon, 459 and 461, Lord Redesdale, 502; *Wellwood v. Wellwood's Trustees*, 2 S. 423; *Earl of Breadalbane v. Jamieson*, 4 R. 667.

was an obligation *inter naturalia* of the lease, and was indeed inserted there *ex necessitate*. The cases cited for the reclaimer were not in point, for the analogy from meliorations was inapplicable here, meliorations being not ordinary acts of administration, but extraordinary acts, and not acts of necessity, as this was, but purely voluntary. These cases, too, so far as dealing with purely personal obligations, were not in point, for this obligation was not of that character, but was an obligation united to a right of property. The opinions expressed in *Queensberry v. Montgomery*,¹ *Waterson v. Stewart*,² and *Learmonth v. Sinclair's Trustees*,³ if not actually deciding the point, were in favour of the pursuer's contention. On a fair construction of the relaxing statutes all such stipulations as were necessary for obtaining leases at an adequate rent would transmit against a succeeding heir of entail. The pursuer was entitled to a proof of the custom he alleged, for if it was made out the obligation founded on it would

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a lease of salmon and trout fishings by an heir of entail was reduced by his successor on the ground that a grant of trout fishing creates merely a personal obligation upon the granter, and does not therefore affect the lands. But, in that case, the principle was clearly recognised that a lease which is within the ordinary powers of administration of an heir of entail in possession, when made real by the tenant having entered on the subjects, is binding on succeeding heirs of entail. The decision, therefore, does not affect the present case, unless it be affirmed that an obligation to take over sheep stock at the end of the lease of a sheep farm is necessarily outwith the range of proper administration. Obligations of a similar kind are common in agricultural leases, e.g., obligations to take over dung or straw left by the tenant at the expiry of the lease at a valuation. It may be that a succeeding heir of entail has not the same interest to challenge the validity of such an obligation as he has in the present case; but in principle the two seem to be indistinguishable, and both must be treated either as personal contracts, or, as I think, as part of the real right acquired by the tenant in possession under a written lease, and as such binding upon singular successors, including heirs of entail. Accordingly I have come to the conclusion that I must repel the second plea in law for the defender, and allow the parties a proof of their averments on this head.

"If the view I have expressed be sound it is probably of small consequence how the third and fourth conclusions are dealt with, but in any event they must be disposed of. The third conclusion seeks a declarator that the whole heritable and moveable estate of the late Sir Rodney Stuart Riddell is liable for the obligation in question; and the fourth seeks a declarator that the defender, as special legatee of certain moveables, is liable for the obligation to the extent of the value of the moveables she has received; or alternatively, that she is liable *subsidiarie* and subject to the condition that the trustees and executors of the deceased shall have been first discussed. In my opinion the third conclusion cannot be competently dealt with in the absence of the executors and general representatives of the deceased. No judgment pronounced in this action would be *res judicata* against them, and if the obligation upon which the pursuer founds be one which cannot be enforced against the heir of entail, it follows that the deceased's trustees are the proper parties to convene in a declarator of this kind. The same observation applies to the fourth conclusion, which, as far as I know, is quite unprecedented. If the general representatives are ultimately found liable in the obligation, it follows that the defender will have to make it good to the extent of any moveable estate which she has taken

¹ Feb. 18, 1814, F. C.

² Nov. 22, 1881, 9 R. 155.

³ 5 R. 548.

Feb. 20, 1908. transmit against the heir of entail.¹ The analogy from the Agricultural Holdings Act, 1883,² was in favour of the pursuer, for in that Act no distinction was made between heirs of entail and other land-owners with regard to the granting of leases. The defender, too, had adopted the lease with all its stipulations, for she had put in force the stipulation in her favour of breaking the lease, and therefore could not escape the other stipulations, *e.g.*, as to taking over the sheep stock. Further, the Lord Ordinary was wrong in dismissing the third and fourth conclusions. No doubt as a general rule disponees were discussed before special legatees,³ but that was for convenience only, and was not universally binding. General and special disponees had been sued together,⁴ and a declaratory decree had been granted against a special legatee.⁵ That was all the pursuer asked for here, and in view of the hardship of the case, and the necessity for the pursuer making arrangements as to his sheep stock before Whitsunday, he was entitled to such a declaratory decree defining his rights.

At advising on February 20, 1908,—

LORD KINNEAR.—This is an action at the instance of the tenant of a sheep farm on the entailed estate of Sunart in Argyllshire, for the enforcement of an obligation undertaken by the lessor, the late Sir Rodney Riddell, the heir of entail in possession at the date of the lease. The lease was for fifteen years from Whitsunday 1903, with an option to either party to terminate at the end of the fifth year. The defender, Miss Louisa Riddell, who is now heir in possession, has given notice to terminate at Whitsunday next, and the pursuer maintains that by force of the obligation in question she is bound as heir of entail in possession to take over his sheep stock at the same price as he paid on his entry for the sheep stock then on the farm. The primary conclusions of the summons are thus directed against the present heir of entail. But there are two subsidiary conclusions for declarator—first, that the whole heritable and moveable estate of the late Sir Rodney is liable for the obligation; and secondly, that Miss Riddell is liable as a special legatee under his will to the extent of the value of her special legacy. These last conclusions, the third and fourth, the Lord Ordinary has dismissed as incompetent, and I believe that all your Lordships are satisfied of the soundness of that judgment. If a debt is to be made good against the estate of Sir Rodney Riddell the proper contradictors are his tee-

by succession. But I think it would be out of the question that she should have to litigate a matter in which she is not primarily interested, and may not be interested at all if there are sufficient funds to meet the deceased's whole obligations, as well as the legacies which he bequeathed. The pursuer's proper course is to sue the trustees and executors in their own *forum*, and if he constitutes his claim against them and fails to recover his debt from want of funds, he may perhaps be entitled to have recourse to the defender to the extent to which she has obtained benefit from the estate, but it will be time enough to decide this when the question is raised. I shall accordingly dismiss these conclusions."

¹ Lord Herries v. Maxwell's Curator, Feb. 6, 1873, 11 Macph. 396; Learmonth v. Sinclair's Trustees, 5 R. 548; Bell v. Lamont, June 14, 1814, F. C.; MacLaine v. Stewart, 36 S. L. R. 233, 37 S. L. R. 623.

² 46 and 47 Vict. cap. 62.

⁴ Weir v. Parkhill, 1738, M. 5857.

³ Ersk. iii. 8, 52.

⁵ Burnett v. Burnett, March 4, 1854, 16 D. 780.

tamentary trustees and executors, and an individual legatee cannot be called upon to discuss the validity of a claim against the general estate, which may or may not affect her particular legacy, in an action to which the general representatives of the testator have not been made parties. The Lord Ordinary's observation appears to be perfectly just when he says that the pursuer's proper course, if he has a claim against the estate, is to sue the trustees and executors in their own *forum*.

We can therefore express no opinion in this case as to the liability of Sir Rodney's personal representatives. They are not called as defenders, and no judgment we could pronounce in this action would be *res judicata* against them. The only question with which we are concerned is the liability of the heir of entail.

The Lord Ordinary says it is singular that this question has not hitherto been made the subject of direct decision, and observes that it may be assumed in the pursuer's favour that heirs of entail in possession have not hitherto disputed the binding character of similar obligations. This is not, perhaps, a very safe method of reasoning, because it is as easy to assume that claims against heirs of entail have never been pressed as that they have always been conceded. But the question arose directly for decision in *Panton v. Mackintosh*,¹ and was decided by Lord Kyllachy in favour of the heir of entail. This is an authority which we regard with the highest respect, but since it is not binding on this Court it will be proper to consider in the first place how the law stands apart from Lord Kyllachy's decision.

If the question is to be considered a novel one, it is, however, to be solved by principles that are well settled. The general rule is established by a great mass of authority, that the personal contracts and obligations of heirs of entail are not binding on their successors in the entailed estate; and this rests on the obvious principle that a succeeding heir who takes his interest in the estate from the entailer alone does not represent a preceding heir from whom he takes nothing whatever. It is true that, subject to certain limitations, leases granted by an heir in possession are binding on his successor. But this does not depend on contract or obligation. It is because the lessor in the lawful administration of his own property has given the lessee a real right which will be effectual against all subsequent owners. But to make it valid it must be made real, or in other words, the tenant must have entered on possession, according to the general rule of law which is thus stated by Lord Westbury in *Campbell v. M'Lean*,² "to make it valid as against the singular successor, the grant must be brought within the operation of the statute of 1449, that is, it must be shewn to be a real right. A lease by the law of Scotland is a personal contract; and the entry of the intended tenant upon the property intended to be demised is equivalent to seisin, and the right thenceforth becomes a real right." Accordingly, it was held in *Kerr v. Redhead*³ that while a lease followed by possession is effectual, a contract to grant a lease is not binding upon the next heir. "If he had lived," says Lord Thurlow, speaking of the contracting heir, "he must have fulfilled his agreement, but as he did not live,

¹ 10 S. L. R. 763, and *infra*, p. 647.

² 8 Macph. (H. L.) 40.

³ 3 Pat. App. 309.

Feb. 20, 1908. it cannot be transferred against a singular successor, which is precisely the character of an heir of entail." So also in his judgment as to the *Gillespie v. Riddell*. *Queensberry Leases*,¹ Lord Eldon, after shewing that a lease containing covenant to renew from time to time might be perfectly good for the term current at the grantor's death, that being otherwise a competent term, goes on to say,—“With respect to the covenant for another lease, it is a mere personal contract, upon which it appears to me there could be no possession”; and refers to *Leslie v. Orme*,² where he says, upon the main question, a lease for four nineteen years was sustained, and yet with regard to a reversionary lease, where no possession had been had, the House held it to be bad. The principle is, and it is trite law, that the heir of entail in possession is fiar of the estate, and as free to deal with it as any other fiar except in so far as he is restrained by the conditions of the entail. It follows that the leases he may have granted, if they have been made real by possession, will be good against his successors in so far, but only in so far, as they do not contravene the cardinal prohibitions. It was at one time a difficulty in the application of this doctrine that, just because it creates a real right in the land, every lease is an alienation, and therefore a contravention of the prohibition to alienate or dispoise. But that problem was finally solved by the judgment of the House of Lords in the “*Queensberry leases*”; and it is now settled that while long leases are void as contraventions of the entail, short leases, which may now be taken as those which do not exceed the period allowed by the Rosebery Act or by the deed of entail, may be sustained. But this is a relaxation admitted only because it was held to be indispensable for the reasonable enjoyment of the estate, which the entailer intended for all his heirs in succession; and Lord Redesdale observes,—“It seems to me that a power thus yielded to necessity, and only to necessity, ought to be bounded by the necessity which compels it to be yielded—that is, by that which, generally speaking, is compatible with the future as well as with the present enjoyment of the estate.” No lease can be sustained, therefore, which exceeds the necessary term, or which infringes otherwise the rights of an heir who may succeed during its currency.

I have dwelt on this point because, as Lord President Inglis has said, the proposition that the heir in possession is fiar of the estate, but subject to the prohibitions and conditions of the entail, is the foundation of all the law applicable to questions of this kind. It follows that each heir in his turn takes the estate subject to the real rights and burdens which have been validly laid upon it by his predecessor, and entirely free from all such as are invalidated by the fettering clauses, and also from all liabilities which stand upon personal obligation and have not been made to affect the estate itself. The point to be determined, therefore, is to which of these classes the obligation in question belongs. There is apparent force in the contention favoured by the Lord Ordinary that if leases are allowed, all stipulations which are reasonable and customary as between landlord and tenant must be admitted as conditions without which a good tenant could hardly be obtained. But the conditions of the lease must be controlled by the

¹ 1 Bligh, 339.

² 1779, M. 15,530, aff. 2 Dow, 112.

limitations of the lessor's power to dispose of the estate ; and I am unable Feb. 20, 1908. to assent to the Lord Ordinary's conclusion, because it disregards this over-
ruling principle, and is thus in my opinion irreconcilable with a long series ^{Gillespie v. Riddell.}
of decisions which have been accepted by the House of Lords as fixing ^{Lord Kinnear.}
the law.

The cases, or most of them, are, as the Lord Ordinary observes, collected in the opinion of Lord Deas in *Breadalbane v. Jamieson*.¹ What he regards as the leading case is *Dillon v. Campbell*.² It was stipulated in a lease granted by an heir of entail in possession that the tenant should be entitled at the end of the lease to the value of buildings to be erected by him. The granter of the lease died during its currency, and at its expiration the tenant brought an action for the value of the buildings against the succeeding heir, and pleaded that the estate had benefited by the expenditure. The report bears that the Lords were at first moved by the equitable nature of the pursuer's demand ; but the answer which ultimately prevailed was that no debt could be made to affect the heir of entail which could not also be made to affect the estate, and consequently that to bind the next heir for improvement debts would infer a contravention of the prohibition against the contraction of debt. The ground of judgment is very clearly brought out in the interlocutor of Lord Braxfield, Ordinary, to which the Court in the end adhered, and by which the defender was assolizied "in respect he did not represent the granter of the lease otherwise than as heir of entail, which entail contained the usual prohibitory, irritant, and resolute clauses *de non alienando vel contrahendo debita*." The same principle received effect in *Webster v. Farquhar*,³ and *Taylor v. Bethune of Balfour*.⁴ The question came before the House of Lords in *Tod v. Moncrieff and Skene*.⁵ In that case an heir of entail in possession had granted a lease by which she bound herself or "the proprietor of the lands at the end of the lease" to pay to the tenant a sum of £625, which the latter had agreed to expend in erecting a new steading on the farm. The tenant brought an action for payment of this sum against the executor of the granter of the lease, who by that time had died, and the executor in his turn brought an action of relief against the new heir of entail, who was then in possession.

All the parties interested were thus before the Court ; and the judgment was that the executor was bound, and that no liability attached to the heir of entail. The argument for the executor was the obvious one that the obligation was imposed in terms on the proprietor of the lands for the time being, who, moreover, would alone derive benefit from the expenditure. The answer which prevailed was that the obligation being personal must be enforceable against the granter and her personal representatives, and could not affect the heir of entail, because the entail contained a prohibition against contracting debt or burdening the lands with sums of money. The decision of this Court was affirmed in the House of Lords with a variation which does not affect the question in hand, and Lord Gifford says in moving the affirmance,—“It is hardly necessary for me to state that in cases of this

¹ 4 R. 667.² M. 15,432.³ Bell's 8vo Cases, 207.⁴ Bell's 8vo Cases, 214.⁵ 2 S. 113, and 1 W. & S. 217.

Feb. 20, 1908. nature it is certainly not competent for the heir of entail in possession to erect farmhouses and other buildings upon the farm and to throw any of the expense to be incurred upon the succeeding heir of entail." He points out that under the Montgomery Act the estate may be burdened with a certain proportion of the expense necessarily incurred, and observes that but for the aid of that statute the incapacity of an heir of entail to build farmhouses without taking the whole expense upon himself might be very prejudicial to all the succeeding heirs. But in that case the heir in possession had not resorted to the statute, and Lord Gifford appears to have had no doubt that except in the mode prescribed by the statute she could throw no part of the burden, and even with the aid of the statute could not throw the whole burden, on the succeeding heir. "On the general point," he says, "the decisions appear to be conclusive." A similar decision was pronounced, and the determining principle was again affirmed, in *Fraser v. Fraser*.¹ But I may observe, in passing, that this case, while it is entirely in accordance with previous decisions, brings out very clearly a distinction which, however obvious, was, I think, overlooked in the discussion of the authorities—the distinction between obligations created by an entailer and those created by an heir of entail. General Fraser, the maker of an entail, granted, or, which is the same thing, authorised his trustees to grant, leases containing obligations on the landlord to pay the tenant for meliorations. His brother Archibald Fraser succeeded as first heir of entail, while the leases were still current. There could be no question that as a gratuitous taker he was liable for the entailer's debts and obligations, and among the rest for the stipulated payment for meliorations. But instead of performing his obligation according to its terms at the end of the lease, he made an agreement with the tenants by which he granted new leases for nineteen years on their renouncing the existing leases and postponing their claims for meliorations till the expiration of the new period, when he bound himself and his heirs to pay these and also certain other meliorations to be undertaken by the tenants. In an action at the instance of a tenant against the next succeeding heir it was held that Archibald Fraser had no power to transfer to the next heir obligations created by the entailer which had become exigible during his own possession, nor to burden either that heir or the estate with the new obligations undertaken in the leases granted by himself.

The obligation in question in *Mackenzie v. Mackenzie*² was of a somewhat different character, but it fell within the same rule. An heir in possession bound himself in a lease of a farm to trench, drain, and lime a part of it. This was held to be a personal obligation which did not transmit against subsequent heirs of entail. It was not considered as a contravention, because it neither was nor could have been made a real burden on the land, and it made no difference that it was inserted in a lease, because the real right acquired under a lease is a right to possession of the land, and stipulations engrafted on the lease by which the landlord undertakes to pay money or perform an obligation are purely personal. The decision therefore illustrates another aspect of the general doctrine laid down in *Dillon v. Campbell*,³

¹ 4 S. 73, 5 S. 722, 8 S. 409, and 5 W. & S. 69.

² 11 D. 596.

³ M. 15,432.

that an heir of entail is not bound by the obligations of a preceding heir, Feb. 20, 1908. except in so far as they may have been made validly to affect the entailed estate without involving a contravention.

Gillespie v.
Riddell.

Three cases were cited by the pursuer's counsel for the purpose of shewing that what he described as ordinary acts of management customary in a district are binding on subsequent heirs of entail, even to their prejudice. This is exactly the argument which was urged unsuccessfully in the House of Lords against the heir of entail in *Fraser v. Fraser*,¹ except that in that case the transaction was said to be beneficial. But there is nothing in the cases cited inconsistent with the general doctrine as I have stated it. In the case of *Lord Queensberry v. Montgomery*² it was held competent for an heir of entail to stipulate for forehand rents in corn farms, so as to secure for his own executor a term's rent, which, if the legal and conventional terms had been the same, would have gone to the next heir. But the point of the case is that the system of management under which corn farms were fore-rented was not introduced by the deceased heir, but had been established before his succession by the entailer. The Lord Ordinary observes that the succeeding heir was deprived of a benefit which would otherwise have belonged to him. But the argument for the successful executors was that the deceased heir would have lost half a year's rent if he had altered the entailer's system, and it is evident that if when a deed of entail comes into operation the farms are let for forehand rents, the only possible way of equalising the interests of all the succeeding heirs is to continue the system unaltered, because the heir during whose possession the rule might be changed could never recover a half year's rent which had been paid to the entailer's executors. The argument in the case of *Lord Queensberry*² therefore was that the rule as to forehand rent is regulated by the will of the entailer, and an heir of entail is not bound to alter the rule to his own prejudice and against the entailer's practice. It was conceded that "an heir of entail is not entitled to alter the terms of payment of rent and to substitute others so as to give a privilege to his executors over the heir"; and the law is distinctly laid down to that effect by Lord President Inglis in *Lord Herries v. Maxwell*.³ The case related to the apportionment of rents under the Act of 1870, and it was necessary to determine whether a rent payable at a certain term "for the half year preceding," during which no crop had been sown or reaped, belonged to the heir or to the executors. The Lord President, after laying down the rule that rents which were due and exigible must go to the executor, whether forehand or not, goes on to say,—“This rule would not have been applicable to an entailed estate if forehand rents were a novelty on that estate—if, for example, the last heir who died had introduced forehand rents, having found a different system in existence at his succession. That would have been taking undue advantage of the next heir of entail, but that is not the case here, for it is stated that forehand rents were the law of the estate. It was both the custom of the district, and the rule that had been adopted by the entailer and continued in all subsequent leases.” The principle seems to me to be very clear, that while an absolute

Lord Kinnear.

¹ 4 S. 73, 5 S. 722, 8 S. 409, and W. & S. 69.

² Feb. 18, 1814, F. C.

³ 11 Macph. 396.

Feb. 20, 1908. owner may choose between his heir and his executor, an heir of entail cannot in any way prejudice the succeeding heir's right.

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*Sinclair v. Learmonth*¹ is, in my opinion inapposite. It was held that an heir of entail was liable, by virtue of a custom having the force of law, to pay the tenant the value of certain woodwork on houses erected by him. But the liability was not rested upon contract but upon a general rule of law applicable to all landlords whether their lands were entailed or not, and whether they were heirs or singular successors. Lord Gifford treated it as a question of tenant's fixtures. He says—"Such woodwork, though fixed, remains in that district the tenant's property, and the landlord must pay for it as such—that is, whoever is landlord at the ish must pay for it if he retains it." Lord Justice-Clerk Moncreiff thought the question whether the obligation to pay transmitted against a succeeding heir of entail or against the executor of the original lessor did not arise (firstly), because in the particular case the deceased heir of entail never undertook any obligation whatever to the outgoing tenant in regard to the right of tenancy on which the claim was founded; and, secondly, because the immemorial custom or usage in the county of Caithness, which the Court held to be effectual, operated not by implied paction or contract but by law, and therefore, said his Lordship, "is as good against the landlord whether he be owner in fee-simple or under an entail, as if a statute had been passed to that effect." The case is therefore no authority on the transmissibility of obligations between heirs of entail.

The third case relied on by the pursuer, *Breadalbane v. Jamieson*,² in so far as it has any bearing, is only another illustration of the general principle. The Marquis of Breadalbane had pulled down the old house of Ardmaddy in order to build a new mansion-house more suitable to the estate, and died before the new house was finished. It was held in an action at the instance of the next heir that his executors and his general estate were not liable to a pecuniary claim of an amount requisite to complete the mansion. It is true, as the Lord Ordinary observes, that this left the heir of entail under a disadvantage. But the ground on which it was found that he could not be relieved at the expense of the executors is perfectly consistent with the former decisions. To destroy or alienate the mansion-house would have been a contravention of the prohibitions, but to pull it down in order to reconstruct it was a lawful exercise of the powers of a fiar who was not in that particular subject to any restriction. The deceased Marquis had therefore done no wrong, and if he died before his purpose to rebuild had been carried out, the succeeding heir took the estate in a condition which had been brought about without any contravention. In those circumstances, the Lord President says there can be no implied obligation between the successive heirs, and no liability except what is created by the fetters of the entail. The only measure of their rights and liabilities is the deed of entail, and no pecuniary liability can be imposed either on a subsequent heir or on the general estate of his predecessor except what the deed of entail authorises. I may add to this discussion of the authorities that of the two recent cases between the *Earl of Galloway*³ and

¹ 5 R. 548.

² 4 R. 667.

³ 4 F. 851; 6 F. 971.

the *Duke of Bedford*, to which the Lord Ordinary refers, the first is, in Feb. 20, 1908. my judgment, entirely in accordance with the whole series of decisions from *Gillespie v. Dillon v. Campbell*¹ downwards. The second is, I think, distinguishable from *Moncreiff v. Skene*² and the other cases in which liability has been fixed upon executors. But, however that may be, it has no bearing on the question now to be decided. Riddell.
Lord Kinnear.

If my view of the general rule of law is correct, its application to the particular contract before us is evident. The obligation which the pursuer seeks to enforce is that the tenant "shall deliver at the end of the lease to the landlord or incoming tenant, as far as possible, not more than the same number of sheep and the same classes as he receives on his entry, and the proprietor agrees that the second party," i.e., the tenant, "or his representatives, shall receive the same prices as he paid on his entry." The question is whether such a stipulation as that can be made good against the defender on the only ground which could enable the granter of the lease to create any liability as against the next heir of entail, to wit, that he was in his time the proprietor of the land, and free to deal with it, except in so far as he was restrained by the fetters. By a restricted construction of the fetters he was enabled to grant a lease which might be valid as a real right. But that will not support an obligation which, although contained in a lease, cannot be made real. It appears to me impossible to make such an obligation as this a real burden upon land consistently with the principles laid down in *Coutts v. The Tailors of Aberdeen*.³ But if it were possible it would involve a contravention, because it is a stipulation for the payment of money, or, in other words, it would affect the estate with debt, and therefore it would be made void and null by force of the irritant clause. But in its true character it is, in my opinion, a personal contract over and above the lease, and therefore it is ineffectual as against the defender, who does not represent the contracting owner. It is, as Lord Kyllachy points out in *Panton v. Mackintosh*,⁴ very much more onerous than the obligations for meliorations, which have over and over again been found to be ineffectual against heirs of entail. There would seem to be two ways, in one or other of which it must be performed. Either the heir must find a new tenant at whatever cost, ready to take over the sheep stock at the pursuer's price, or else he must pay the price and take the stock himself. In the first view, the heir in possession undertakes to regulate the terms of a lease to be granted by his successor after his own possession has come to an end, and that cannot be supported consistently with the decisions of the House of Lords in *Kerr v. Redhead*⁵ and in the *Queensberry Leases*.⁶ In the second view, it imposes upon the heir a contract to purchase a stock of sheep at a price which the pursuer alleges upon record is above their value; and that is just as inconsistent as the first alternative with the principles which have regulated such questions for more than a hundred years. For these reasons I agree entirely with the judgment of Lord Kyllachy in *Panton v. Mackintosh*,⁴ and I think we ought to follow his decision.

¹ M. 15,432.

² 2 S. & M'L. 609.

³ 3 Pat. App. 309.

² 2 S. 113.

⁴ *Infra*, p. 647, note.

⁶ 1819, 1 Bligh, 339.

Feb. 20, 1908. We ought not, however, to pass unnoticed the argument for the pursuer, that in equity his claim ought to be sustained. If he is right in his allegation that he has a good claim in law against the general estate of the lessor, Gillespie v. Riddell, I am unable to see any equity in imposing upon the defender a liability, Lord Kinnear. which does not properly attach to her, in order to relieve him of the inconvenience of suing his true debtor in another Court. But if it were assumed that the executors are not liable, the equity is by no means so obvious as in the cases with reference to meliorations, for in these cases the heir of entail had benefit from the expenditure on farms and buildings. The defender on the other hand, does not take the sheep stock, for which she declines to pay. But the true answer is to be found in the opinion of Lord Thurlow in *Kerr v. Redhead*,¹ and in accordance with that judgment we must hold that the tenant has no right in equity if he has no right in law.

LORD PRESIDENT.—I agree entirely with the opinion which my brother Lord Kinnear has just delivered, and as he has gone into the matter so fully I only intend to add a few words. The key to the solution of this question seems to me to consist in one or two well-known and old-established propositions. When you seek to enforce the personal contract of one man against another man you must shew that that other man represents him. An heir of entail taking in succession to another heir of entail does not represent the prior heir of entail at all; he takes from the entailor. A lease in its origin is a personal contract, and accordingly a lease entered into by the proprietor of an estate, whether he was heir of entail or whether he was a person holding the estate in fee-simple, would not be binding upon anyone who did not represent that man—and so, of course, it would not be binding against an ordinary purchaser or a singular successor—were it not for the old statute which made leases of a certain duration real rights. Accordingly, the efficacy of a lease against a person who does not represent the grantor of the lease is always due to the fact of its being made a real right by statute, and not to the fact of its being a personal contract. Now, when you come to deal with leases in the case of heirs of entail you of course come athwart the conditions of the entail itself. There is no doubt that a lease is an alienation of the estate, because, in so far as it is a real right, it is a giving away of the estate, no doubt temporarily, but still a giving it away for the time being to someone else. Accordingly, if the matter had been treated *strictissimi juris* there can, I think, be no doubt that no lease would have been good as against an heir of entail as being an alienation. It was held to be an alienation in the well-known set of cases which are known by the general name of the *Queensberry Leases*,² but it was held at the same time that it was a necessity of the situation that a certain relaxation should be made, and the rule of relaxation that was made was that a lease should not be treated as an alienation where it was of such duration that it could be held to enure to the benefit not of one heir, but of the whole heirs of entail as a body. I think it is quite clear, when you come to a stipulation of the sort that we are dealing with here, that it will not fall within that exception; and I entirely agree with what Lord Kin-

¹ 3 Pat. App. 309.

² 1 Bligh, 339.

near said in the course of his opinion, that there arises a very necessary difference between the obligation upon an heir of entail where all that the heir of entail for the time being has to submit to is the taking away of his land for a temporary period under the condition of being paid therefor, and where the thing he has to submit to is, not the enforcement of a real right, but the payment of a sum of money. I agree with the doubt which his Lordship indicated, but which he passed over, namely, the doubt whether anything that is a payment of money of uncertain amount to be recovered as being a real right, can ever square with the well-known canon of rules which Lord Corehouse laid down in the *Tailors of Aberdeen*.¹ Accordingly I also agree with the conclusion which Lord Kinnear came to, that you will find, on looking at the sum total of the cases, that nothing has ever been enforced against an heir of entail except the mere giving up of land—nothing in the way of making him perform some other obligation which may mean more than the giving up of land.

I think this will become even more clear if one tests it for the moment by the remedy. Supposing that an heir of entail in possession, against whom an obligation of this kind was sought to be enforced, was entirely impecunious, how are you going to work it out by diligence? Of course, as far as ordinary possession upon a lease is concerned, that is simple enough. All you have got to do, supposing the new landlord drove forth the tenant by force out of his farm, would be to interdict the heir of entail, and the tenant would be restored to the occupation of his farm. That is the protection which the Court would give. But supposing the heir of entail refuses to pay the sum which is the true value of the sheep, and has no money, what is to be done? If you set to work by adjudication, which on the expiry of the legal might take away the estate altogether, that surely would be alienation with a vengeance. In other words, it would be a sort of alienation which certainly would not fall within the exception which was laid down by the House of Lords in the *Queensberry Lease* cases.² If you did not proceed by adjudication, but proceeded by the other well-known diligence of poiding the ground, you would not get any more satisfactory result, because it is perfectly clear that the consequences of poiding the ground would fall entirely upon the back of one heir of entail in the succession of heirs taking the land, whereas the whole idea of the exception laid down in the *Queensberry Leases*² is that the thing is for the benefit of the whole heirs of entail. Upon these grounds, and I have merely added a very few words to what was so well explained by Lord Kinnear, I am of opinion that the Lord Ordinary's judgment here cannot stand.

LORD M'LAREN.—I cannot usefully add anything to the opinion which Lord Kinnear has delivered, and in which I concur on all points. In listening to the opinion one observation did occur to me, not altogether independent, but rather supplementary, to what has been said, to the effect that however this claim is put—if it were clearly expressed as a real burden in the lease—it would amount to an alienation of the estate, and therefore

¹ 2 S. & M'L. 609.

² 1 Bligh, 339.

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Ld. President.

Feb. 20, 1908. to a contravention of the prohibitions in the entail. In the record the material clauses of the lease are set out, and in the clause in question the obligation is, "That the proprietor agrees that the second party or his representatives shall receive the same price for the sheep as he paid on entry." It is not said from whom he is to receive the money. The obligation may either mean that the granter of the lease binds himself and his heirs and executors to pay this price at the expiration of the lease, or it may mean that he proposes that his successor in the entail shall pay the price of the stock out of his private means, or it may mean that he would transmit this obligation, supposed to be for the benefit of the estate, as a real burden affecting the entailed estate. As to the first alternative I need say nothing, for the reasons expressed by the Lord Ordinary and Lord Kinneir, that neither the heir-at-law nor the personal representatives are parties to this action. As to the second alternative, the conclusion of the summons is just as ambiguous as the lease itself is in regard to the nature of the obligation or the persons affected by it. We are asked to make a declaratory finding that the obligation is binding on the defender as heiress of entail in possession of the said lands, and that may either mean that she is to pay the money out of other sources than the estate, or that she is in some way or other compelled to fulfil the obligation out of the estate. I agree with your Lordship that the real test, or a very convincing test, of the efficacy of the obligation is to bring it to the test of diligence. Supposing that the pursuer had taken the view that the heiress of entail was personally liable, and had concluded for payment of the same price or value of the sheep stock as he had himself paid to the tenant on his entry to the farm, if he had gone on to formulate a petitory conclusion for the payment of that sum of money, what would the answer of the defender be? She would say,—“I am not confirmed in the personal estate, nor have I made up a title by service as heir in general; what I have done is to obtain service as heir of provision, which has the effect of establishing that I am the person pointed out in the destination as heir of entail, and entitles me to have an entry from the Crown or the superior, as the case may be, which will put me in possession of this estate.” There is nothing in such an entry that could possibly subject the defender to take over the debts of the previous heir in possession, and I do not suppose that such a proceeding was contemplated by the pursuer, because nothing was suggested in argument about it. What was really maintained to us was that in some way or other the obligation was one attaching to the estate and for the benefit of the estate, the fulfilment of which was therefore obligatory on the heirs of entail in their order. Supposing that the defender takes up a position of passive resistance, as she is quite entitled to do, then there is no other way of making the pursuer's theory effective and recovering the money out of the land than by adjudication of the entailed estate. If the adjudication had been obtained in the lifetime of the granter of the obligation, could it for a moment be doubted that this would be a contravention of the prohibition against contracting debt whereby the estate should be evicted? Is it less so when the proceeding is taken after his death with relation to the same subject and with the same result? But then the forfeiture only affects the interest of the granter of the lease, and does not touch his successor. I

think when the case is looked at in this way the essential unsoundness of Feb. 20, 1903. the argument becomes very evident, because it is then seen that what has been done or attempted is really a diminution of the capital value of the estate to all future heirs of entail, and therefore a contravention of the conditions of the entail. I do not add anything further, except that I agree that it is wholly unnecessary that there should be a proof in this case. Subject to anything that may be said as to the form of the judgment, I think we must reverse the decision of the Lord Ordinary upon the main question, but of course I agree that we should adhere as to the conclusions affecting the personal representatives.

Gillespie v.
Riddell.

Lord M'Laren.

LORD PEARSON was absent.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor: Assolzie the defender from the first alternative of the second conclusion of the summons: *Quoad ultra* dismiss the other conclusions; and decern," &c.*

MACRAE, FLETT, & RENNIE, W.S.—HAMILTON, KINNAR, & BRATSON, W.S.—Agents.

* The case of *Panton v. Mackintosh* referred to above was decided by Lord Kyllachy, in the Outer-House, on 20th March 1903.

John Panton was tenant in the farm of Dalmunzie, in virtue of a lease dated October 1883 and expiring at Martinmas 1902, which contained this clause—"And the said John Panton is bound, as he hereby binds and obliges himself, to take over from the said James Small" (the previous tenant) "the sheep stock on the lands hereby let at the valuation of two men mutually chosen, or of an oversman in case of difference; the said Charles Hills Mackintosh (the lessor, then heir of entail in possession) binds and obliges himself, at the expiry of this lease, to bind the next or incoming tenant to take from the said John Panton the stock of sheep on the said lands hereby let at the valuation of two men. . . ."

Panton's widow and executrix brought an action of declarator against the heir of entail in possession, who had in 1893 succeeded Charles Hills Mackintosh in the estate, to have it declared that the defender was bound, in virtue of the lease granted by his predecessor, either to secure a new tenant in the farm whom he should bind to take over the pursuer's sheep stock at valuation as at Martinmas 1902, or else himself take the stock over.

Lord Kyllachy, in granting the defender absolvitor on the ground that the pursuer's averments were irrelevant, said—"In this case I am not satisfied that even if the estate of Dalmunzie had been unentailed and the defender had succeeded his uncle, the lessor, as heir-at-law or gratuitous disponee, he (the defender) could have been held liable in terms of this summons either to secure a tenant who should take over the sheep stock at valuation or else to take over the sheep stock himself on the same terms. The obligation in the lease (differing from that in the former lease to Mr Small) imposes on the lessor no obligation in any event to take over the sheep stock. It simply requires that he will take the next or incoming tenant bound to do so. And I doubt much whether that implies any undertaking applicable to the case of the lessor taking the farm into his own hands, or at all events applicable to the case, which apparently has happened, of his doing so after ineffectual attempts to let the farms—attempts not said to have been other than honest—but which have not resulted in any offer of any kind being received.

"But it is not, I think, necessary to determine finally any question as to the construction of this obligation. For the defender is an heir of entail, and while the lease being a lease of ordinary duration may as a title of

No. 89.

Poor HELEN DAWSON, Pursuer (Respondent).—*R. C. Henderson.*
 WILLIAM M'KENZIE, Defender (Appellant).—*A. Orr Deas.*

Feb. 21, 1908.

Dawson v.
 M'Kenzie.

Parent and Child—Bastard—Filiation—Proof—Opportunity—Corroboration—False denials by defender.—Observed that in actions of filiation and aliment opportunity alone will not amount to corroboration of the pursuer's evidence, unless it is of such a character as to bring in the element of suspicion, or has a complexion put upon it by statements made by the defender which are proved to be false.

Dicta in Macpherson v. Largue, June 16, 1896, 23 R. 785, approved.

1st DIVISION.
 Sheriff of
 Lanarkshire.

HELEN DAWSON, 3 Fingal Street, Glasgow, brought an action of filiation and aliment in the Sheriff Court of Lanarkshire, at Glasgow, against William M'Kenzie, 13 Holmhead Street there.

A proof was allowed and led. At the proof it was established that

possession have been good as against him, it is I think conclusively settled that he is not liable in performance of any obligation undertaken by a preceding heir of entail, although relating to the entailed lands, and contained in a lease, which is in itself a contravention of the entail. That principle is perhaps best illustrated by the cases upon melioration which are to be found collected and commented upon in *Jamieson v. Earl of Breadalbane* (March 16, 1877, 4 R. 667), and *Learmonth v. Sinclair* (January 23, 1878, 5 R. 548). And in view of the doctrine of these cases I am not, I confess, sure whether the pursuer's position would be worse or better according as his construction or the defender's construction of the obligation was preferred. For if the lessor is to be held as having himself undertaken to take over the sheep stock, that is an obligation considerably more onerous than any involved in most obligations for meliorations, while, on the other hand, if the lessor is to be held to have undertaken for himself and his heirs of entail to let the farm at all cost, and do so at such rent, if any, as could be got with such a burden attaching to the tenancy, the interference with the heir of entail's rights would be of a kind which would be certainly novel, and I think very difficult to support.

"It is said that in the case of a fee-simple estate the obligation would have been good as against purchasers and singular successors, and perhaps it might (I do not know), but so also would be an obligation to pay meliorations. And yet, as I have said, there is no doubt as to the heir of entail's freedom in that matter, or rather as to his freedom prior to the recent statute (Entail Amendment (Scotland) Act, 1878, 41 and 42 Vict. cap. 28). The truth is that the considerations which determine the liability of, for instance, a purchaser, are wholly different from those which determine the liability of an heir of entail. With a purchaser the question is as to the terms, express or implied, of his disposition. With an heir of entail, on the other hand, the question is as to the effect of the fetters of the entail.

"It is also urged that there is here an averment that the clause in question is usual and customary in similar leases. But I do not see my way to allowing a proof upon that point. If the averment had been that, apart from all stipulation, the obligation in question was effectual, by force of custom having the force of law, such an averment might have required consideration. For, although not perhaps necessary to the decision, there are opinions upon that subject expressed by Judges of eminence in the case of *Learmonth v. Sinclair* (*cit. sup.*), which would require to be reckoned with. But the averment here falls obviously far short of anything of that kind. All that is said is that such clauses are usual and customary in similar leases. And I am afraid that there are many clauses not unusual in leases which are yet beyond all doubt contraventions of a strict entail. I do not, therefore, see my way to allowing a proof of the averment referred to. . . ."

the parties had been in the habit of meeting frequently and spending Feb. 21, 1908.
some time in each other's company. These meetings would have
afforded opportunity for connection to have taken place between them, Dawson v.
but the meetings themselves were not accompanied by any element of M'Kenzie.
suspicion, and there was no proof of familiarities. The statements
made by the defender in the witness-box were not disproved in any
material particular by the other evidence adduced at the proof.

On 28th November 1906 the Sheriff-substitute (M. G. Davidson)
assoilzied the defender.

The pursuer appealed to the Sheriff (Guthrie), who, on 22d Feb-
ruary 1907, recalled the interlocutor of the Sheriff-substitute, and
granted decree as craved.

The defender appealed to the Court of Session, and the case was
heard before the First Division on 21st February 1908, when the
undernoted authorities were referred to.¹

LORD PRESIDENT.—In a case like this I am afraid that the Court will
always be left with the feeling that possibly it may not have arrived at the
real truth. Yet, none the less, in the consideration of such delicate circum-
stances, it is absolutely necessary for the security of people in general that
the Court should not be moved by sympathy or by moral inferences to
depart from the rules already laid down by which evidence must be judged.
I do not think it necessary to say more, as to the rules which prevail in
regard to such cases as this, than has been said already. The modern
doctrine—and the modern doctrine owed its introduction to the alteration
of the old law under which the parties were not competent witnesses—the
modern doctrine was first laid down in the case of *M'Bayne*,² and perhaps
the best expression of it was that given in a more recent decision by the
Lord Justice-Clerk and Lord Trayner, in the case of *Macpherson*,³ with
which I entirely concur. The outcome of it is this, that there must be
something more than the pursuer's own statement, and that that something
must amount to corroboration. Now the mistake which the learned Sheriff
has made here is in taking the mere proof of opportunity as amounting to
corroboration. Mere opportunity alone does not amount to corroboration,
but two things may be said about it. One is that the opportunity
may be of such a character as to bring in the element of suspicion.
That is, that the circumstances and locality of the opportunity may
be such as in themselves to amount to corroboration. The other is
that the opportunity may have a complexion put upon it by state-
ments made by the defender which are proved to be false. It is not
that a false statement made by the defender proves that the pursuer's state-
ments are true, but it may give to a proved opportunity a different com-
plexion from what it would have borne had no such false statement been
made. I am really only repeating in other words what was said by the
Lord Justice-Clerk in the case of *Macpherson*.³ He there said,—“No cor-
roboration can be derived from evidence of the defender which shews he is

¹ *M'Bayne v. Davidson*, Feb. 10, 1860, 22 D. 738; *M'Kinven v. M'Millan*, Jan 13, 1892, 19 R. 369; *Young v. Nicol*, June 8, 1893, 20 R. 768; *Macpherson v. Lague*, June 16, 1896, 23 R. 785; *Havery v. Brownlee*, *supra*, p. 424.

² 22 D. 738.

³ 23 R. 785.

Feb. 21, 1908. not speaking the truth. If his evidence is not to be believed it must be taken out of the case altogether, and the case must be treated as if he had not been examined." He then refers to the facts in the case before him, and continues,—“But if those facts were capable of leading to a certain inference, and if the defender made no answer when that inference was suggested, it is then that that absence of explanation by the defender's evidence would come to be of importance, and in the same way his denial of those facts, which are held to be proved, is significant, as it gives a complexion to them which they might not otherwise bear if explained.” Accordingly, if I had found, or could have found, from the evidence here that the defender had denied things—possibly innocent in themselves—which were affirmed by other witnesses, that might have afforded the amount of corroboration necessary to establish the pursuer's case. That would have brought it within the same class of facts that were present in the case of *M'Bayne*,¹ where the thing that turned the scale was that the defender denied ever having seen the pursuer before the occasion when she stopped him in the street and charged him with being the father of her child, while it was held to be established that he had twice met her before, though in circumstances which could not in themselves give rise to suspicion. Those facts seem to me to be an illustration of the minimum that will suffice as corroboration, and it does not appear to me that that minimum is afforded by the facts of the present case.

There is also this, that there appears to be something here which might have been brought out at the proof, but which has not been brought out. There are certain letters, the second of which seems to me to have a strong ring of truth about it. But these are not evidence against the defender though they might have been made available as evidence had they been put to the defender in his cross-examination. That, however, as I say, has not been done.

On the whole matter, therefore, I think that the pursuer has not made out her case, and that the only course open to us is to recall the interlocutor of the Sheriff and restore the judgment of the Sheriff-substitute.

LORD M'LAREN.—I concur in your Lordship's opinion, and it is hardly necessary to add anything. It is a very common state of the evidence in such cases as this that the pursuer's case depends only upon her own evidence, with a certain amount of corroboration as to opportunities, and then the question of fact arises whether these opportunities were such as to raise legal grounds of suspicion, or were merely of the nature of innocent meetings between man and woman. I think that in this class of cases the law laid down by the Lord Justice-Clerk in the case of *Macpherson*² comes to be of importance, because I agree with his Lordship that it is not sufficient corroboration if you merely displace the evidence of the defender and shew that he has made false statements. There must be corroboration of the pursuer's evidence; yet when the effect of the defender's false evidence, i.e., his denial of circumstances which are otherwise proved, is to shew that there is something of which he is ashamed, or something the admission of

which he conceived would throw suspicion upon himself, this will put a Feb. 21, 1908. different complexion on what the Court might otherwise be disposed to regard as innocent intimacy between the parties. Here there is nothing that is calculated to throw doubt on the truth of the defender's statements. Although there is no evidence tending to shew to what other person the paternity of the pursuer's child should be attributed, yet I think the pursuer has not established her case against the defender, and the Sheriff-substitute's judgment is right.

LORD KINNEAR.—I am of the same opinion. I think the learned Sheriff proceeds on a combination of two grounds, both of which are grounds of inference of fact and not of legal opinion, namely, first, that there was opportunity, and second, that the defender denies too much.

Now, I think only the first of these two grounds can reasonably be accepted as made out, for when the defender's evidence is compared with the evidence against him, one cannot find that he denies anything which has been really proved, and therefore, I think we reach the question whether the bare statement of the pursuer herself, coupled with evidence of opportunity in the sense that both were together in circumstances in which connection was not impossible, is sufficient to prove the pursuer's case. It is not proved that they were alone together in such circumstances as to give rise to suspicion or reproach, and there is no evidence of opportunity in any other sense than that it was not physically or morally impossible that connection might have taken place, and the result therefore is that there is no evidence on which the Court can proceed other than the pursuer's own statement, which, of course, is not enough.

LORD PEARSON was absent.

THE COURT recalled the interlocutor of the Sheriff, and assoilzied the defender.

ALEX. WHITE, W.S.—R. M. SCOTT, Solicitor—Agents.

THE CLAN STEAM TRAWLING COMPANY, LIMITED, AND OTHERS,
Pursuers (Respondents).—*Hunter, K.C.—D. Anderson.*

THE ABERDEEN STEAM TRAWLING AND FISHING COMPANY, LIMITED,
Defenders (Reclaimers).—*Dickson, K.C.—Lippe.*

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The Clan
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Ship—Salvage—Services rendered under contract.—Services rendered by one vessel to another in distress are not "salvage" services unless voluntarily rendered.

One vessel assisted another in distress. Both vessels were insured in the same mutual insurance company, under policies which contained a condition that any vessel insured in the company should if necessary render assistance to any other vessel insured in the same company.

Held that the services rendered, being contractual and obligatory, were not "salvage" services entitling the owners of the vessel rendering them to "salvage" remuneration.

ON 13th June 1907 the steam-trawler "Clan Grant," owned by the Clan Steam Trawling Company, Limited, rendered assistance to the steam-trawler "Strathclyde," owned by the Aberdeen Steam Trawling and Fishing Company, Limited, at a time when the latter vessel was

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The owners, and the master, mate, and crew of the "Clan Grant" raised an action against the owners of the "Strathclyde" concluding for payment of £500 as salvage.

The defenders, while admitting that services had been rendered, stated, *inter alia*:—(Ans. 9) " . . . The 'Strathclyde' and the 'Clan Grant' were insured in the Aberdeen Mutual Steamship and Trawlers Insurance Company, and each of these vessels was bound to come to the assistance of the other when in distress in terms of the policy of insurance effected by each of the said vessels with the said insurance company, and the rules of said company. The 'Strathclyde's' policy of insurance is herewith produced and referred to, as are also the rules of the said insurance company (incorporated in all policies of assurance effected with said company), and reference is specially made to Rule 30.* It is explained that the system of

* The following are the material portions of the documents referred to:—

Policy of Insurance.

" . . . and it is agreed that this writing or policy of insurance . . . is and shall be upon the principle that while the contracts of insurance are contracts with the company, the premiums, or contributions of the nature of premiums, payable in respect of the insurances are to be calculated according to the losses by way of mutual insurance. . . . And it is mutually agreed between the assured and assurers, that the articles of association of the assurers' company, and the rules of the company, shall be deemed part hereof, and be binding upon the assured and assurers as fully and effectually, to all intents and purposes, as if such articles were inserted in this policy, and any breach thereof will invalidate the same."

Articles of Association.

"3. Every person who insures on behalf of himself or any other person any ship, or share or shares of a ship, in pursuance of the regulations hereinafter contained, shall, as from the date of the commencement of such insurance, be deemed to have become a member of the company. . . . 9. The classes into which the members are divided, and the rights and obligations of the members of each class shall be further defined by rules, and every member shall be deemed to accept and agree to be bound by the rules for the time being in force relating to the class of which he is a member."

Rules.

"2. The company will insure steamships . . . upon the principle that while the contracts of insurance are to be contracts with the company, the premiums or payments in the nature of premiums (hereinafter called 'contributions') payable in respect of the insurances are to be calculated according to the losses upon the same basis as if the assured were mutual insurers, an entrance fee and contributions towards the current expenses of the company being payable, and allowances being made, in respect of each insurance according to the articles and rules for the time being of the company. . . . 25. The company shall contribute towards any charges or expenses properly paid or incurred by any member for assistance rendered to any ship insured in the company such proportion of the total amount of such charges and expenses as the sum insured bears to the value of the ship as declared in the policy. . . . 30. Ships insured in this company shall give assistance to any steamer broken down or in distress, which is insured either in this company or in the Total Loss Mutual Steamship Insurance Company (Sunderland), or the United Kingdom Steam Tug and Trawler Insurance and Indemnity Association (Shields), or any other Association with which an agreement is or may be entered into. . . . 32. The funds required for the payment of claims shall be raised by contributions

taking all vessels insured in the said insurance company bound to Feb. 25, 1908.
 render reciprocal aid is designed to be, and, as a matter of fact, is for
 the advantage not only of the owners of these vessels, but also of the
 crews, and in particular of the masters and mates, who share in the
 proceeds of the catch of fish, and who accordingly suffer loss by
 vessels being detained, laid up, or lost, and correspondingly gain by
 timely assistance being rendered to vessels in distress. . . . The
 defenders, while not admitting any liability to do so, are willing to
 pay reasonable compensation to the officers and crew of the 'Clan
 Grant' for the services rendered by them to the 'Strathclyde.'"

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The pursuers pleaded, *inter alia* ;—(1) The pursuers having salvaged the defenders' ship, they are entitled to salvage from the defenders.
 (3) The conditions of the policies of insurance and rules of said insurance company libelled, not excluding claims for remuneration for salvage services, the defenders' plea in bar of the pursuers' right to claim salvage should be repelled.

The defenders pleaded, *inter alia* ;—(1) The pursuers, the Clan Steam Trawling Company, Limited, being under pre-existing obligation to render the services in question to the "Strathclyde," are not entitled to salvage, and the defenders are entitled to absolver, *quoad* the claims of these pursuers, with expenses.

By interlocutor dated 7th January 1908, the Lord Ordinary (Salvesen) repelled the first plea in law for the defenders, and allowed a proof.*

from all the members in the following manner, viz.:—All claims for total loss, damage done, and general average, and for particular average shall be assessed on the capital at risk in each class respectively on the dates of such claims arising. The members of each class shall contribute only to the insurance claims of vessels insured in that class."

The following excerpt is taken from the Rules of the Total Loss Mutual Steamship Insurance Company :—

"92. Steamers insured in this association bind themselves to give assistance to any vessel broken down or in distress, insured in this association, or in the associations of the United Kingdom Steam Tug and Trawlers Insurance and Indemnity Association (North Shields), Tyne Steam Tug Towing Mutual (Shields), Percy Mutual (Newcastle), Forth and North Sea Steamboat Mutual (Leith), it having been arranged that the vessels in these associations shall be bound to like conditions, and that the compensation for services rendered be decided and determined by the committees of the association or associations in which the vessels were insured."

* "OPINION.—The pursuers in this action are the owners, officers, and crew of the steam-trawler 'Clan Grant'; and they seek to recover a sum of £500 in respect of salvage services rendered to the defenders' vessel 'Strathclyde.' It is not disputed that the facts averred disclose a relevant case for compensation as for salvage services; and the defenders on record state that they are willing to pay reasonable compensation to the officers and crew of the 'Clan Grant.' They plead, however, that the owners' claim is excluded because they were under a pre-existing obligation to render the services in question to the 'Strathclyde,' and it was this matter alone which was the subject of discussion in the Procedure-roll.

"The pre-existing obligation in question is derived from the Rules of the Aberdeen Mutual Steamship and Trawlers Insurance Company, with which Company both the 'Clan Grant' and the 'Strathclyde' were insured." (His Lordship quoted articles 3 and 9 of the articles of association, and article 30 of the rules)—"Appealing to this rule the defenders say that the owners of the 'Clan Grant' were under a general obligation to render

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The defenders reclaimed, and argued;—The services rendered by the "Clan Grant" were rendered in fulfilment of an obligation undertaken by the owners in their contract of insurance. The fact that they were thus contractual and not voluntary took them out of the category of salvage services, it being well settled that services rendered by one vessel to another were only salvage services when they were rendered voluntarily and were not attributable either to legal obligation or official duty.¹ An excellent illustration of the rule was to be found in the cases of the tug or pilot who were only entitled to salvage remuneration for extraordinary services outwith the scope of their contract of employment.² It followed accordingly that if the services rendered by the pursuers were not salvage services, they could not form the basis of a claim for remuneration in a salvage action. If any remuneration was due them it must be under the contract of insurance, and it could only be recovered in another action

salvage services to any vessel in distress insured in the same company; and that the claim for salvage services as distinguished from a claim for actual loss incurred in rendering the services is accordingly barred.

"The authority relied on in support of this proposition was a decision of Lord Stowell in the case of the '*Zephyr*,' 2 Hagg. 43; and undoubtedly if the rubric is to be read as laying down an absolute rule on the subject apart from the special circumstances in which the question arose, it supports the defenders' contention. In that case two vessels had agreed to sail as consorts, and to render to each other mutual assistance. In the course of the voyage one of the vessels rendered certain services to the other by standing by for several days; but these services were held in fact, as I read the decision, not to be such as would found a salvage claim. This was obviously a sufficient ground for dismissing the action. But the learned Judge prefaced his judgment with some observations in which he indicated that the claim would in any event have been barred by the mutual agreement to which I have referred. The case, however, was a very special one, and does not, in my opinion, support the general proposition that, where the owners of two vessels have agreed to give assistance to each other if broken down or in distress no claim for remuneration as for salvage can ever arise. In the case of the '*Zephyr*' it must be held to have been implied in the agreement that such services as were actually rendered were to be mutually given by the vessels concerned without remuneration; and it is material to a proper understanding of the case that the Court held that the services, which were the subject of the action, were not salvage services at all.

"The defenders also referred to the case of *Harriot*, 1 W. Rob. (Adm.) 439; the '*Maria Jane*,' 14 Jur. 857; and '*Sappho*,' L. R., 3 P. C. A. 690. In the last of these cases it was decided that when salvage services are performed by one ship to another belonging to the same owners the master and crew of the salving ship are entitled to salvage remuneration; although no claim will lie at the instance of the owners. The decision, therefore, does not touch the present case; and it does not appear to me that the observations

¹ The "*Neptune*," 1824, 1 Hagg. (Adm.) 227, Lord Stowell, at 236; the "*Zephyr*," 1827, 2 Hagg. (Adm.) 43; the "*Calypso*," 1828, 2 Hagg. (Adm.) 209, Sir Christopher Robinson, at 217; the "*Solway Prince*," L. R., [1896] P. 120, Sir F. H. Jeune, at 127; the "*Sappho*," 1871, L. R., 3 P. C. A. 690; the "*Harriot*," 1842, 1 W. Rob. Adm. Reps. 439; Abbott's Law of Merchant Ships and Seamen, 14th ed., p. 965; Kennedy's Law of Civil Salvage, pp. 2, 71, 84, 97; MacLachlan's Law of Merchant Shipping, 4th ed., pp. 642, 643; Bell's Prina. sec. 444.

² *Akerblom v. Price, Potter, Walker, & Co.*, 1881, L. R., 7 Q. B. D. 129.

based upon the contract. A consideration, however, of the policy, articles, and rules, especially Rule 30, clearly shewed that no pecuniary payment was contemplated, the *quid pro quo* being lower premiums and the right to obtain similar gratuitous assistance from every other vessel insured with the Company. The pursuers' suggestion that it would be against public policy to refuse an award of salvage in the present action was without foundation, seeing that the defenders were willing to compensate the master and crew. The "*Waterloo*,"¹ founded on by the pursuers, contained nothing which controverted the general proposition laid down in the authorities already cited, and the "*Margery*"² only dealt with the rights of the master and crew, which were not here disputed.

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Argued for the pursuers and respondents;—The Lord Ordinary was right. Salvage had been defined as the "compensation paid for the saving of a ship or her apparel or cargo."³ The respondents' vessel

made by Lord Justice Mellish, in delivering the judgment of the Court, have any bearing upon the question at issue here. Nor does there appear to me to be any analogy between the case of seamen who render services connected with the saving of their own ship and the case of shipowners who are not otherwise connected than that both their vessels are insured in the same company rendering services to each other's vessels. In my opinion, therefore, there is no law to the effect that a pre-existing obligation constituted by an agreement between two shipowners to render salvage services to each other's ship operates in all cases as a bar to a claim for compensation. Such an agreement really does not add very much to the moral obligation which every ship is under to give assistance where possible to another ship that is in distress.

"I do not affirm that shipowners may not, by agreement, bar themselves from any claim for salvage remuneration in respect of services rendered to each other's property. Such an agreement might conceivably be objected to as being contrary to public policy. But, assuming its validity, I think it must be clear, from the agreement, that the rendering of assistance to a vessel in distress shall not found a claim for remuneration. The right to obtain salvage remuneration is one very much favoured in the law, and therefore cannot be excluded unless by express words or by very clear implication from the language used. Rule 30 contains no express exclusion of such a claim, and it does not appear to me that there is any implication at all that it should be excluded. If the question had arisen with a vessel belonging to the Total Loss Mutual Steamship Insurance Company of Sunderland, I find, from the rules of that association (rule 92), that compensation would have been claimable, although the amount would require to be fixed by the committees of the associations in which the vessels were insured, and not by the ordinary tribunals of the country. The defenders here say that they are willing to pay the owners of the '*Clan Grant*' any outlay they have incurred or any damage they have sustained in connection with the services rendered, and that it has been the practice of the insurance company to meet such claims. If their argument, however, is good for anything, I think they must maintain that even such a claim is barred by Rule 30. It is possible to read into Rule 30 an implication that no compensation shall be allowed for assistance given in terms of that rule; but I cannot understand on what principle compensation should be limited to those cases where loss or outlay has been incurred in rendering services. A similar question was mooted, although not decided, in the case of the '*Margery*,' L. R., [1902] P. 157; but it was not necessary to arrive at any decision on

¹ 1820, Dodson's Adm. Reps., Vol. 2. 433.

² [1902] P. 157.

³ Abbott's Law of Merchant Ships and Seamen, 14th ed., p. 962.

Feb. 25, 1908. had saved the reclaimers' vessel, and all that they now claimed was compensation. Claims for such compensation were always favourably regarded by the Court for reasons of public policy, and the right to obtain it could only be excluded by express provision or by the clearest implication.¹ There was no such express provision here. Rule 30, it was true, provided that vessels were to assist each other, but it did not provide that they were to do so gratuitously, although it could easily have done so had that been intended. That such an intention was not to be implied, but rather the contrary, was apparent from Rule 92 of the Total Loss Mutual Steamship Insurance Company, which referred in distinct terms to "compensation for services rendered." The fallacy which underlay the reclaimers' whole argument was that of regarding a simple obligation to perform services as equivalent to an obligation to perform services gratuitously. An examination of the cases where salvage remuneration had been held to be excluded shewed that they fell into one of two classes, viz. :—(a) cases where the ships were engaged upon a common enterprise;² (b) cases where the persons rendering the services stood in some special relation of duty to the vessel saved, such as pilot, tug, or crew.³ The "*Margery*,"⁴ although not entirely analogous in its circumstances, was, so far as it went, an authority favourable to the respondents.

At advising, on 25th February 1908,—

LORD JUSTICE-CLERK.—At the hearing of this case I formed a fairly decided opinion that this reclaiming note must be successful, and a subsequent investigation of the authorities to be found in previous decisions confirmed my view as taken at first. I agree with the Lord Ordinary that "salvage remuneration" is very much favoured in the law, but he seems to me to err in holding that this is a case of salvage. It does not appear to me that the services rendered by the "*Clan Grant*" to the "*Strathclyde*" fall under the description of salvage services. The whole tone of the authorities is to be found in the expression "voluntary." Services to be rendered by one vessel to another in distress are services for which salvage is exigible when the service is not a service of contract or obligation, but is a service which those rendering it could refuse to render without committing any

the point now at issue, because the owners of the salving vessel were not parties to the suit but were content with the award of compensation which the committee of the Sunderland Association had made in their favour. Without, therefore, expressing any opinion as to the validity of a bargain between the members of a mutual insurance company that their vessels should mutually render assistance on the footing of not being remunerated for their services, however meritorious, I reach the conclusion that the present claim is not barred because there is nothing in the agreement to exclude the right of the salvor to receive the remuneration for his services which the law gives him. I shall therefore repel the first plea in law for the defenders, and allow parties a proof of their respective averments."

¹ The "*Waterloo*," 1820, 2 Dodson's Admiralty Reports, 433.

² The "*Swan*," 1839, 1 W. Rob. Adm. Reps. 68, *per* Dr Lushington, at p. 70; the "*Zephyr*," 1827, 2 Hagg. (Adm.) 43; the "*Sappho*," 1871, L. R., 3 P. C. A. 690, *per* Mellish, L. J., at p. 693; the "*Harriot*," 1842, 1 W. Rob. Adm. Reps. 439.

³ The "*Neptune*," 1824, 1 Hagg. (Adm.) 227, Lord Stowell, 236, 237; *Akerblom v. Price, Potter, Walker & Co.*, 1881, 7 Q. B. D. 129.

⁴ [1902] P. 157.

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breach of contract or duty undertaken as matter of obligation. It is of Feb. 25, 1908. course true that there is a duty in the sense of the moral law to render succour as far as may be possible to those in distress at sea. This moral obligation applies on land as well as on sea, and its force as a moral obligation is only greater in the case of sea perils because these are in the general case more clamant in their call for aid because of their exceptionally dangerous character. But this is an obligation which applies not to seafaring matters only, but to all circumstances in which the citizen can by timely assistance save others from danger; and even that obligation can hardly be held to exist as regards saving of corporeal subjects. It applies only to persons. But whatever be the extent of it, it is plainly not an obligation in law. Its non-fulfilment cannot be visited with either public official censure or give claim in civil suit in respect of failure. Salvage in its true sense is suitable reward for services voluntarily rendered in circumstances where by the services offered on the one hand and accepted on the other there is saving of what otherwise was in risk of perishing or being lost.

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It seems to me quite clear that the word "salvage" does not apply to services which those rendering them had by contract undertaken to render.

Here, in this case, the insurance conditions were that the vessels mutually insured gave, as part of the consideration for the insurance, an obligation to render assistance to vessels mutually insured with them. It may be taken to be quite certain that this obligation was as much a part of the premium of insurance as the money paid by the insurer. Each insured bargained for the assistance of the others, and undertook to render assistance to the others, when any two vessels came to be the one in the position of being a vessel in distress, and the other a vessel able to render assistance. It was a perfectly intelligible and efficient contract for benefit, which the one had a right to claim and the other had contracted to give.

That being so, I have without hesitation come to the conclusion that the defenders' plea in law which the Lord Ordinary has repelled should be sustained. I do not think it necessary to go over the authorities in detail. I have had an opportunity of perusing an opinion of Lord Ardwall which reviews these authorities very fully, and in which I concur.

Accordingly I would move your Lordships to recall the interlocutor of the Lord Ordinary, to sustain the first plea in law for the defenders, and to grant absolvitor from the claim for salvage. The defenders are willing to meet such charges as may be necessary to meet outlays and payments to officers and crew of the "Clan Grant," and the case will be remitted back to the Lord Ordinary that this matter may be disposed of.

LORD STORMONTH-DARLING.—Had the proof allowed by the Lord Ordinary been a proof before answer I should have been disposed to think that the inquiry might have thrown some light on the question whether the sum claimed by the owners of the "Clan Grant" was for "salvage services" as claimed in the summons. But that is not the nature of the proof, for the Lord Ordinary prefaces his allowance of it by repelling the first plea in law for the defenders, which distinctly tables the proposition that the owners are not entitled to salvage. Now, being thus brought face to face with

Feb. 25, 1908. the question whether this claim, so far as at the instance of the owners, is a salvage claim at all, I have come to agree with the opinion of your Lordship and also with that which my brother Lord Ardwall is about to read.

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LORD ARDWALL.—This is an action raised by the Clan Steam Trawling Company, Limited, as owners of the ship “Clan Grant,” and the officers and crew of the said ship, against the Aberdeen Steam Trawling and Fishing Company, Limited, the owners of the steam-trawler “Strathclyde,” and it concludes for payment of £500 in name of salvage in respect of “the salvage services specified in the condescendence.”

It is not disputed by the defenders that if the services in respect of which the claim is made had been rendered spontaneously and voluntarily, the owners of the “Clan Grant” would have been entitled to salvage; but in their first plea in law they plead that the pursuers, the owners of the “Clan Grant,” being under pre-existing obligation to render the services in question to the “Strathclyde,” are not entitled to salvage. With regard to the claim of the officers and crew, the defenders represent themselves as being willing to pay a reasonable amount of salvage, and with regard to them, the only question that remains is as to the amount to be paid.

The question that has to be decided now is whether the first plea in law for the defenders ought to be sustained or repelled. The Lord Ordinary repelled the plea on the ground, apparently, that the services rendered by the “Clan Grant” were “salvage services,” and that there is nothing in the contract founded on by the defenders to exclude the claim. He expresses himself thus,—“The right to obtain salvage remuneration is one very much favoured in the law, and therefore cannot be excluded except by express words or by very clear implication from the language used. Rule 30 contains no express exclusion of such a claim, and it does not appear to me that there is any implication at all that it should be excluded”; and again he says,—“I reach the conclusion that the present claim is not barred, because there is nothing in the agreement to exclude the right of the salvor to receive the remuneration for his services which the law gives him.”

It humbly appears to me that the Lord Ordinary has in these passages and the rest of his opinion assumed that the services rendered were salvage services giving the pursuers a right to remuneration unless such right was barred by contract.

I cannot help thinking that the Lord Ordinary by making the assumption alluded to has failed to attend to what is implied in the term “salvage services,” and that the question is not whether the pursuers have barred themselves from claiming the salvage remuneration they are entitled to, but whether they are entitled to any salvage remuneration at all—in other words, whether their services were of the nature of “salvage services.”

Now, I think it clear upon the authorities that in order to entitle a person to claim salvage remuneration, the services in respect of which he claims must have been spontaneously and voluntarily rendered, and not rendered in respect of any contractual or official duty resting on the person rendering them. This, I think, is established by a series of *dicta* pronounced by Judges of the greatest eminence in a variety of cases.

In the case of the "*Neptune*"¹ Lord Stowell is reported as having Feb. 25, 1908. expressed himself as follows :—"What is a salvor? A person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship." And the same noble and learned Lord in the case of the "*Zephyr*"² refused to entertain a claim of salvage for services rendered by one vessel to another, where the vessels were sailing as consorts and under an agreement to render mutual assistance. And in the same volume of Reports, in the case of the "*Calypso*,"³ Sir Christopher Robinson, in considering an alleged distinction between civil and military salvage, expressed himself thus :—"It will be found, I think, that both these forms of salvage resolve themselves into the equity of rewarding spontaneous services rendered in the protection of the lives and property of others. This is a general principle of natural equity, and it was considered as giving a cause of action in the Roman law, and from that source it was adopted by jurisdictions of this nature in the different countries of Europe." He then refers to a judgment of Sir William Wiseman in which he refers to the Digest, lib. 3, tit. 5.

The case of the "*Waterloo*"⁴ was quoted by the pursuers for certain *dicta* therein which they alleged to be favourable to their contention. In that case the East India Company attempted to escape liability for a claim for salvage on the ground that there was a usage and practice exempting them from payment of salvage when ships belonging to them were salvaged by a ship in their employment. Lord Stowell, then Sir William Scott, held that no such custom or usage was proved, and in the course of his judgment said that where an exemption is claimed from a submission to a general rule, the exemption must be so set forth as to be intelligible in its extent; an indefinite claim of exemption is "*rank*"—and other remarks to the same effect; but nowhere as far as I read the judgment is there anything controverting the general principle that to bring services within the category of salvage services they must be rendered voluntarily, and not in respect of any contract or official duty. The soundness of the definitions and *dicta* above quoted have been recognised in a variety of cases; for instance, in the *Cargo ex "Schüller,"*⁵ Lord Justice Brett says, at page 149—"Both cases are therefore consistent with what was said in the '*Thetis*'⁶ and the '*Neptune*,'⁷ that salvage is the service which volunteer adventurers spontaneously render to the owners in the recovery of property from loss or damage at sea under the responsibility of making restitution, and with a lien for their reward."

In the case of the "*Solway Prince*,"⁸ it was held by Sir F. H. Jeune that a contract with underwriters which was not depending on success precluded the plaintiffs from asserting a "maritime lien" on the vessel and claiming salvage remuneration from her owners. In delivering judgment he said—"There is not, so far as I know, any direct authority in the Court

¹ (1824), 1 Hagg. (Adm.) 227, at p. 236. ² (1827), 2 Hagg. (Adm.) 43.

³ (1828), 2 Hagg. (Adm.) 209, at p. 217. ⁴ (1820), 2 Dodson, 433.

⁵ 1877, 2 P. D. 145.

⁷ (1824), 1 Hagg. (Adm.) 227.

⁶ (1833) 3 Hagg. (Adm.) 14, at p. 48.

⁸ [1896] P. 120.

Feb. 25, 1908. of Admiralty on the point, unless it is to be found in those cases which decide that persons who perform services in themselves of a salvage nature because they are bound by a pre-existing contract or a pre-existing duty to perform them are not entitled to claim as salvors. See the '*Neptune*'¹ and the '*Hannibal*.'² These authorities at least illustrate the voluntary character which is held to be essential to the claim of a salvor, and they shew that if work be done in pursuance of a contract other than a salvage contract, it does not under ordinary circumstances give rise to a salvage claim."

The *Olan*
Steam Trawl-
ing Co.,
Limited, v.
Aberdeen
Steam Trawl-
ing and Fish-
ing Co.,
Limited.

Lord Ardwall. The rule of these decisions is very well set forth in Lord Justice Kennedy's Treatise on Civil Salvage. On page 2 his definition of salvage services concludes thus:—"If and so far as the rendering of such services is voluntary and attributable neither to legal obligation, nor to the interests of self-preservation, nor to the stress of official duty"; and again he says, on page 28 of the same work—"Voluntariness on the part of the salvor is equally with danger to the thing saved an essential element in the constitution of a salvage service."

The cases in which the services of a tug or of a pilot were remunerated as salvage services were referred to as detracting from the universality of the rule regarding voluntariness that I have just been considering, and, in particular the case of *Akerblom v. Price, &c.*,³ was referred to. In that case some pilots had rendered important services towards a vessel, and it was held that they were entitled to be remunerated as for salvage services, but in concluding the judgment of the Court, Lord Justice Brett spoke as follows:—"We have thought it right to give our reasons at length, but we might decide this case by saying that the service rendered was one which the pilots were not bound to render. It was a danger they were not bound to encounter; next that the service was not one of pilotage; it was not a piloting to any port or place, but of taking out—a salving from danger."

And so with regard to all similar cases it appears that the services were considered to be salvage services, because they were outside of and not within the contracts of towage or pilotage. In the present case the alleged salvage services, according to the pursuer's own averments, were of a most ordinary description.

The law standing thus, the only question is whether in the present case the owners of the "*Clan Grant*" were or were not under a contractual obligation to render the services they did to the "*Strathclyde*." This depends on the effect to be given to the policies of insurance, the articles of association, and the rules of the Aberdeen Mutual Steamship and Trawlers Insurance Company. The "*Clan Grant*" was insured with this company under a policy which is No. 15 of process, and in that policy it is provided that the premiums or contributions of the nature of premiums payable in respect of the insurance are to be calculated according to the losses by way of mutual insurance, and the policy goes on to provide thus:—"And it is mutually agreed between the assured and assurers that the articles of association of the assurers' company and the rules of the company shall be deemed part hereof, and be binding upon the assured and assurers as fully

¹ (1824), 1 Hagg. (Adm.) 227.

² 1867, L. R., 2 A. & E. 53.

³ 1881, 7 Q. B. D. 129.

and effectually, to all intents and purposes, as if such articles were inserted Feb. 25, 1903. in this policy, and any breach thereof will invalidate the same."

By No. 3 of the articles of association it is provided that every insurer is to be deemed to become a member of the company, and by article 9 the members bind themselves to accept and agree to be bound by the rules of the company. Article 30 of the rules of the insurance company provides as follows:—"Ships insured in this company shall give assistance to any steamer broken down or in distress which is insured either in this company, or in the Total Loss Mutual Steamship Insurance Company (Sunderland), or the United Kingdom Steam Tug and Trawler Insurance and Indemnity Association (Shields), or any other association with which an agreement is or may be entered into." And Rule 32 provides that the funds required for the payment of claims shall be raised by contributions from all the members.

The Clan

Steam Trawling Co.,
Limited, v.
Aberdeen
Steam Trawling and Fishing Co.,
Limited.

Lord Ardwall

The "Strathclyde" was insured with the same company under a policy of insurance in identical terms with the policy over the "Clan Grant."

It is obvious from the above contract of insurance taken along with the articles and rules, which are declared to be incorporated therewith, that there was established a mutuality of obligation between all the members of the insurance company—all the members had an interest in keeping down claims for loss, because the fewer of these the smaller would be the contribution periodically demanded from the various members, and while each member was bound by the rules to give assistance to ships of other members of the company, he was on his part entitled to receive assistance from them, and if a ship belonging to any member of the company failed to give assistance to any other ship insured in the company which was broken down or in distress it is, I think, clear, first, that the owners of the former ship would be guilty of a breach of contract, in consequence of which their own policy would be invalid, and they might in addition be subjected to an action for damages.

I therefore think that it is perfectly plain that in the present case the "Clan Grant" was bound to give assistance to the "Strathclyde," which was in distress at the time the services condescended on were rendered. If this is so, it appears to me that there is an end of the pursuers' case, so far as at the instance of the owners of the "Clan Grant," because there was a pre-existing contract under which that vessel was bound in the circumstances to give assistance to the "Strathclyde," in other words, the services which were rendered by the "Clan Grant" to the "Strathclyde" were not in law salvage services at all, but were services rendered in pursuance of the contract between the owners of the "Clan Grant" and the Mutual Insurance Company, in which the owners of the "Strathclyde" had a *jus quæsitum*.

This being so, it is irrelevant and unnecessary to inquire whether the owners of the "Clan Grant" are barred by the contract from claiming remuneration as for salvage services, there being no salvage services for which remuneration can be claimed. But it is satisfactory to notice that the conclusion I have arrived at as matter of law is truly in accordance with the special contract, because I think it clearly appears from Article 25 that no remuneration for services was contemplated by the contract except for charges and expenses, and Rule 92 of the Total Loss Mutual Steamship

Feb. 25, 1908. Insurance Company, which was referred to by the pursuers as aiding their argument, is, I think, equally clear to the effect that salvage remuneration is not contemplated as a reward to steamers insured in that association giving assistance to vessels in distress, but only such "compensation" as may be determined by the committees of the association, and I need hardly point out that compensation and salvage remuneration, or "reward" as it is sometimes termed, are two very different things, and are arrived at in very different ways. To take one point of difference, the value of the property salvaged falls to be taken into account in salvage remuneration, whereas it has no place in a claim for compensation.

The Clan Steam Trawling Co., Limited, v. Aberdeen Steam Trawling and Fishing Co., Limited.
Lord Ardwall.

On these grounds I am of opinion that the Lord Ordinary's interlocutor should be recalled; that the first plea in law for the defenders should be sustained, and the defenders assoilzied from the conclusions of the action so far as at the instance of the Clan Steam Trawling Company, Limited, and that *quoad ultra* the case should be remitted to the Lord Ordinary for further procedure.

LORD LOW was absent.

THE COURT pronounced the following interlocutor:—"Recall the said interlocutor reclaimed against: Sustain the first plea in law for the defenders, and assoilzie them from the conclusions of the action so far as laid at the instance of the Clan Steam Trawling Company, Limited: Remit," &c.

DAVIDSON & MACNAUGHTON, S.S.C.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—
Agents.

No. 91. MRS MARY PENNY AND ANOTHER (James Penny of Park's Trustees),
First Parties.—*D.-F. Campbell—A. R. Brown.*

Feb. 25, 1908.

MRS MARY PENNY OR ADAM AND OTHERS, Second Parties.—
Cullen, K.C.—A. M. Mackay.

Penny's
Trustees v.
Adam.

MRS JANE DAVIDSON OR PENNY AND OTHERS (James Penny of Lochwood's Trustees), Third Parties.—*Cullen, K.C.—A. M. Mackay.*

MRS JANE DAVIDSON OR PENNY, Fourth Parties.—*Cullen, K.C.—
A. M. Mackay.*

MRS JANE DAVIDSON OR PENNY AND OTHERS (Tutors of Mary Penny and Others), Fifth Parties.—*D.-F. Campbell—A. R. Brown.*

Succession—Testament—Vesting—Vesting subject to Defeasance—Conditional Institution of Issue—Direction to divide at postponed period—Power to advance meantime.—A testator by his general settlement appointed his wife his sole trustee with power to advance for the purpose of setting up any of his children in business—all payments to children "being reckoned as part of their ultimate share,"—and left his wife the liferent of his whole estate, "the same to be realised and divided equally on her death among" his "children, share and share alike, the issue of predeceasing children taking among them the share which would have fallen to their parents if in life."

Held that the estate vested in the children of the testator *a morte testatoris* subject to defeasance in the event of their predeceasing the liferentrix leaving issue.

Opinion reserved as to whether defeasance took place on a child's issue surviving their parent irrespective of whether or not they survived the liferentrix.

Cairns' Trustees v. Cairns, 1907, S. C. 117, followed.

JAMES PENNY of Park, in the counties of Aberdeen and Kincardine (hereinafter called the truster), died on 22d January 1902, leaving a general settlement dated 10th September 1901. The settlement provided as follows:—"I . . . do hereby . . . appoint my wife to be my sole trustee and executrix, with power to her as trustee and executrix foresaid to borrow money on the security of my estate, either for the purpose of setting up any of my children in business or on their marriage . . . all payments made to children being reckoned as part of their ultimate share when the same falls to be divided: And I leave my said wife the liferent of my whole means and estate of every kind, the same to be realised and divided equally on her death among my children, share and share alike, the issue of predeceasing children taking among them the share which would have fallen to their parents if in life."

Feb. 25, 1908.

Penny's
Trustees v.
Adam.

2D DIVISION.

The truster left estate of the value of £20,000, whereof £19,500 was heritage, comprising the estate of Park, certain fishings, and certain feu-duties.

The truster was survived by his wife and by eight children. One of these children, James Penny of Lochwood, died on 1st November 1905, survived by a widow and three pupil children, and also by his mother, and the other seven children of the truster. He left a trust-disposition and settlement by which he conveyed his whole estate to trustees, and directed them, *inter alia*, to pay the income to his wife during her lifetime.

Before his death, James Penny of Lochwood had received a payment of £609, 17s. 9d. under the powers contained in the truster's general settlement, for the purpose of setting him up in business.

Questions having arisen as to what right, if any, James Penny of Lochwood had in the estate of his father the truster, the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were:—(1) The trustees, original and assumed, of James Penny of Park, the truster; (2) the truster's surviving children; (3) the testamentary trustees of James Penny of Lochwood; (4) the widow of James Penny of Lochwood; (5) the tutors of the three pupil children of James Penny of Lochwood.

The special case contained the following statement:—

"The whole estate of the said James Penny of Lochwood, exclusive of any right he may be found to have had to a share of his father's estate, will not exceed £1000, and it will therefore be necessary for his widow, the fourth party hereto, to be advised whether or not she should claim her legal rights; but until the questions raised by this case are decided, it is impossible for her to ascertain what her husband's rights in the succession of his father may amount to in the circumstances which have arisen."

The second, third, and fourth parties maintained that on a sound construction of the general settlement of James Penny of Park, the truster, a share of the fee of his estate vested absolutely at his death in the children who survived him. The third and fourth parties maintained that the share which so vested in James Penny of Lochwood fell to be accounted for to the third parties as his testamentary trustees and executors and to be administered as part of his estate.

The fifth parties maintained that as James Penny of Lochwood predeceased the period of division of the estate of James Penny of Park, the truster; namely, the death of Mrs Mary Penny, the truster's widow, who was still alive, no share of the fee of the estate had vested

Feb. 25, 1908. in him, and the share of the estate destined to him was not carried to his trustees (the third parties) by the general conveyance in his trust-disposition and settlement.

Penny's
Trustees v.
Adam.

The questions of law were:—“(1) Did the fee of the shares of the estate of the truster vest in his children *a morte testatoris*? or, Did said estate vest in the children of the truster subject to defeasance in the event of their predeceasing their mother, the liferentrix, leaving issue? or, Is the vesting of said estate postponed till the expiry of said liferent? (2) (As amended) In the event of the first branch of the first question being answered in the negative does the amount of the payment made to James Penny of Lochwood during his mother's lifetime fall to be deducted from the share of the estate payable to his children?”

The second and fifth parties ultimately conceded that the second question fell to be answered in the affirmative.

The case was heard before the Second Division on 7th January 1908.

Argued for the first and fifth parties;—Under the truster's settlement vesting took place in his children *a morte testatoris* subject to defeasance in the event of their predeceasing the liferentrix leaving issue. The present case was ruled by the decision in *Cairns' Trustees v. Cairns*.¹ The only distinction between that case and the present was that here there was a power to advance. But a power to advance did not affect the question of vesting.² Predeceasing here meant predeceasing the liferentrix. That was in accordance with the ordinary rule of construction. Words of survivorship³ and predecease⁴ *prima facie* referred to the period of division. In the present case even apart from the general rule “predeceasing” must refer to the period mentioned immediately before, viz., the date of the death of the liferentrix. “Their ultimate share” meant the share eventually taken by a child, or by his issue if he predeceased the liferentrix. The argument now based upon the fact that here the word “predeceasing” was not unequivocally or expressly referable to the period of division was stated in *Cairns' Trustees*¹ as appeared from the argument in that case as reported.⁵ The only possible alternative to vesting subject to defeasance was suspension of vesting altogether till the period of division.⁶

Argued for the second, third, and fourth parties;—A share of the truster's estate vested indefeasibly *a morte testatoris* in each of the truster's children who survived him. Where a destination over to the issue of predeceasing children of the testator was unambiguously and *per expressum* referable to the period of division there was a strong presumption against vesting *a morte*. But where the period to which the destination over referred was ambiguous the primary presumption in favour of vesting *a morte* prevailed.⁷ *Cairns' Trustees*¹ was the

¹ 1907, S. C. 117.

² *Fyfe's Trustees v. Fyfe*, 1890, 17 R. 450, *per* Lord Rutherford Clark, at p. 453.

³ *Young v. Robertson*, 1862, 4 Macq. 314; *Bowman v. Bowman*, 1899, 1 F. (H. L.) 69, *per* Lord Watson, at p. 73.

⁴ *Cairns' Trustees v. Cairns*, 1907, S. C. 117.

⁵ 1907, S. C., at p. 121.

⁶ *Parlane's Trustees v. Parlane*, 1902, 4 F. 805; *Forrest's Trustees v. Mitchell's Trustees*, 1904, 6 F. 616.

⁷ *Thompson's Trustees v. Jamieson*, 1900, 2 F. 470, at p. 488, and cases there cited *per* Lord Kincairney; *Taylor's Trustee v. Christal's Trustees*, 1903, 5 F. 1010; *Ogle's Trustees v. Ogle*, 1904, 6 F. 359.

only case where, with no express reference of the destination over to ^{Feb. 25, 1908.} the period of division and no survivorship clause, indefeasible vesting ^{Penny's} *a morte* had been negatived. In *Cairns' Trustees*¹ the distinction now ^{Trustees v.} stated was not considered by the Court. In *Provan v. Provan*,² in *Adam. Parlane's Trustees v. Parlane*,³ and *Forrest's Trustees v. Mitchell's Trustees*,⁴ the reference to the period of division was unequivocal. In *Bowman*,⁵ the opinions were divided as to the effect of a destination over to heirs. The direction to divide at a postponed period was not important.⁶ Conceding the presumption to be that a destination over referred to the period of division, yet it was plain from the cases cited⁷ that this presumption had been held to be overcome in the case of settlements containing expressions the same as those found here, and occurring in the same collocation with the period of division, and even in the case of settlements where the destination over was unequivocally referable to the period of division.⁸ The case of *Cairns' Trustees*¹ was distinguishable. In that case it was said that there was nothing in the context to take the case out of the general rule. Here there was a power to advance. Such a power had been held to be in favour of vesting *a morte*.⁹ But here the power to advance was not a mere incidental provision. It was placed in the forefront of the settlement as one of its main purposes. The trustee was empowered to give one of the children his whole share at once, and so defeat the rights of the grandchildren if the argument for the fifth parties was well founded. It was not likely that the truster intended his trustee to have power to give away the whole share before anything had vested, and when such a power was given it was more reasonable to hold that the testator intended vesting *a morte*.¹⁰ The power to advance was confined to children, and did not extend to issue of children. There was nothing to shew that division was postponed with a view of determining the class of beneficiaries, or that there was any other purpose except that the widow might retain the position of the liferentrix of the truster's heritable estate. The terms of the settlement shewed that the truster specially contemplated benefit to his immediate children rather than to his grandchildren.

At advising, on 25th February 1908,—

LORD STORMONTH-DARLING.—The will in this case is a very simple one, with few complications. I am of opinion that its just construction is governed, so far as the provisions of one will can be said to govern another, by the case of *Cairns' Trustees*,¹ and that we should answer the first question by affirming its second alternative, *i.e.*, by holding that the fee of the shares of the truster's estate vested in his children *a morte testatoris*, but

¹ 1907, S. C. 117.

² 1840, 2 D. 298.

³ 1902, 4 F. 805.

⁴ 1904, 6 F. 616.

⁵ 1899, 1 F. (H. L.) 69.

⁶ *Thompson's Trustees v. Jamieson*, 1900, 2 F. 470, *per* Lord Stormonth-Darling, at p. 493; *Taylor's Trustee v. Christal's Trustees*, 1903, 5 F. 1010; *Ogle's Trustees v. Ogle*, 1904, 6 F. 359.

⁷ *Supra*, p. 664, note 7.

⁸ *Matheson's Trustees v. Matheson's Trustees*, 1900, 2 F. 556.

⁹ *Bowman v. Bowman*, 1899, 1 F. (H. L.) 69, *per* Lord Shand, at p. 78; *Wilson's Trustees v. Quick*, 1878, 5 R. 697; *Matheson's Trustees v. Matheson's Trustees*, 1900, 2 F. 556.

¹⁰ *Bowman v. Bowman*, 1899, 1 F. (H. L.) 69.

Feb. 25, 1908. subject to defeasance in the event of their predeceasing their mother, the liferentrix, leaving issue.

Penny's
Trustees v.
Adam.

LdStormonth-
Darling.

The only material facts are that the testator, Mr Penny of Park in Aberdeenshire, died on 22d January 1902 possessed of a heritable estate worth nearly £20,000, which was almost all he had. He was survived by his widow, who is still alive, and by four sons and four daughters. To his widow he left the liferent of his whole estate. He also appointed her his sole trustee and executrix, giving her power to borrow money on the security of his estate, either for the purpose of setting up any of his children in business, or on their marriage, or for the purpose of paying estate-duty, or for the proper upholding of the buildings on the estate of Park, "all payments made to children being reckoned as part of their ultimate share when the same falls to be divided." With regard to the fee of his estate, after giving the liferent to his widow, he directed the same to be "realised and divided equally on her death among my children, share and share alike, the issue of predeceasing children taking among them the share which would have fallen to their parents if in life."

The eldest son, James Penny of Lochwood, died on 1st November 1905, having received a payment from his father's trust of £609, 17s. 9d. under the powers of the will for the purpose of setting him up in business. He was survived by a widow and three daughters, who are still in pupillarity. It is maintained for the tutors and curators of these pupil children that their father, James Penny of Lochwood, having died before the period of division of the truster's estate, viz., the death of the liferentrix, no share of the fee vested in him, but passed to them as conditional institutes. Their mother also urges a plea which has some similarity to that stated in *Cairns'* case,¹ viz., that she desires to know what her late husband was entitled to under his father's will in order that she may decide whether to claim her legal rights or not. The same principle which led us to sustain the competency of the special case in *Cairns'* case,¹ though the liferentrix was alive and no payments could take place till her death, should enable us, I think, to answer the second question. I should propose to answer it in the affirmative, simply because the testator has expressly said that "all payments made to children are to be reckoned as part of their ultimate share when the same falls to be divided." These words seem to me to include a prospective share, ultimately falling either to an immediate child of the truster or to those in his right.

With regard to the question of vesting, it all turns, just as it did in *Cairns'* case,¹ on the meaning to be attached to the words "the issue of predeceasing children taking among them the share which would have fallen to their parents if in life." Now, when the word "predecease" or "survivorship" occurs in a will, it plainly refers to some point of time—either death before the time, whatever it may be, or survivance after the time. I find that Lord Low in his opinion, at the top of page 124, deals with the words as *in pari casu*, for he speaks of "there being nothing in the context to take the case out of the general rule that provisions in regard to predecease or survivorship refer to the term of payment." And the effect

¹ 1907, S. C. 117.

of the whole judgment was to hold that, while it was impossible to limit Feb. 25, 1908 the words "any predeceasing child" to the event of the immediate child ^{Penny's} predeceasing the testator himself, it would be contrary to the current of ^{Trustees v. Adam.} recent decision to hold that vesting was absolutely suspended. Accordingly we all agreed with Lord Kyllachy in the view which he had expressed in ^{LdStormonth-Darling.} the case of *Wylie's Trustees*,¹ that "a contingency depending merely upon the existence or survivance of issue falls to be read as a resolute and not as a suspensive condition." But we did not decide there—and, as I understand, we do not decide here—that defeasance necessarily takes place on the child's issue merely surviving their parent (which has happened in the case of the three children of James Penny of Lochwood) irrespective of whether or not they also survive the liferentrix (which either may or may not happen). That question was expressly reserved by Lord Kyllachy in his opinion at page 122 of S. C. 1907, and it would hardly be proper that we should attempt to decide it *ab ante*, since it may never arise as a practical question. I think, therefore, that we should reserve it here.

For these reasons I am for answering the first and third branches of the first question in the negative, and the second branch of the first question in the affirmative. Further, I am for answering the second question (as amended) in the affirmative.

The LORD JUSTICE-CLERK and LORD ARDWALL concurred.

LORD LOW was absent.

THE COURT pronounced this interlocutor:—"Answer the second branch of the first question of law . . . in the affirmative, and the first and third branches thereof in the negative: Answer the second question of law . . . as amended in the affirmative: Find and declare accordingly, and decern," &c.

R. C. GRAY, S.S.C.—ALEX. MORISON & Co., W.S.—Agents.

SAMUEL BOAL, Pursuer.—*Crabb Watt, K.C.—Trotter.*

THE SCOTTISH CATHOLIC PRINTING COMPANY, LIMITED, Defenders.—*Morison, K.C.—Findlay.*

No. 92.

Feb. 27, 1908.

Process—Jury Trial—New Trial—Reparation—Excessive Damages—Consent of Parties.—In an application for a new trial on the ground of excessive damages, the Court cannot refuse a new trial and itself assess the damages without obtaining the consent of both parties. ^{Boal v. Scottish Catholic Printing Co., Limited.}

Watt v. Watt, L. R., [1905] A. C. 115, followed.

(SEE S. C. 1907, p. 1120.)

Samuel Boal raised an action of damages against the Scottish Catholic Printing Company, Limited, for a slander contained in a newspaper of which the defenders were the proprietors. The case was tried before the Lord President and a jury on 23d December 1907, when the jury returned a verdict for the pursuer, and assessed the damages at £250.

The defenders applied for a new trial on the ground that the damages awarded were excessive.

1st DIVISION.
Ld. President
and a Jury

Feb. 27, 1908.

Boal v.
Scottish
Catholic
Printing Co.,
Limited.

The LORD PRESIDENT raised the question of the power of the Court, if they considered the damages excessive, to reduce them without granting a new trial, and referred to the case of *Watt v. Watt*¹. The cases of *Johnston v. Dilke*² and *Ritchie & Son v. Barton*³ were also cited as illustrating the practice of the Court.

In reply to the Lord President, counsel for the pursuer and the defenders both stated that they were willing to accept whatever decision as to the amount of damages might be pronounced by the Court in the cause.

LORD PRESIDENT.—The finding of the Court is that the verdict be reduced to £125, which will carry the expenses of the action with the exception of those connected with the motion for a new trial, as to which no expenses will be found due to or by either party. I think it right, for the guidance of the Bar and of the profession in general, to say a few words more, for this is the first case since the decision of the House of Lords in the case of *Watt v. Watt*¹ in which we have had an opportunity of stating the opinion of the Court in this matter. After the judgment in that case, it is no longer possible to follow the old practice by which, in cases where the Court thought that the amount of the damages found due by the jury was excessive, but that the verdict was otherwise justified, the Court were in the habit, without consulting the defender, of giving the pursuer the alternative of accepting the amount which they thought reasonable, or of facing a new trial. The case of *Watt*¹ seems to have laid down that the consent of the pursuer only is not enough, and that a verdict for a new amount can be pronounced by the Court only with the consent of both parties. Accordingly, in the present case we should not have done as we have done to-day, had we not previously obtained the consent of both parties.

I may add that, speaking as the Judge who presided at the trial, it is my opinion that, had a new trial been granted the pursuer would again have secured a verdict; for although I do not think that any *malus animus* was proved on the part of the writer of the article, still I think that the article associated the pursuer with a somewhat doubtful transaction, with which he had nothing to do, and that this had been taken advantage of to injure the pursuer in his profession. At the same time the damages found due by the jury were excessive—more than double the whole earnings of the pursuer for the year. Looking to the fact that his character has been completely cleared, we think that the sum which we have awarded is sufficient compensation.

LORD M'LAREN.—I am of the same opinion. The judgment of the House of Lords in the case of *Watt*¹ is of course subject to the observation that it was pronounced in a case in England, where the conditions and rules relating to jury practice have been largely innovated by statute, while we have kept to the practice as it existed in the time of King George III., when jury trial in civil cases was introduced into this country. But in this case I

¹ L. R., [1905] A. C. 115.

² June 16, 1875, 2 R. 836, interlocutor at p. 842.

³ March 16, 1883, 10 R. 813, interlocutor at p. 819.

cannot think that the differences between English and Scottish practice can prevent a decision of the House of Lords being binding on us in the Courts of Scotland. There may be cases where the defender might have good reason for refusing to consent to the assessment of damages by the Court. It might be that the verdict of the jury, in addition to being excessive in the amount of the damages awarded, was also unreasonable in the view taken of the evidence, though not so unreasonable as to warrant its being set aside as contrary to the evidence. In such a case the defender might be justified in saying,—“The verdict is so absurd that I prefer to have a new trial.” I may say that, if the point were open, my individual opinion would be in agreement with the judgment in the case of *Watt*.¹

Boal v. Scottish Catholic Printing Co., Limited.
Lord M'Laren.

LORD KINNEAR.—I entirely agree with your Lordship. I am satisfied that the judgment of the House of Lords is binding upon us, because it proceeds upon principles which apply as much in this country as in England. I cannot doubt, after your Lordship's explanations, that the defenders in this case have exercised a wise discretion in agreeing to leave the assessment of damages to the Court, but I quite agree that we could not have compelled them to do so.

LORD PEARSON was absent.

THE COURT pronounced this interlocutor:—“The Lords (including the Lord President, who presided at the trial), having heard counsel for the parties, discharge the rule formerly granted, and refuse to grant a new trial: On the motion to apply the verdict of the jury, of consent of parties restrict the amount of damages assessed by the jury to the sum of £125; apply the verdict thus restricted, and in respect thereof decern against the defenders for payment to the pursuer of the said sum of £125, and decern: Find the pursuer entitled to expenses, except the expenses in connection with the motion for a new trial, as to which find no expenses due to or by either party: Remit,” &c.

BRYSON & GRANT, S.S.C.—E. ROLLAND M'NAB, S.S.C.—Agents.

THE ABERDEEN MASTER MASONS' INCORPORATION, LIMITED, Pursuers No. 93.
(Respondents).—*Hunter, K.C.—A. R. Brown.*

LESLIE SMITH, Defender (Reclaiming).—*Dickson, K.C.—Chree.* Feb. 27, 1908.

Trade Union—Restraint of Trade—Title to Sue—Company—Registration—Objects—Memorandum of Association—Trade Union Act, 1871 (34 and 35 Vict. cap. 31), sec. 5—Trade Union Amendment Act, 1876 (39 and 40 Vict. cap. 22), sec. 16.—The Aberdeen Master Masons' Incorporation, Limited, was incorporated under the Companies Acts, and the memorandum of association provided that the objects of the Incorporation, *inter alia*, were “(1) to take over the whole or any of the assets and liabilities of the unincorporated association known as ‘The Aberdeen Master Masons' Association’”; (13) to assist any institution with objects similar to those of the trade, “and not being a trade union”; (22) to do all lawful things conducive to the attainment of the above objects, “provided that the Incorporation”

Aberdeen Master Masons' Incorporation, Limited, v. Smith.

¹ L. R., [1905] A. C. 115.

Feb. 27, 1908. poration shall not impose on its members or support with its funds any regulation which, if an object of the Incorporation, would make it a trade union."

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Master
Masons'
Incorporation,
Limited, v.
Smith.

An action having been raised by the Incorporation against a member for payment of dues, the defender averred that the association, whose assets and liabilities were taken over by the pursuers, was a trade union, and that the pursuers were *de facto* acting as a trade union, and pleaded that the pursuers, being a trade union, were not validly registered as a company, and had no title to sue.

Held (aff. judgment of Lord Ardwall) that as any act which would make the Incorporation a trade union would be null and void under the above quoted clauses of the memorandum of association, the Incorporation could not be a trade union, and plea of "no title to sue" repelled.

Company—Friendly Society—Incorporation of Masons—Membership—Qualifications—Objections to admission pleadable by company and not by member—Liability for dues.—At a meeting, on 8th July 1904, of the directors of the Aberdeen Master Masons' Incorporation, Limited, incorporated under the Companies Acts, S. was admitted as a member of the Incorporation. On account of his age and for other reasons, S. was, in accordance with the articles of association, ineligible for membership, but he accepted membership, and acted as a member till 20th March 1906, when he sent in a letter of resignation. On 4th June 1906 the Incorporation raised an action against S. for payment of dues incurred by him prior to the date of his resignation. S. pleaded that he never was a member of the Incorporation, and had consequently never incurred the dues.

Held (aff. judgment of Lord Ardwall) that the defender was liable for the sum sued for on the ground that he was a member of the Incorporation, the objections to his admission being pleadable by the Company and by no one else; Lord Kinnear also holding that whether he was technically a member or not, he was bound by his agreement with the Incorporation.

1st DIVISION.
Lord Ardwall.

On 4th June 1906, the Aberdeen Master Masons' Incorporation, Limited, raised an action against Leslie Smith, master mason, Aberdeen, for payment of certain dues alleged to have become payable by him under the articles of association of the Incorporation, between 8th July 1904 and 20th March 1906, during which period he was said to have been a member of the Incorporation.

The action was defended on two grounds, (1) that the pursuers were a trade union, that their registration as a company was accordingly void, and that they had no title to sue; and (2) that the defender had never been a member of the Incorporation. Apart from these questions, the defender's liability for the sum sued for was not denied.

The parties, *inter alia*, averred as follows:—(Cond. 1) "The pursuers were incorporated under the Companies Acts, 1862 to 1900, on 15th October 1903, as a company limited by guarantee, and have their registered office in Aberdeen." (Ans. 1) "Admitted that the pursuers registered themselves under the Companies Acts. The pursuers are, however, a trades union in the sense of the Trade Union Acts, 1871 and 1876. By section 5 of the Trade Union Act of 1871 their registration is therefore void." (Cond. 2) "The objects for which the Incorporation was formed are set forth in the memorandum of association." * (Ans. 2) "The

* The memorandum of association provided, *inter alia*:—

"Third.—The objects for which the Incorporation is formed are:—(1) To take over the whole or any of the assets and liabilities of the unincorporated Association known as 'The Aberdeen Master Masons' Association.' . . .

memorandum of association is referred to for its terms. . . . Ex- Feb. 27, 1908.
 plained that the Incorporation aims at regulating the relations between
 masters and men, and between masters and masters. The Incorpora-
 tion is the successor of a trade union known as 'The Aberdeen Aberdeen
 Master
 Masons' Association.' Its first object, as set forth in its Masters' Incorporation,
 memorandum of association, was 'to take over the whole or any of Limited, v. Smith.
 the assets and liabilities' of said trade union or unincorporated asso-
 ciation, which, under bye-laws agreed to by it and the United Opera-
 tive Masons' and Granite Cutters' Union, imposed restrictive conditions
 on the conduct of the building trade in Aberdeen with regard, *inter*
alia, to working hours, subcontracting, rate of wages, and employment
 of apprentices. Said bye-laws further provided that members of said
 Union should not work for employers who were not members of the
 Association, and that members of the Association should not employ
 operatives who were not members of the Union. In pursuance of
 the policy embodied in said bye-laws the pursuers entered into an
 agreement with said Union, whereby they regulate the employment
 of workmen and their wages. In particular, it is provided by said
 agreement that the operatives' Union should not, without consent of
 pursuers, allow any member of that Union to work for any master
 who is not a member of the pursuers' Association. The pursuers are
 thus a trade union." (Cond. 5) "The defender was admitted a mem-
 ber of the Incorporation on 8th July 1904, and he was duly furnished
 with a certificate of membership in terms of the rules. . . . The
 defender retained possession of said certificate, and he continued as
 a member until 20th March 1906, when he resigned his member-
 ship. . . ." (Ans. 5) "Admitted that defender in 1904 received
 a certificate in terms stated. *Quoad ultra* denied. Explained that
 defender was never eligible for membership. Reference is made to
 defender's statement of facts."

In his statement of facts the defender averred:—"The defender on
 8th July 1904, when he is alleged to have been admitted a member,
 was sixty-eight years of age, or eighteen years beyond the prescribed
 age limit for admission to membership; he never made any formal
 application for membership, never was medically certified to the
 directors, nor proposed, seconded, or balloted for; he made no pay-
 ment of entry-money, and accordingly could not, under the articles,
 be admitted, and was never legally admitted, a member of the Incor-
 poration." *

(13) To establish . . . or otherwise assist any association . . . with objects
 altogether or in part similar to those of the trade and not being a trades
 union. . . . (22) To do all such other lawful things as are incidental or
 conducive to the attainment of the above objects, or any of them, provided
 that the Incorporation shall not impose on its members or support with
 its funds any regulation which, if an object of the Incorporation, would
 make it a trade union. . . . (25) To do all such other lawful things as are
 incidental or conducive to the attainment of the above objects, or any of
 them."

It is unnecessary to refer in detail to the other objects, which were osten-
 sibly to promote the study of the science of building and provide allow-
 ances to members and their widows, and which were not *prima facie* in
 restraint of trade.

* The articles of association provided, *inter alia*:—"ADMISSION OF MEM-
 BERS.—*Conditions of Benefits*, &c.—42. The following shall be held to
 be the first members of this Incorporation, viz.:—(List of names). "43.

Feb. 27, 1908. The defender's statements regarding his age and the mode of his election were not denied.

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The following narrative of the facts regarding the defender's admission to the Incorporation, as disclosed in the averments of parties, is taken from the opinion of the Lord Ordinary (Ardwall):—

"The pursuers were incorporated on 15th October 1903 for the purpose, *inter alia*, of superseding and taking over the assets and liabilities of an unincorporated association known as the Aberdeen Master Masons' Association. The defender was an active member of this association, and apparently took a great interest in the arrangements that went on for adjusting the constitution of the incorporated association which it was proposed to form. This history is set forth in detail in answers 2 and 3 to the defender's Statement of Facts, but whether it is quite correct or not, it is certain that, owing to the defender's disapproval of some of the proposals for the formation of the new association, he declined to join the pursuers' incorporation at the date of its being incorporated on 15th October 1903. It seems, however, that afterwards he became desirous of joining the incorporation, and at a meeting of the pursuers' directors, on 8th July 1904, he was, in accordance with his own desire, formally admitted a member of the incorporation on the same terms as if he had been a person whose name had been mentioned in Article 42 of the articles of association. These persons were held to be the first members of the incorporation, and were, as the defender was, members of the former unincorporated association already referred to. All those persons were admitted as original members, without payment of entry-money and under exemption from the conditions applicable to new members under Article 44. It must be assumed that at, or at all events immediately after, his admission, the defender was aware of this, and in law he must be presumed to have been acquainted with the articles and memorandum of association on becoming a member of the incorporation. He never, however, attempted to get rid of his obligations, nor did he forego his privileges as a member; on the contrary, he took an active part in the business of the incorporation, was elected and acted as a director, and in every way conducted himself as a member till 20th March 1906, when he wrote a letter in these terms,—'I hereby resign membership of the Aberdeen Master Masons' Incorporation as at this date.'"

The pursuers pleaded;—(1) The defender, having been a member of the pursuers' Incorporation during the period condescended on, decree ought to be pronounced against him, in terms of the conclusions of the summons. (7) The defender, having agreed to become a member of the pursuers' Incorporation on the footing that the conditions contained in article 44 of the articles of association were waived

The above-named members . . . shall be entitled to all benefits of the Incorporation, including right to participate in the funds of the Incorporation, as hereinafter provided, without payment of entry-money. . . .
"44. The directors shall have the power of admitting new members of good character, not exceeding fifty years of age, such members being proposed by one of the directors and seconded by another, and thereafter balloted for. No new member . . . shall be admitted unless, at the date of his being proposed, his life be certified by a duly qualified medical man as a good average insurable life. Every new member . . . shall, upon his admission, pay £50 of entry-money to the secretary and treasurer of the Incorporation."

in his favour, is barred *personali exceptione* from maintaining that his admission was *ultra vires*. Feb. 27, 1908.

The defender pleaded;—(2) The pursuers, being a trade union, are not validly registered, and have no title to sue. (4) The defender never having been eligible for admission to membership under pursuers' articles of association, his alleged admission was *ultra vires* of the incorporation and the directors. (5) The defender, never having become a member of the incorporation, is entitled to absolvitor.

The case was heard before Lord Ardwall, Ordinary, who, on 2d February 1907 repelled the defences, and continued the cause.*

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* "OPINION.—This is an action brought against the defender, who is alleged to be a member of the pursuers' Incorporation, and it is practically an action of accounting, with the view of determining what sum is due by him as a contribution to the funds of the Incorporation, and the defender resists the action mainly on three grounds.

"(First) That the Incorporation is a trade union, and that accordingly, in terms of the Trade Union Act, 1871 (34 and 35 Vict. cap. 31), sec. 5, and the Trade Union Amendment Act, 1876 (39 and 40 Vict. cap. 22), sec. 16, the registration of the pursuers under the Companies Acts is void, and that therefore they have no title to sue, as was decided in the case of the *Edinburgh and District Aerated Water Manufacturers Defence Association v. Jenkinson*, 5 F. 1159. I am of opinion that this argument is ill founded. This question, I think, must be judged of by the constituting documents of the company. Now, by article 13 of the memorandum of association, No. 18 of process, the purposes of incorporation are set forth as follows:—

"'To establish, subsidise, promote, co-operate with, receive into union, become a member of, act as or appoint trustees, agents, or delegates to control, manage, superintend, lend monetary assistance to or otherwise assist any association and institutions, incorporated or not incorporated, with objects altogether or in part similar to those of the trade, and not being a trades union.' Further, by article 22 of the said memorandum, it is provided that the following shall be among the objects for which the Incorporation is founded:—'To do all such other lawful things as are incidental or conducive to the attainment of the above objects, or any of them, provided that the Incorporation shall not impose on its members, or support with its funds, any regulation which, if an object of the Incorporation, would make it a trade union.'

"In face of these provisions, it seems to me that it is vain to argue that this is a combination 'for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business,' because, if the directors or members of the Incorporation were to make any regulation, or perform any act which would make the Incorporation a trade union, such act would be wholly void and null under the above recited clause of the memorandum of association.

"(Second) The defender maintains that, even assuming the Incorporation to be a properly constituted company, the defender never was a member of it, and never could lawfully become so in respect of the provisions of article 44 of the pursuers' articles of association, which are to the effect that the directors have only power to admit as members persons not exceeding fifty years of age, and that only on their lives being certified by a duly qualified medical man as good average insurable lives. Now, it is admitted that at the date when the defender was admitted a member of the Incorporation he possessed neither of these qualifications, being at the date of his alleged admission sixty-eight years of age, and never having been medically certified. The important facts regarding the defender's admission to the society, and his subsequent conduct as a member, are as follows:—(His

Feb. 27, 1908. Thereafter, on 1st March 1907, the Lord Ordinary (Guthrie) decerned against the defender for payment of the sum sued for.

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The defender reclaimed.

The case was argued before the First Division on 22d January 1908.

Argued for the defender;—(1) The articles of association shewed that the Incorporation was a trade union. Its primary object was to take over the assets and liabilities of the Aberdeen Master Masons' Association, which was a trade union. In any event, in spite of its ostensibly innocent objects, the Incorporation was acting as a trade union, and the defender was entitled to a proof of his averments to that effect.¹ Being a trade union, it was not validly registered under the Companies Acts, and had no title to sue.² (2) The admission of the defender to the Incorporation was *ultra vires* of the directors, and he never was a member.

Argued for the pursuers;—(1) There was nothing in the constituting documents of the Incorporation to shew that they were a trade union, and any acts which would make them a trade union would be *ultra vires* and not the acts of the Incorporation. (2) The admission of the defender was ratified at a general meeting of the company, and was quite regular; and in any event, the objections alleged were not statable by him, especially in view of the fact that he had acted as a member for two years.

At advising,—

LORD PRESIDENT.—In this case I agree with the Lord Ordinary, and really have nothing to add to what his Lordship says. It seems to me that, first of all, looking at the constituting documents of the association it is impossible to find that this is a trades union. Secondly, as regards the other question of liability, it seems to me that the only objections to receiving the defender as a member of the association were objections which were pleadable by the company and by no one else, and that he cannot take advantage of them on his own behalf. In other words, I think this class of question has been decided again and again in liquidation cases, and if the matter had been tested by the company being wound up, there is no doubt

Lordship's narrative is quoted *supra*)—But it is said that it was *ultra vires* of the directors to admit the defender as a member, and that no actings of his can make him one. I do not agree with this view. If the defender's admission as a member was contrary to the constitution of the Incorporation, it was only so because it was contrary to the articles of association, and not to the memorandum. It was in the power of the Incorporation to alter the articles of association, or to homologate anything done in violation of them, and this they did by resolution of 29th October 1906. But the point is, in my view, a simple one. The defender's agreement to become a member was a contract between him and the Incorporation, and he is barred by his actings from resiling from that agreement, and the Incorporation having all along impliedly, and afterwards expressly, homologated that agreement, it therefore must be held to be valid. . . ."

¹ Procurator-Fiscal v. Wool-Combers in Aberdeen, Dec. 15, 1762, M. 1961; Barr v. Carr, Jan. 21, 1766, M. 9564.

² Edinburgh and District Aerated Water Manufacturers Defence Association, Limited, v. Jenkinson & Co., July 15, 1903, 5 F. 1159; Trade Union Act Amendment Act, 1876 (39 and 40 Vict. cap. 22), sec. 16.

whatsoever in my mind that this gentleman would have been put upon the list as a contributor. That really ends the matter, because whether there could or could not have been a question as to whether he could get out of the company by the simple act of resignation, that question is not raised in this proceeding, as the sum for which he is sued is a sum entirely due before the date of his resignation. I am for adhering.

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LORD M'LAREN.—I concur.

LORD KINNEAR.—I am of the same opinion. I think the defender is liable upon his own agreement with the company for the sum sued for, whether he is technically a member or not.

LORD PEARSON was absent.

THE COURT adhered.

ALEX. MORISON & Co., W.S.—HENRY & SCOTT, W.S.—Agents.

STAGG & ROBSON, LIMITED, Pursuers (Reclaimers).—*Dickson, K.C.* No. 94.
—*Hon. W. Watson.*

JOHN STIRLING AND OTHERS, Defenders (Respondents).—*Morison, K.C.* Feb. 28, 1908.
—*J. S. Mackay.*

Bill of Exchange—Proof—Parole—Competency—Bills of Exchange Act, 1882 (45 and 46 Vict. cap. 61), sec. 100.—Section 100 of the Bills of Exchange Act, 1882, enacts,—“In any judicial proceeding in Scotland, any fact relating to a bill of exchange . . . which is relevant to any question of liability thereon, may be proved by parole evidence. . . .”

Stagg &
Robson,
Limited, v.
Stirling.

By a written agreement two parties stipulated that payment of certain goods, sold but not delivered, should be made by bills, which were to be guaranteed. Certain of the bills not having been met, the holders raised an action against the guarantors for payment of the balance. In defence a verbal agreement between the parties was alleged to the effect that the bills were to be renewed at maturity if the goods had not been delivered, and it was averred that delivery of all the goods had not been accepted.

The Lord Ordinary (Dundas), holding that the above section applied, allowed a proof before answer.

The pursuers having reclaimed, *held (rev. the judgment)* that the defence was irrelevant, in respect that the bills were granted in implement of the written agreement, and that the terms of this agreement could not be modified by parole evidence.

IN January 1907 Stagg & Robson, Limited, van and wagon makers, Selby, Yorkshire, raised an action against Scott, Stirling, & Company, Limited, carriage builders at Hamilton and Twickenham, for payment of the price of certain carriage bodies which had been sold by the former to the latter, but had not been delivered. On 16th May 1907 the action was taken out of Court on terms which were embodied in the following document, which was regularly signed before witnesses on behalf of each of the parties:—

1st DIVISION.
Lord Dundas.

“HEADS of SETTLEMENT, Stagg & Robson, Ltd., v. Scott, Stirling, & Co., Ltd., dated 16th May 1907.

“This action in the Scotch Courts is to be withdrawn on the fol-

Feb. 28, 1908. **Stagg & Robson, Limited, v. Stirling.** lowing terms, which are to be drawn up by the parties' Scotch solicitors respectively in accordance with Scotch law :—
"Scott, Stirling, & Co., Ltd., to pay to Stagg & Robson, Ltd., the sum of £2250 in the following manner :—

"By £250 cash forthwith.
£500 bill at one month.
£500 bill at three months.
£500 bill at four months.
£500 bill at five months.

"Scott, Stirling, & Co., Ltd., to pay the usual bank rate discount, and each of the bills are to be guaranteed personally, jointly, and severally by James Scott of Burnbank, Carluke, N.B., John Stirling of Twickenham, and Laurence Miles of Twickenham.

"On payment of the £250 cash three of the bodies are to be delivered; the remainder of the bodies undelivered are to be delivered, if required, to Scott, Stirling, & Co., Ltd., when the first bill for £500 is met."

On 27th July 1907 John Stirling, Laurence Miles, and James Scott signed a guarantee for payment of the bills, in accordance with the agreement.

On 30th September 1907 Stagg & Robson raised the present action against the guarantors for payment of the contents of the bills as far as the same had not been met.

In defence the defenders stated :—(Stat. 2) "On or about 16th May 1907 an arrangement was come to between the defender John Stirling, on behalf of the said Scott, Stirling & Company, and the pursuers' managing director, Mr Stagg, on behalf of the pursuers, in pursuance of which the said action was taken out of Court. It was agreed that the said Scott, Stirling, & Company should pay the sum of £250 to the pursuers. It was also agreed that the said Scott, Stirling, & Company should accept and pay for said goods as they required them in the ordinary course of business. It was further agreed that the said Scott, Stirling, & Company should grant four bills for £500 each in favour of the pursuers at one month, three months, four months, and five months respectively. It was agreed that the said bills should be renewed at maturity in the event of the said Scott, Stirling, & Company not having taken delivery of goods to the amount of the cash paid by them and of the bills which had fallen due. It was on the faith of this agreement that the defenders granted the guarantee." (Stat. 3) "The said Scott, Stirling, & Company duly paid the sum of £250 to the pursuers, and on 17th May 1907 they granted the said bills. The said bills thus matured on 20th June, 20th August, 20th September, and 20th October 1907 respectively." (Stat. 4) "The said Scott, Stirling, & Company duly paid to the pursuers the sum of £500 contained in the bill which fell due on the 20th June 1907. They have also paid the sum of £100 in respect of the bill which fell due on 20th August 1907. In terms of the agreement of 17th May 1907, the said Scott, Stirling, & Company have accepted delivery of certain of said goods. The said payments of £250, £500, and £100 are more than sufficient to cover the price of all goods of which the said Scott, Stirling, & Company have accepted delivery from the pursuers. In terms of the agreement of 17th May 1907 the pursuers are bound to renew the said bill which fell due on 20th August 1907 to the extent of £400, and to renew the bills which fell due on 20th September and 20th October 1907 to their full amount. They are

not entitled to demand payment of the said sums of £400 and £500 Feb. 28, 1908. and £500 from the said Scott, Stirling, & Company, and in refusing to pay said sums the said Scott, Stirling, & Company have not failed to fulfil their obligations under said bills. The said Scott, Stirling, & Company have paid all sums which are due by them to the pursuers under said bills, and the defenders are not liable to pay any sums to the pursuers under said guarantee." Stagg & Robson, Limited, v. Stirling.

The pursuers denied that there was any agreement as to the renewal of the bills.

The pursuers pleaded;—(1) The defenders having under the guarantee condoned on undertaken liability to the pursuers for the due payment by Scott, Stirling, & Company of the amounts sued for, and the said Scott, Stirling, & Company having failed to pay the same, the pursuers are entitled to decree against them as concluded for. (2) The defences are irrelevant, and should be repelled.

The defenders pleaded;—(3) The pursuers being bound to renew said bills, are not entitled to decree for the sums sued for.

On 22d November 1907 the Lord Ordinary (Dundas) allowed a proof before answer.*

* "OPINION.— . . . The defenders moved for a proof of their averments. They claimed that they are entitled to prove by parole evidence the verbal terms of agreement which they allege, in virtue of section 100 of the Bills of Exchange Act, 1882 (45 and 46 Vict. c. 61). That section provides that 'in any judicial proceedings in Scotland any fact relating to a bill of exchange . . . which is relevant to any question of liability thereon, may be proved by parole evidence.' Now, this action is a 'judicial proceeding in Scotland,' and the facts which the defenders allege appear *prima facie* to be quite relevant to the question of their liability under the bills mentioned in the summons. I may refer to two recent decisions as illustrating the wide scope and effect which section 100 has been held to possess. The first of these (*Drybrough & Company, Limited*, 1903, 5 F. 665) has features strongly resembling the present case. The defender there was allowed parole proof of an alleged verbal agreement to the effect that the bill on which he was being sued would be renewed from time to time by the pursuers, subject to certain conditions which the defender said he had fulfilled. This decision was approved and followed in *Viani & Company*, 1904, 6 F. 989, where the defender was allowed a proof that the pursuer (indorsee and holder of the bill) had verbally agreed that if the bill was in his hands at maturity he would not call upon the defender (the acceptor) to retire it. At the discussion in the Procedure-roll, I heard a forcible argument by the pursuers' counsel to the effect that, while he fully accepted the authority of the decisions, the proof sought by the defenders should not be allowed, because the language of the written 'Heads of Settlement' is unambiguous, and absolutely inconsistent with the terms of agreement which the defenders allege to have been verbally adjected; that the defenders' averments, therefore, were in face of the written agreement, palpably irrelevant, and that nothing in the Bills of Exchange Act warranted an attempt to contradict by parole proof the written agreement of parties as evidenced not by the bills themselves but by the 'Heads of Settlement.' I do not think these contentions are sound. I do not consider that the language of the 'Heads of Settlement' is such as necessarily to exclude or negative the defenders' statement of the agreement as a whole. It certainly seems singular, if the latter is true, that no allusion to renewal is made either in the 'Heads' themselves or in the separate guarantee which was granted in pursuance thereof. But the idea of renewal is not expressly negatived, and the fourth paragraph of the 'Heads of Settlement' seems to

Feb. 28, 1908.

The pursuers reclaimed.

Stagg &
Robson,
Limited, v.
Stirling.

The case was argued before the First Division on 29th January 1908.

Argued for the reclaimers;—There was no room here for the application of section 100 of the Bills of Exchange Act, 1882.¹ The defence put forward was not “relevant to any question of liability” on the bills, but was an attempt to vary by parole evidence the agreement contained in the Heads of Settlement, in implement of which the bills were granted. That agreement was in writing, and its terms were unambiguous and final, and could not be altered by parole evidence.

Argued for the respondents;—Under section 100 of the Bills of Exchange Act, 1882,¹ it was always competent for the granter of a bill to prove a parole agreement contradicting his liability on the face of the bill.² In the present case the agreement was partly written and partly verbal, and the defenders were entitled to prove it by parole evidence so far as that was necessary for their case. As guarantors of the bills, the defenders were entitled to plead any defence which would have been competent in an action against the granters.

At advising,—

LORD PRESIDENT.—In this case the Lord Ordinary has allowed a proof, and it is against that interlocutor that the reclaiming note has been taken. The pursuers had raised an action against the defenders for the price of goods supplied, and that action was settled upon terms which were embodied in a written document, regularly signed before witnesses, and called “Heads of Settlement.” These heads of settlement settled that the action in the Scottish Courts was “to be withdrawn on the following terms,” and then it was provided that Scott, Stirling, & Company were to pay Stagg & Robson, Limited, the pursuers, the sum of £2250 in the following manner:—£250 in cash, £500 by bill at one month, and three other bills for a like sum of £500 at three, four, and five months respectively. Then there was a further stipulation that the bills were to be guaranteed personally, jointly and severally, by three persons mentioned, and after that there were certain stipulations as to the time within which the goods were to be delivered. Now, the

square in some measure with the defenders’ averment about taking delivery of the goods only as they required them. It is also to be observed that the written agreement does not provide that the pursuers are to receive certain payments at stipulated times, and that bills are to be granted for these, but only that the defender shall ‘pay’ the pursuers ‘in the following manner,’ viz., by a payment in cash (which was duly made), and granting four bills at such and such dates (which were duly granted). It seems, therefore, that the pursuers’ action must rest, not on the ‘Heads of Settlement,’ but on the bills themselves, and it is in fact so laid. Upon the whole matter, I think I must allow a proof before answer, the defenders to lead.”

¹ Quoted in rubric.

² National Bank of Australasia v. Turnbull & Co., March 5, 1891, 18 R. 629, *per* Lord Adam, at p. 637; Gibson’s Trustees v. Galloway, Jan. 22, 1896, 23 R. 414, *per* Lord M’Laren, at p. 416; Drybrough & Co., Limited, v. Roy, March 17, 1903, 5 F. 665; Viani & Co. v. Gunn & Co., July 14, 1904, 6 F. 989.

bills as they became due were not all honoured. The first was paid, but Feb. 28, 1908. the second only partly, and the others not at all, and the present action is raised to recover the amount. The Lord Ordinary has allowed a proof of an averment which really comes to this, that there was a verbal agreement at the same time that these bills should be renewed when they fell due, and he has felt himself bound to do that because of the 100th section of the Bills of Exchange Act, which provides that "in any judicial proceedings in Scotland any fact relating to a bill of exchange, which is relevant to any question of liability thereon, may be proved by parole evidence." I am bound to say that I do not think that that provision of the statute has any application to the matter in hand. It does not mean that there is a sort of magic in the word "bill," and that the moment you allege anything with regard to a bill you at once upset the whole law of evidence. The meaning of the provision, I think, was clear enough to allow you to prove by parole, what the rules of law might not allow to be proved by parole, namely, the true relations to each other of the parties upon the bill; that is to say, that the indebtedness which, *prima facie* on the bill, is upon the acceptor, might be shewn to be not really upon the acceptor; or, in other words, that the true position of the names on the bill might be proved. But I do not think that that section has anything to do with the general rule of law, which is that you cannot alter a written agreement by parole evidence. The result, I think, would be almost fantastic, because the provision in the agreement that these bills were to be guaranteed by certain persons would be practically swept out of existence. They would only, of course, be bound to guarantee the particular bills which are there mentioned, and if these bills were renewed and represented by other bills, then the guarantee would fly off. I am therefore of opinion that there is no relevant defence to the action, and that decree should be pronounced in terms of the conclusions of the summons.

Stagg &
Robson,
Limited, v.
Stirling.
—
Ld. President.

LORD M'LAREN.—I think it is settled that the time-honoured defence that a bill was merely a matter of form and was not intended to impose liability on anyone, is not admissible under the Bills of Exchange Act any more than it was at common law. In one of the first cases that came before this Court under the Bills of Exchange Act (*The National Bank of Australasia v. Turnbull & Company*,¹) we found that there was no relevant allegation of any contract of which the bills formed a term, but only a general statement that the acceptor was not intended to be liable, and it was held that the Legislature could not have intended that the question whether a bill was an obligatory document or not was to be tried upon parole evidence. In the present case the allegation is not very different. It is in substance that there was an express or implied obligation to renew the bills when they fell due. Now, my opinion is, that wherever it can be shewn that a bill is one ingredient of a contract, then you are entitled to prove the contract, and it may be that under some condition of the contract the bill is not enforceable. Again, as a bill is in form a unilateral document although it is always stated to be for value received, any question relative

¹ 1891, 18 R. 629.

Feb. 28, 1908. to the consideration of the bill may under the statute be proved by parole evidence, and we have examples in our practice at common law of allowing a proof on a question of no value, although that was not invariably done, and in fact was only done in exceptional cases. But what makes it clear in the present case that the defence is impossible is this, that the drawer of the bill stipulated that he should have the personal guarantee, jointly and severally, of the directors of the Company for payment of the bill, and there is no stipulation that that guarantee should be renewed or made applicable to any substituted bill that might afterwards be granted. Now, can anything be more absurd than to suppose that while stipulating for a personal guarantee for the payment of these bills, it was at the same time agreed that the bills should be renewable and that the guarantee should then cease to be binding? It is evident here that the guarantee would be altogether futile if this defence could be received, and if proof were admissible to shew that the bills were renewable. I therefore agree with your Lordship.

LORD KINNEAR.—I am of the same opinion. The old rule of our law, which has been displaced by the 100th section of the Bills of Exchange Act, created a presumption of onerosity so strong that, although it might be contradicted, it was not allowed to be disproved except by the writ of the party seeking to enforce liability on the bill, or else by a reference to his deposition on oath. That rule was supposed to be supported by favour to trade, but in comparatively recent times it was seen that it might operate very unjustly, and yet the rule was so well settled that the Court could not disregard it. Now, I apprehend that the main purpose of the section in question was to remedy that injustice, but I think it is extremely probable that the language of the clause went somewhat beyond what was required to remedy the particular mischief to which I have referred, and it may be that it would allow parole evidence being admitted with reference to other questions of liability than those which depend on mere presumption of onerosity. However that may be, I am certainly of opinion that it can only apply to cases where the alleged liability is rested exclusively upon a bill and not upon a bill as the mere method of carrying into effect a written contract. Now, in the present case the bills were granted for the purpose of working out a contract which is expressed in writing, and the terms upon which the bills were to be drawn and accepted are not therefore to be gathered from the mere terms of the bill itself, but from the agreement which was carried into execution by their being accepted. I think it is contrary to perfectly well-settled rules of evidence to allow the terms of that agreement to be altered or enlarged by parole evidence, and I therefore agree with your Lordships that there is no relevant case to be sent to proof.

LORD PEARSON was absent.

THE COURT recalled the interlocutor reclaimed against, and decerned against the defenders in terms of the conclusions of the summons.

ROBERT AITKEN RENNIE, Complainer.—*Munro—A. M. Mackay.*
WILLIAM JAMES, Respondent.—*A. M. Anderson.*

No. 95.

Feb. 28, 1908.

Process—Res Judicata—Competent and Omitted—Expenses—Decree for Expenses in name of Agent-disburser—Objections not stated timely.—*Rennie v. James.*
A party to an action in the Sheriff Court who had allowed the agent of his opponent to obtain decree for expenses in his own name, held (aff. judgment of Lord Mackenzie) to be barred by the exception of competent and omitted from suspending a charge on the allegation (1) that the agent had not, at the time when the motion for expenses was made, paid his dues as law-agent, and (2) that *de facto* he was not the agent-disburser.

Ewing v. Wallace, Aug. 13, 1832, 6 W. & S. 222, followed.

IN July 1905 Robert Aitken Rennie, writer, Glasgow, raised an action of declarator and removing in the Sheriff Court at Dunoon against E. S. Duncan, Glasgow, who instructed his agents, M'Ilwraiths & Steel, solicitors, Greenock, to defend the same. The defence was conducted by William James, writer, who was in the employment of M'Ilwraiths & Steel, as their procurator. The action was ultimately decided in favour of the defender, and the pursuer was found liable in expenses. An account of the defender's expenses was lodged and taxed by the Auditor, and by interlocutor of 19th July 1906, which bore that parties had been heard " . . . on the motion for the defender to allow the decree for expenses to go out and be extracted in name of Mr William James, solicitor, Greenock, the agent-disburser thereof," the Sheriff-substitute (Penney) made avizandum, and on 21st July he granted decree against the pursuer for the taxed amount, and allowed the decree "to go out in name of the defender's agent (Mr James) as agent-disburser." No objections were stated at the time by the pursuer to the Sheriff.

1ST DIVISION.
Lord Mac-
kenzie.

Thereafter Mr James extracted the decree, and charged Mr Rennie to make payment to him of the sums contained therein. A note was then presented by Mr Rennie against Mr James praying the Court to suspend the charge.

The nature of the complainer's averments sufficiently appears from his pleas.

The complainer pleaded;—2. The said pretended decree is incompetent and *ultra vires* of the Sheriff-substitute, and the charge following thereon is inept, in respect—(1) That there was no motion made to the Sheriff asking for decree in name of the respondent as agent-disburser; (4) that the respondent was not agent-disburser in the said action; (5) that the respondent was not at the time the said motion was made entitled under the Law-Agents Act, 1873, and the Stamp Act, 1891, to act as agent in the cause or to recover costs therein.

The respondent pleaded that the first ground of suspension stated by the complainer was unfounded in fact, and that he was barred by the exception of competent and omitted from pleading the other grounds of suspension above stated.

A proof was taken, into the details of which it is unnecessary to enter. It was held on the evidence that the complainer had failed to prove that no motion was made to the Sheriff asking for decree in name of the respondent as agent-disburser.

Feb. 28, 1908. On 1st June 1907 the Lord Ordinary (Mackenzie) repelled the reasons of suspension and refused the prayer of the note.*

Rennie v.
James.

The complainer reclaimed.

The case was argued before the First Division on 31st January 1908.

Argued for the complainer;—The Sheriff had exceeded his jurisdiction in giving decree in name of the agent-disburser, for no motion to that effect had ever, in point of fact, been made before him. In any event, the party in whose name the decree had gone out was not the agent-disburser, he was only the procurator in the employment of the agents by whom the disbursements were made, and who alone were entitled to the benefit of the decree.¹ The Act of Sederunt, 10th July 1839, which by section 106 empowered the Sheriff to grant decree in the name of "the procurator who conducted the suit," applied only to the agents acting on behalf of the party. Further, the respondent had not paid the law-agent's duty imposed by the Stamp Act,² and was not entitled to sue for his fees. The plea of competent and omitted was not pleadable in an appeal against the decree of an inferior Court.

Argued for the respondent;—The interlocutor of the Sheriff bore that a motion had been duly made for expenses in the name of the agent-disburser, and the complainer had failed to prove the contrary. As to the other grounds of suspension, the complainer was barred from pleading them by the exception of competent and omitted.³ They had not been stated before the Sheriff—as they might have been—and they could not be stated now. The complainer should have appealed the interlocutor of the Sheriff-substitute to the Sheriff. In any event the objections were not well founded. In a question of this kind stamp-duty was not exigible,⁴ and if it were, the respondent

* "OPINION.— . . . I have left to the end two points which were strongly urged on behalf of the complainer. The first is that Mr James was not 'the procurator who conducted the suit' within the meaning of section 106 of the Act of Sederunt of 1839. It was maintained that the 'procurator who conducted the suit' meant the same thing as the agent-disburser, and that it was Mr Walker [the sole partner of M'Ilwraiths & Steel], and not Mr James, who disbursed all the expenses in connection with the case. The second point is contained in the amendment to statement 9, viz., that the respondent is not, and was not at the time he obtained the decree, a certificated enrolled law-agent, or at least that he had not paid the duties for the period then current entitling him to act as a law-agent; and that accordingly he was not entitled under the Law-Agents Act, 1873, and the Stamp Act, 1891, to act as agent in the cause or to recover costs therein. I do not consider it necessary to express an opinion upon the merits of either of these pleas. I consider that the complainer is barred by the exception of competent and omitted from maintaining either of them as a reason for the present suspension. The decision in the case of *Ewing v. Wallace*, 6 W. & S. 222, seems to me a sufficient authority to cover both pleas.

"I am accordingly of opinion that the reasons for suspension should be repelled and the note refused, with expenses."

¹ Rennie & Playfair v. Aitken, June 8, 1811, F. C.; Bell's Comm. vol. ii. pp. 35, 37, note 3.

² Stamp Act, 1891 (54 and 55 Vict. cap. 39), sec. 47.

³ Ewing v. Wallace, Aug. 13, 1832, 6 W. & S. 222.

⁴ Grierson's Law of Stamp-Duties, 1907 ed., p. 109, note to sec. 43.

should have an opportunity of paying it now and putting the matter right. Feb. 28, 1908.

At advising,—

Rennie v.
James.

LORD PRESIDENT.—This is a case where a gentleman being in possession of a decree, proceeds to make it good by charging, and this is a suspension of the charge on that decree. Now, I need scarcely say that a decree cannot be opened up unless there is something clearly wrong about it. What is said to be wrong with this decree is this: It is a decree which was issued for a sum of expenses in the name of an agent-disburser. The party against whom the decree is sought to be enforced says that the decree is truly a mistake, because no motion was ever properly made in the case to allow the decree to go out in the name of the agent-disburser; and then he says it is bad for two other reasons—(firstly) that the gentleman who holds it was not, in fact, the agent-disburser; and (secondly) that he could not enforce it because he had not paid certain stamp-duties which he ought to have paid in order to have a licence to practise as an agent. I do not say that it would be impossible to suspend a decree upon averments that it had never been moved for, and that no decree had ever been in truth pronounced. If you could suppose a case where it could be clearly proved that the Judge had never really pronounced any decree at all, and that the so-called decree was what might be called a figment of the clerk's imagination, and not authorised by any pronouncement of the Judge, I think in such a case the decree could be suspended. But certainly, if ever there is a case where the *maxim omnia præsumuntur rite et solenniter acta esse* should apply, the proceedings of a Court of law supply such a case, and it would require, to my mind, the most clear evidence to allow your Lordships to set aside a decree on such grounds. I do not propose to go through the evidence in detail, but I say without any hesitation that so far from it being clear that the motion for expenses was not made, there is, on the contrary, a great deal of evidence to the opposite effect. The complainer may be in good faith in saying that he did not hear the motion made, but that does not shew that a motion was not made; and at anyrate I think it is quite enough for the purposes of this case to hold, as the Lord Ordinary has held after proof, that the complainer has failed to prove his case. So much for the first objection.

As regards the other two points, it seems to me that the objection comes too late. I agree with the Lord Ordinary that the case of *Ewing v. Wallace*,¹ really covers both points here. It directly covers the point about the gentleman not having paid his proper dues. I think it covers the other point *pari ratione*. It was quite apparent when this decree was pronounced that the person who was asking for it as agent-disburser was the procurator who had conducted the case, as he was the only person who had been in Court. Well, we are told, and I will assume truly, that that procurator, although he conducted the case, really only conducted it as the hand of another agent and was not a licensed procurator, and we are told that the actual disbursements came out of the pocket of this other gentleman, and not out of that

¹ 1832, 6 W. & S. 222.

Feb. 28, 1908. of the procurator. That is as it may be; but I am quite sure that if the objection was to be taken that the man who was conducting the case was not the agent-disburser, that is an objection which ought to have been taken at once, and it is far too late to take it afterwards by way of suspension. On the whole, therefore, I am of opinion that the Lord Ordinary has decided the matter rightly, and that we should adhere to his judgment.

LORD M'LAREN.—I concur.

LORD KINNEAR.—I also concur.

LORD PEARSON was absent.

THE COURT adhered.

ST CLAIR SWANSON & MANSON, W.S.—ALEXANDER RAMSAY, S.S.C.—Agents.

No. 96. JOHN KING AND SPOUSE, Pursuers (Reclaimers).—*Wilson, K.C.—MacRobert.*
 Feb. 28, 1908. WILLIAM JOHNSTON AND SPOUSE, Defenders (Respondents).—*R. S. Horne—Strain.*
 King v. Johnston.

Right in Security—Disposition ex facie absolute to Bondholder—Unrecorded back-letter—Extinction—Confusio.—The holder of a bond and disposition in security obtained from the debtor, in security of an additional loan, a disposition *ex facie* absolute which was recorded, and granted a back-letter which was not recorded. In a question between the bondholder and the holder of a postponed bond granted prior to the *ex facie* absolute disposition, *held* that the radical right remaining with the granter prevented the first bond from being extinguished *confusione* when the absolute disposition was granted.

Ground-annual — Extinction — Confusio.—*Opinion, per Lord Guthrie, Ordinary, that a ground-annual may be extinguished confusione.*

2D DIVISION. BY feu-disposition, dated 11th, and recorded 13th December 1901, Lord Guthrie. James Aitken, writer, Glasgow, proprietor of certain subjects in Bell Street, Airdrie, having divided the subjects into six plots for building purposes, disposed plot 1 to Robert Riddagh, builder, Airdrie, under burden of the feu-duty of £2, 5s. 4d.

Thereafter, by five contracts of ground-annual, dated and recorded in 1901 and 1902, Aitken disposed to Riddagh the five remaining plots under burden of ground-annuals amounting in all to £22, 10s.

Upon acquiring the property of these plots Riddagh proceeded to raise money on the security thereof, and, *inter alia*, granted two bonds and dispositions in security for £350 each dated 11th, and recorded 13th June 1902, in favour of Aitken over plots 3 and 4 respectively.

By bond and disposition in security dated 14th, and recorded 17th March 1903, Riddagh disposed the six plots of ground to Mr and Mrs King, 5 Burnbank Road, Hamilton, in security of the sum of £1070.

Thereafter, by disposition *ex facie* absolute, dated 8th, and recorded 9th May 1903, Riddagh disposed the six plots to Aitken; and Aitken granted a back-letter in which he acknowledged that he held the subjects in security of advances made and to be made by him to

Riddagh and bound himself to reconvey on repayment of said advances. Feb. 28, 1908.
The back-letter was not recorded.

By assignation, dated 1st and recorded 3d October 1904, Aitken King v.
Johnston. assigned to Readman the two bonds above mentioned for £350 each over plots 3 and 4 respectively, and by assignation, dated 9th and recorded 15th November 1905, Readman assigned these bonds to the Rev. William Johnston, minister of Uphall, and Mrs Eliza Arbuckle or Johnston, his wife.

In March 1907 Mr and Mrs King, the creditors in the bond for £1070, dated and recorded in March 1903, brought an action against, *inter alios*, Mr and Mrs Johnston, the assignees to the two bonds for £350 each dated and recorded in June 1902, and also against Robert A. M. Reid, the trustee on Aitken's sequestrated estates, who was in right of the five ground-annuals constituted over plots 2 to 6.

The summons concluded for declarator (1) that the real burdens of £350 each, created by the two bonds and dispositions in security for £350 each, dated 11th and recorded 13th June 1902, over the subjects therein specified, were both and each as of 9th May 1903 extinguished, and that the said subjects were not affected by any assignations of said two bonds, granted subsequent to 9th May 1903, and that the bond and disposition in security, in favour of the pursuers for £1070, dated 14th and recorded 17th March 1903, created a real burden over the said subjects preferable to the real burden created by said two bonds; and for declarator (2) that the five ground-annuals created by the five contracts of ground-annual, dated and recorded on various dates in 1901 and 1902, were so far as real burdens on the subjects therein contained extinguished as at 9th May 1903.

The pursuers averred:—(Cond. 5) “By disposition, dated the 8th, and recorded 9th May 1903, the said Robert Riddagh disposed to the said James Aitken the said six plots of ground. On said last-mentioned date the said James Aitken was, as shewn by the record (1) the holder of said five ground-annuals . . . ; (2) the creditor in the two bonds granted in his favour over plots 3 and 4, as above mentioned, and holder and in right of the security thereby created; and (3) the owner of said six plots of ground. . . . The said disposition of date 8th May 1903 had *ipso jure* the effect . . . of extinguishing the real burden created in his favour by said two bonds and dispositions in security, and of making the pursuers' said bond and disposition in security a first charge on the subjects thus unburdened. Further, the said last-mentioned disposition in favour of James Aitken had the effect . . . of extinguishing, as at its date, the said five ground-annuals, . . . and thereby increasing the value of the security subjects contained in the pursuers' said bond and disposition in security.”

The pursuers pleaded, *inter alia*;—(2) The real burden for the two sums of £350 constituted by the two bonds and dispositions in security first set forth in the summons having been *ipso jure* extinguished *confusione*, decree of declarator should be pronounced as first concluded for. (3) The five ground-annuals set forth in the summons having to the extent foresaid been *ipso jure* extinguished *confusione*, decree of declarator should be pronounced as second concluded for.

The defenders Mr and Mrs Johnston pleaded, *inter alia*;—(2) The

Feb. 28, 1908. bonds and dispositions in security, now held by these defenders not having been extinguished, the decree of declarator sought in respect of them should be refused.

King v.
Johnston.

The defender Reid pleaded, *inter alia*;—(2) The five ground-annuals libelled in the summons not having been to any extent extinguished, the decree of declarator sought in respect of them should be refused.

On 30th December 1907 the Lord Ordinary (Guthrie) pronounced this interlocutor:—“(1) With respect to the two bonds for £350 each mentioned in the summons, finds that the said bonds did not become extinguished *confusione* in the person of James Aitken on the subjects and others embraced in said bonds being conveyed to him in absolute terms by Robert Riddagh, the disposition thereof being qualified by back-letters to the effect that the said James Aitken held the subjects merely in security of advances: Therefore finds that the pursuers’ bond for £1070 is not a preferable security over the subjects contained in the foresaid two bonds for £350 each, and assoilzies the defenders the Reverend William Johnston and Mrs Eliza Arbuckle or Johnston, his wife, from the conclusions of the summons, and decerns; . . . (2) With respect to the five ground-annuals mentioned in the summons, finds that the same were similarly not extinguished *confusione* in the person of the said James Aitken on his acquisition in absolute terms of the subjects over which these ground-annuals were created: *Quoad ultra* allows” a proof on a branch of the case not now reported.*

* “OPINION.—The pursuers are heritable creditors for £1070 over certain subjects in Airdrie. If these subjects are burdened by the two bonds and the ground-annuals mentioned in the summons, the pursuers’ bond, looking to the value of the subjects, is believed to be valueless. The pursuers seek declarator that the defenders’ bonds and ground-annuals were extinguished *confusione*.

“The pursuers’ bond for £1070 is dated 17th March 1903. At that date Robert Riddagh was proprietor of the subjects, and the bond was granted by him.

“Prior to 17th March 1903 the bonds for £350 were granted by Riddagh in favour of James Aitken. Subsequently to 17th March 1903, namely, on 9th May 1903, Aitken acquired the subjects over which both sets of bonds were placed in security by an *ex facie* absolute disposition under back-letters. The pursuers say that the £350 bonds were extinguished *confusione* in Aitken’s person on 9th May 1903. These bonds were assigned between 1904 and 1906 to Mr George Readman, who assigned them to the defenders Mr and Mrs Johnston.

“The ground-annuals mentioned in the summons were created for Aitken by Riddagh in 1901 and 1902. The pursuers say that they were also extinguished *confusione* in Aitken’s person when he acquired the subjects, although only in security, on 9th May 1903. These ground-annuals are held by the defender Aitken’s trustee. . . .

“The defenders deny confusion, because—(1) Aitken did not acquire the subjects on 9th May 1903 as absolute proprietor, but as a trustee for Riddagh; (2) so far as the ground-annuals are concerned, because ground-annuals cannot, like bonds, be extinguished *confusione*. . . .

“I. The pursuers admit that if, as in a question with them, the back-letters must be recognised, then their case fails. To operate confusion, one and the same person must become both debtor and creditor. But if the back-letters receive effect, while Aitken, at the date of the conveyance, was absolute creditor under the bonds, he did not become absolute debtor under the bonds in respect of the conveyance, but only trustee for the debtor.

The pursuers reclaimed, and at the hearing intimated that they brought under review the first portion only of the Lord Ordinary's interlocutor. Feb. 28, 1908.
King v.
Johnston.

Argued for the pursuers;—If the disposition of 9th May 1903 had been in fact as well as in form absolute and irredeemable, the two bonds and dispositions in security would have been extinguished *confusione* as at that date, for Aitken in the case supposed would have come to be both creditor and debtor in the bonds.¹ Where a recorded disposition was *ex facie* absolute, although qualified by a back-letter, the *ex facie* absolute donee was feudal proprietor of the subjects if the back-letter was unrecorded, at all events, *quoad* any person in ignorance of the existence of the back-letter.² *Ex facie* of the records, therefore, Aitken was both debtor and creditor in the bonds, which consequently were extinguished *confusione*. The pursuers were entitled to rely on the records; the intention of the parties was immaterial.³ [LORD ARDWALL referred to *Mackenzie v. Gordon*.⁴] In that case the person who pleaded *confusio* had private knowledge of the real facts, and therefore the records did not avail him.⁵ Further, in *Mackenzie v. Gordon*⁴ a trustee was interposed.

Argued for the defenders;—In order that *confusio* might operate, the same person must be absolute creditor and absolute debtor in the

That this was in fact his position is admitted. If so, it does not matter whether the back-letters were recorded or not. The pursuers' rights were fixed on 17th March 1903. At that date the bonds for £350 each and the ground-annuals existed as prior rights, coming before the pursuers' security. . . . It must be held to have been their own fault if the pursuers did not know about the bonds which were recorded, and about the ground-annuals which were mentioned in their bond. The pursuers' security might have been improved at any time by Aitken becoming absolute proprietor of the subjects. But he never did become absolute proprietor, but, by a transaction with which the pursuers had nothing to do, he came into the position of a heritable creditor, with an *ex facie* absolute disposition, qualified by back-letters. I therefore sustain the defenders' contention.

“II. The defenders say that so far as the ground-annuals are concerned there could be no confusion, because *confusio* does not operate to extinguish ground-annuals. On this matter, in the case of *Murray v. Parlane's Trustee*, 1890, 18 R. 287, opposite opinions were expressed by Lord Rutherford Clark, who thought that *confusio* might operate extinction of a ground-annual, which is, ‘nothing more than an obligation for payment of an annuity secured over the heritable estate,’ and by Lord Kinnear and Lord Trayner, who thought that ground-annuals, being *ex facie* irredeemable rights in land, completed by infestment, cannot be extinguished *confusione*. I take the same view as that expressed by Lord Rutherford Clark. In a question of extinction, it is significant that, in ground-annuals as distinguished from feu-duties, the real security is destroyed by the negative prescription if the ground-annual is omitted from the title for forty years. . . .”

¹ Lord Blantyre v. Dunn, July 1, 1858, 20 D. 1188; Hogg v. Brack, Dec. 11, 1832, 11 S. 198.

² Scottish Heritable Security Co., Limited, v. Allan, Campbell, & Co., Limited, Jan. 14, 1876, 3 R. 333; Union Bank of Scotland, Limited, v. National Bank of Scotland, Limited, Dec. 10, 1886, 14 R. (H. L.) 1.

³ Bald v. Buchanan, 1787, 2 Ross' L. C. (Land Rights), 210.

⁴ Jan. 16, 1838, 16 S. 311, aff. March 26, 1839, M'L. & Rob. 117.

⁵ Petrie v. Forsyth, Dec. 16, 1874, 2 R. 214; Stoddart v. Dalziel, Dec. 16, 1876, 4 R. 236.

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Johnston.

same capacity.¹ Here, no doubt, Aitken was, on 9th May 1903, absolute creditor in the two bonds for £350, but the disposition of that date conveying the security subjects to him, while it was *ex facie* absolute, was truly in security—he held the security subjects as trustee for Riddagh. Even if the same person came to be both creditor and debtor, *confusio* did not operate if that person had an interest to keep up the security² which Aitken had, for he had given cash for the bonds, and it was not suggested that Riddagh's personal obligation to repay was extinguished on 9th May 1903. It was nothing to the purpose that the back-letter was not recorded; defenders' bond was dated March 1903, two months before the date of the *ex facie* absolute disposition; the doctrine as to the faith of the records was therefore out of the case.

LORD LOW.—The question which we have to determine in this case is whether the two bonds and dispositions in security granted by Riddagh in Aitken's favour have been extinguished *confusiones*? It appears that Riddagh, who is a builder, acquired certain ground which had been divided into six lots for building purposes. Aitken lent him two sums of £350 each, and in security of each loan he disposed to Aitken one lot of ground. Subsequently Aitken made further advances to Riddagh, in security of which Riddagh granted to him an *ex facie* absolute disposition of the whole ground, which was qualified by a back-letter from Aitken acknowledging that the disposition was in security only. The disposition was duly registered, but the back-letter remained unrecorded.

It is not disputed that if this disposition had been in fact as well as in form absolute, the rights of security which Aitken had in the two lots would have been extinguished. But in fact the disposition was only in security, and if Riddagh had paid his debt Aitken would have been bound to reconvey the ground to him. If that had been done it is plain that Riddagh would have got back the two lots under burden of Aitken's securities. Now, if the securities were not extinguished in a question with Riddagh, why should they be so in a question with the pursuers, who derived their right from Riddagh prior to the date of the *ex facie* absolute disposition to Aitken? The pursuers say that they were entitled to rely upon the records, and that as nothing appeared upon the register except the absolute disposition it must be assumed that the property of the ground had been conveyed to Aitken. That would have been a good argument if the pursuers had acquired their title from Aitken after the registration of the absolute disposition in his favour, or even, it may be, if they had done something, or refrained from doing something, in reliance upon the register. But no considerations of that kind are present. The position of the pursuers simply is that prior to the date of the absolute disposition they obtained a bond and disposition in security for £1070 from Riddagh, postponed to the two bonds in favour of Aitken.

In these circumstances it appears to me that no question arises involving the faith of the records. The question is really one of fact, namely, whether

¹ Ball's Prin., sec. 580; Bell's Lect., 3d ed., p. 1173; Lawrie v. Donald, Dec. 7, 1830, 9 S. 147.

² Fleming v. Imrie's Trustees, Feb. 11, 1868, 6 Macph. 363.

Aitken did or did not acquire an absolute right to the ground. For the Feb. 28, 1908.
 reasons which I have given, I think that it is clear that he did not do so, and
 accordingly the pursuers' case fails. King v.
Johnston.

I am therefore of opinion that we must adhere to the Lord Ordinary's interlocutor.

LORD ARDWALL.—I am of opinion that the course proposed by Lord Low is the right one and should be followed. I think the case a clear one, and I am somewhat surprised that this plea of *confusio* was ever put forward. It is, however, the only question that has been argued. It is said that the two bonds for £350 have been extinguished *confusione*, with the result that the pursuers' bond for £1070 is now a first security over the subjects in question. Now, at the time when the pursuers obtained this bond the state of the record was that in front of the bond which they were getting there stood these two bonds for £350 each on the record, and they therefore took their bond as a security postponed to the debts represented by these two other bonds. They say that they are now entitled to stand in the position of first security holders, because owing to a subsequent transaction, with which admittedly they had nothing to do, and to which they were in no way parties—these two bonds have been extinguished *confusione*. It appears to me to be settled law that *confusio* only takes place in a case where the full and absolute right of the creditor and the full and absolute debt of the debtor merge in one and the same person, and in no other circumstances.

Now, what was the case here? We have not the bonds before us, but it has not been alleged that the personal obligations in the bonds have ever been discharged—certainly the debt never was discharged—and therefore Riddagh remained the debtor to Aitken in these sums throughout, and it is vain to say that Aitken ever became the debtor to himself. This is sufficient, I think, to dispose of the plea of *confusio*, so far as the mere debt is concerned, because, as I understand the pursuers' case, they nowhere allege that Riddagh did not remain throughout the debtor in these sums to James Aitken.

But a plea which is not in so many words stated on the record was argued upon the reclaiming note to the effect that the security title under the two bonds in which Aitken was vested at the time when the pursuers' bond was granted became merged in and extinguished by the absolute title to the subjects which he subsequently obtained from Riddagh, with the result of leaving the pursuers' bond the first security on the subjects. Now, I do not think it has been decided that if "A" holds a recorded bond and disposition in security for a certain sum over a property, and "B" subsequently obtains another bond and disposition in security over the same property, and thereafter "A" obtains an absolute disposition of the said property, the result necessarily is that A's security for his debt is postponed to B's security, or, to express it otherwise, is extinguished in consequence of "A" having acquired the property in fee. But this general question was not argued, the defenders being content to rest their case on the ground that Aitken was never truly, as matter of fact or law, absolute proprietor of the subjects in question, because although he held them under an *ex facie* absolute disposition granted by Riddagh, that disposition was

Feb. 28, 1908. qualified by a back-letter. I am of opinion that that argument is well founded.

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Aitken was really holding as a *quasi* trustee for behoof of Riddagh, under the obligation, if the debts in respect of which he had obtained the absolute disposition were paid off, to reconvey the property to Riddagh, or if the property were sold under the bonds, to account for the reversion of the price. And it was Riddagh who still remained the true proprietor of the subjects, because it was he who had the radical right thereto, and who had the interest in the reversion. That being so, it appears to me that *confusio* cannot be held to have taken place, because Aitken was never truly the absolute proprietor of the subjects over which the bonds were granted, but only an encumbrancer. But it was argued very strenuously by Mr MacRobert that it did not matter what the nature of the transaction was so long as on the face of the records it appeared that these two bonds had been extinguished in the person of James Aitken by the disposition in his favour. Upon that point I have only to say this, that in my opinion this is not a question depending merely on the records; it is the true state of the facts that has to be looked to. The case of *Mackenzie*,¹ referred to in the debate, seems to me almost a direct authority for this proposition, that notwithstanding that it may appear on the face of the records that the character of creditor in a heritable bond and that of proprietor of the subjects over which the bond was granted have become united in the same person, yet if it be the fact that the person is not truly absolute proprietor, but holds them on some lesser title, *confusio* will not take place. None of the cases quoted for the pursuers seem to me to be authorities to the contrary. I accordingly think that the Lord Ordinary's judgment ought to be affirmed.

LORD STORMONTH-DARLING.—I agree with both your Lordships.

The LORD JUSTICE-CLERK was absent.

THE COURT refused the reclaiming note, adhered to the interlocutor reclaimed against, and remitted to the Lord Ordinary to proceed.

ROSS SMITH & DYKES, S.S.C.—DRUMMOND & REID, W.S.—Agents.

No. 97.

MATTHEW WISHART, Petitioner.—*D. M. Wilson.*

Mar. 4, 1908.

Wishart.

Company—Liquidation—Liquidator—Expenses of Petitioning Creditors.—In the voluntary winding-up of a company with a nominal capital of £5000, and a paid-up capital of £42, 4s. A was appointed liquidator. In a petition by a creditor for a supervision order, the company and the creditors concurred in asking the Court to grant the order, and to appoint B joint liquidator. The Court *granted* the order, but in respect of the smallness of the sum involved *refused* to appoint a joint liquidator, superseded A as liquidator, and appointed C sole liquidator.

The Court intimated that in such cases they would not in future grant expenses to petitioners as a matter of course, but would leave it for the decision of the Lord Ordinary to whom the liquidation was remitted.

Observations on the expenses in liquidation proceedings.

At a general meeting of the West Regent Investment Company, Limited, on 31st December 1907, a special resolution was passed that the Company be wound up voluntarily, and that John Meikle, accountant, Glasgow, be appointed liquidator, which resolution was duly confirmed. Mar. 4, 1908.
Wishart.
1st Division.

On 19th February 1908 Matthew Wishart, a creditor, presented a petition praying the Court to order that the Company be wound up by the Court, and to appoint Joseph Patrick, C.A., Glasgow, as liquidator, or alternatively, to order the voluntary winding-up of said Company to be continued under the supervision of the Court, for the removal of the liquidator appointed by the shareholders, and for the appointment of Joseph Patrick, C.A., Glasgow, as liquidator.

The petition set forth that the nominal capital of the Company was £5000, and the subscribed capital £42, 4s., and that the petitioner was a creditor of the Company for the sum of £70. No answers were lodged to the petition.

On 4th March 1908 the petitioner presented a note stating that at a meeting of the creditors on 21st February it had been resolved that the voluntary winding-up should be continued under the supervision of the Court, and that Joseph Patrick should be associated with John Meikle as joint liquidator, and craving the Court to confirm this arrangement.

There was no opposition to the note.

LORD PRESIDENT.—I will take this opportunity of intimating for the information of counsel that we are going to alter the practice of granting expenses to petitioners in such cases as a matter of course, and to leave that to the Lord Ordinary to whom the liquidation is remitted, and who has a knowledge of the facts. In this case it is all very well to say that two liquidators are required, but I see no reason why there should be two horses in this one-horse concern. This is a company of which we are told the capital is £5000, and the total capital subscribed £42, 4s. The Company passed a resolution for voluntary winding-up and the appointing of a liquidator, and then there was a creditor's petition. The parties seem to have come together and agreed that the liquidation should be continued under the supervision of the Court, and that a liquidator nominated by the creditors should be conjoined with the liquidator appointed by the Company. It has been brought under the notice of the Court that in a great many liquidations there is really almost a scandalous amount spent in expenses, and the Court are resolved to do what they can to prevent this abuse. It seems to me that the proposition made here is an abuse on the face of it, and although in ordinary cases the wishes of the creditors will be consulted as to who should be appointed as liquidator, it seems that the arrangement here is so objectionable that the only course for your Lordships to take, and the one I propose, is to pronounce a supervision order, remove the present liquidator, and appoint an entirely new liquidator who is not proposed by any of the parties.

LORD M'LAREN and LORD KINNAR concurred.

LORD PEARSON was absent.

THE COURT pronounced this interlocutor :—"Order the voluntary

Mar. 4, 1908.

Wishart.

winding-up of the West Regent Investment Company, Limited, resolved on by the special resolution referred to in the petition to be continued, but subject to the supervision of the Court: Also supersede the appointment of John Meikle, accountant, Glasgow, made on 31st December 1907, and confirmed on 22d January 1908, as liquidator of said Company, and in his room and place appoint Mr John M. McLeod, C.A., Glasgow, as liquidator thereof: Dispense with the finding of caution by said liquidator: Further dispense with the reading of this interlocutor in the Minute-book, and authorise immediate extract, and decern: Find the petitioner entitled to the expenses of the petition and proceedings therein, as the account thereof shall be taxed by the Auditor, to whom remit the same for that purpose, and ordain said expenses to be expenses in the liquidation," &c.

ADAMSON, GULLAND, & STUART, S.S.C., Agents.

No. 98. ANDREW WILSON TAIT AND ANOTHER (Liquidators of Bruce Peebles & Company, Limited), Petitioners.—*D.-F. Campbell—Clyde, K.C.*
 Mar. 5, 1908. —*Sandeman.*

Liquidators of
Bruce Peebles
& Co.,
Limited, v.
Shiells.

S. E. BASTOW AND OTHERS, Compearers.—*Maitland.*
 COURTENAY JOHN SHIELLS AND OTHERS, Respondents.—*Lyon Mackenzie*
 —*Munro—Macmillan—F. C. Thomson.*

Company — Liquidation — Liquidator — Director — Foreign. — Circumstances in which the Court appointed as joint liquidator in the winding-up of a company a person who was a director of the company, and who was resident in London.

1ST DIVISION.

ON 14th February 1908 a petition was presented by Bruce Peebles & Company, Limited, electrical engineers, incorporated under the Companies Acts, and having its registered office in Edinburgh, craving (1) the appointment of a provisional liquidator, and (2) an order for the Company to be wound up by the Court under the provisions of the Companies Acts, and for the appointment of Mr Andrew Wilson Tait, C.A., a director of the Company, and residing in London, as official liquidator. The capital of the Company consisted of 58,381 shares, preference and ordinary, of £5 each, fully paid up, representing a capital of £291,905. The Company had also issued debentures to the amount of £75,900. It was stated that the Company was unable to continue business through its inability to pay its debts, which amounted to £201,117. It was further stated that the Company's works were situated in Edinburgh, but that the procuring and negotiating of the contracts carried out by the Company was almost entirely conducted from its office in London.

On 14th February 1908 intimation and advertisement of the petition was ordered, and Mr A. W. Tait was appointed provisional liquidator.

On 24th February 1908 an extraordinary general meeting of the Company was held at Edinburgh, when it was resolved, *inter alia*, (1) that the Company should be wound up voluntarily; (2) that the above-mentioned Mr A. W. Tait, C.A., London, and Mr J. A. Robertson-Durham, C.A., Edinburgh, be appointed joint liquidators; and (3) that the winding-up be placed under the supervision of the Court.

On 26th February 1908 a note in the petition was accordingly presented by Mr Tait and Mr Robertson-Durham, as liquidators of the

Company, craving, *inter alia*, for a supervision order, and for confirmation of their appointment as joint liquidators. Mar. 5, 1908.

Appearance was made in support of the application in the note by S. E. Bastow and others, who were shareholders representing £140,000 of the capital, debenture-holders representing £41,000, and creditors representing £124,551. In addition the Royal Bank of Scotland, who were creditors to the amount of £43,390, intimated that they left the matter to the determination of the trade creditors. Liquidators of Bruce Peebles & Co., Limited, v. Shiells.

The application was opposed by C. J. Shiells, C.A., Edinburgh, and others, who were shareholders representing £8000 of capital, debenture-holders representing £1000, and creditors representing £6600. The opposition was directed principally against the appointment of Mr Tait as one of the liquidators, in respect (1) that he was resident in England and outwith the jurisdiction of the Court; and (2) that questions would arise for the determination of the liquidators in the course of the liquidation regarding the past management of the Company which would make it inexpedient to have a director of the Company acting as liquidator.

Parties were heard on 5th March 1908.

Argued for the petitioners and concurring comparears;—Mr Tait's appointment was approved of by the vast majority of those concerned, and in particular by the creditors, to whose wishes the Court was always ready to give effect.¹ There was no absolute rule against the appointment as liquidator of an official of the Company,² or of a person residing outwith the jurisdiction of the Court. In the present case there were circumstances connected with the carrying on of the Company's business which made it highly expedient to appoint Mr Tait as one of the liquidators.*

Argued for the respondents;—Neither an official of the Company³ nor a person residing outwith the jurisdiction of the Court⁴ were eligible for the post of liquidator, except in special circumstances, and no such circumstances had been shewn to exist in the present case,

LORD PRESIDENT.—In the application that is before us we have first of all to decide whether this should be a compulsory winding-up, or whether the voluntary winding-up which has already been started by the Company should be continued under the supervision of the Court. There has been scarcely any argument upon that point, and at anyrate it is sufficient to say that there is no reason why we should disturb the liquidation at present going on. The Court will accordingly pronounce an interlocutor in the ordinary form continuing the winding-up under the supervision of the Court.

The real question, however, which has been argued before your Lordships is the question who the liquidators are to be. The provisional liquidator, who was appointed only the other day, is Mr Tait, who is a chartered accountant resident in London, and also was a director of the Company. The application of the Company, who are the presenters of the petition,

¹ Pattisons, Limited, v. Kinnear, Feb. 4, 1899, 1 F. 551.

² Sanderson v. Muirhead, July 18, 1884, 21 S. L. R. 766; M'Knight & Company, Limited, v. Montgomerie, Feb. 27, 1892, 19 R. 501.

* These circumstances are fully stated in the opinion of the Lord President.

³ *In re* Gold Company, 1878, 11 Ch. D. 701.

⁴ Brightwen & Co. v. City of Glasgow Bank, Nov. 27, 1878, 6 R. 244; Barberton Development Syndicate, Limited, Feb. 23, 1898, 25 R. 654.

Mar. 5, 1908. was originally intended to be an application for an order to have the
Liquidators of Company wound up by the Court, and for the appointment of Mr Tait as
Bruce Peebles official liquidator ; but after the prayer had actually been framed they were
& Co., approached by several of the creditors who said that they objected to having
Limited, v. a director of the Company appointed as sole liquidator, but indicated that
Shiells. they would be perfectly contented if an independent liquidator was
Ld. President. appointed in conjunction with Mr Tait, and the name suggested was that of
Mr Robertson-Durham. Accordingly, before your Lordships to-day, the
position taken up by the Company has been that the liquidators ought to
be Mr Tait, and associated with him Mr Robertson-Durham. The applica-
tion is opposed by certain parties who, through the counsel who appeared,
represent in all £7000 worth of creditors, 1600 shares, and £1000 worth of
debenture debt. The total figures which might be represented under these
three heads are, for creditors—I give the figures of course, roughly—
£200,000 ; for debentures, £75,000 ; and for shareholders £290,000—
58,000 odd shares. Now, the objections that have been made by the
compearing parties are really reduced to two heads alone. They objected
to Mr Tait, first, in respect that he is domiciled in England, and not
subject to the jurisdiction of the Court ; and secondly, that he has been,
and was at the moment of the liquidation, a director of the Company. On
the other hand, the Company have given special reasons as they say, why
Mr Tait's appointment should be confirmed. These special reasons are as
follows :—They explain that the Company has been brought into the diffi-
culties which necessitate its liquidation because of the tightness of money
in the money market, and that, assuming its business may go on, it is not
certain that it will eventually become insolvent. Whether that is the case
or not, it is true that the Company at this moment, in the course of its
business, is engaged in carrying out a great many important and lucrative
contracts. Therefore it is in the interests of all concerned that the benefit
of these contracts should not be lost, because even apart from the question
of the relinquishment of profit from these contracts there would be a very
severe loss to the Company in respect that under the forfeiture clauses
which are common enough in such contracts, they would lose a great deal
of their plant in various parts of the world by that plant being seized by
the persons with whom they had contracted. They further explained that
there are in several of these contracts clauses of what we call in Scots law
irritancy, by which the contracts may be brought to an end by the liquida-
tion of the Company, and they go on to say that the continued presence of
Mr Tait in the active management of the business as a going concern is
really a *sine qua non* in the negotiations which must necessarily ensue with
the various parties with whom they have these contracts. That is a story
which, upon the face of it, appears to have quite the impress of truth
and probability. It is not admitted to the full by all the parties who are
here compearing, and of course it is impossible for your Lordships sitting
here to have an inquiry in order to get at the absolute truth of the state of
facts. In regard to these matters your Lordships are bound to deal in a
case of this sort with the *prima facie* view, and all I say is that the story
as told seems to me to bear the impress of truth. But your Lordships,
I think, in such a case, where it is found that averments made on one side

are not admitted on the other, have pointed out to you by the terms of the statute what is the proper method of solution. You are in all these matters, the statute says, to have regard to the wishes of the creditors and of the contributors. I have already given the figures of the compearing and objecting persons, and I have given the figures of the total compearers. In every such case, of course, it is not to be expected that we should have everybody here ; but for the petitioners we have here, so far as the creditors are concerned, about £124,000 out of £200,000, and we have to notice that one very large creditor, the Royal Bank, which has a claim for over £43,000, is neutral, but neutral in such a way as practically to belong to the petitioners, because the Royal Bank, following its usual practice, did not take any part in determining the course to be taken by the creditors, but intimated that it would leave the decision to the trade creditors, which is tantamount to voting with the majority. Accordingly, you have here a sum of something like 160 odd thousand pounds, and you have besides practically about £140,000 worth out of the whole shareholding, and the petitioners have through a separate appearance practically the whole of the debenture-holders. I need scarcely say when these figures are compared with the figures of the compearing objectors, that there is absolutely an overwhelming majority in favour of the demand by the petitioners. Therefore I think your Lordships should have little hesitation in supposing that the particular reasons which have been given for appointing this gentleman are true, seeing that the belief that these reasons are true is a belief that commends itself to the enormous majority of the shareholders, and still more of the creditors, who are of course the persons most to be thought of. Accordingly, it seems to me that everything points to granting the prayer of the petition in this matter, unless there is some real objection in law. Now, it is no objection in law to the appointment of the gentleman that he is not at this moment subject to the jurisdiction of the Court. It seems to me that he subjects himself most clearly by consenting to become an officer of this Court ; and subject to the difficulty of arresting him in England, I cannot help thinking we should have every power against him, if such a thing were necessary—a contingency which is, I am glad to think, most improbable—that we would have against a Scotch liquidator. Nor do I find it has been ever laid down that it is impossible for the Court to appoint liquidators not subject to its jurisdiction. On the contrary, Lord President Robertson, in the case of *The Barberton Development Syndicate, Limited*,¹ seems to me to have been particularly careful to bar the idea that such a course was incompetent, although it goes without saying that in ninety-nine cases out of a hundred it is much more convenient in practice for the Court to appoint a gentleman in their own jurisdiction, for this reason, that it is better to have the man who conducts it there also. And the considerations which guided the Court in the well-known case of the *City of Glasgow Bank*,² are really too obvious to require stating. In that case there was nothing to be done but to distribute the assets of the City of Glasgow Bank. There were four men, capable gentle-

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¹ 25 R. 654.² *Brightwen v. City of Glasgow Bank*, 1878, 6 R. 244.

Mar. 5, 1908. men, in Scotland who had been appointed, and the man proposed to be added to these four was a gentleman who was in England—really, if I may use the expression, clearly a case of a fifth wheel to the coach. Here the reason for asking that Mr Tait should be a liquidator is not really connected with the distribution of the assets of the Company, but is connected with the weighty consideration of being able to continue this business as a going business at present, and consequently making the most money out of it for both creditors and shareholders.

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Then it is said that Mr Tait was a director, and it is hinted or said that questions may arise as to the conduct of the directors in the past. That may be so, and I think it would be a very weighty consideration against the appointment of Mr Tait as the sole liquidator. But it is not now proposed that Mr Tait should be sole liquidator. I do not wish to say anything peculiarly personal, but it is only fair to Mr Robertson-Durham to say that he, the gentleman selected and put before us, is a gentleman well known to this Court, and one at the head of his profession, and one in whom the Court has every confidence. It is perfectly absurd to think that Mr Robertson-Durham, knowing his duties as an officer of this Court, would ever allow to remain uninvestigated any transaction in the past, because he thought it might eventually go against the interests of Mr Tait. If such things are unfortunately discovered, I conceive it would be a duty which he would perform, to call attention to the matter, to say to Mr Tait that the time had now come in which his interests became conflicting, and to call upon him to resign; and if he did not do so, it would be Mr Robertson-Durham's duty to bring the matter before the Court; and in such circumstances as I have put I do not think it is doubtful what the Court would do. All that is speculation as to the future, and all that does not touch the real crucial point of the matter, viz., the extreme desirability of keeping these contracts running. Accordingly, I am of opinion here—it is a peculiar, and in many respects a unique case—that the petitioners have really made out the position they have put before us. Upon this matter of conflicting interests there again, it seems to me, your Lordships' action is really backed up by the action of the persons to be considered, the creditors. As soon as it was known that Mr Tait was to lodge a petition to appoint him liquidator, the creditors said "No," and the moment it was proposed to have Mr Robertson-Durham along with him the creditors said "Yes," and they are saying "Yes" before your Lordships to-day. I am therefore of opinion that the prayer of the note should be granted.

LORD M'LAREN.—I concur.

LORD KINNEAR.—I also concur.

- LORD PEARSON was absent.

THE COURT pronounced this interlocutor:—"Order that the voluntary winding-up of Bruce Peebles & Company, Limited, resolved on by the extraordinary resolution quoted in said note, be continued, but subject to the supervision of the Court: Confirm the appointment of the said Andrew Wilson Tait and James Alexander Robertson-Durham as joint liquidators of

the said Company, in terms of, and with the powers conferred by, the Companies Acts, 1862 to 1900: Appoint the said Andrew Wilson Tait to find caution for his own actings and intromissions as joint liquidator, by a bond containing a clause consenting to the jurisdiction of the Court of Session being prorogated: Limit such caution to the sum of £500, and allow a bond for that amount by the Ocean Accident and Guarantee Corporation, Limited, to be approved of by the Clerk: Find the petitioners and the said liquidators entitled to the expenses of the petition and note, taxed as between agent and client, as the account thereof shall be taxed by the Auditor, to whom remit for that purpose; and direct said expenses to be expenses in the liquidation: *Quoad ultra* find no expenses due to or by any of the respondents or compearers."

Mar. 5, 1908.
Liquidators of
Bruce Peebles
& Co.,
Limited, v.
Shiella.

DAVIDSON & SYME, W.S.—MACANDREW, WRIGHT, & MURRAY, W.S.—
W. & F. HALDANE, W.S.—GARDINER & MACFIE, S.S.C.—
NORMAN M. MACPHERSON, S.S.C.—WOOD & ROBERTSON, W.S.—Agents.

SIR JAMES HENRY RAMSAY, Baronet, Pursuer (Respondent).—

No. 99.

Constable—Ramsay.

JOHN HOWISON, Defender (Appellant).—*D.-F. Campbell—Macmillan.*

Mar. 5, 1908.

Et e contra.

Ramsay v.
Howison.

Lease—Damages—Claim by tenant for breach of condition of the lease—Failure to burn heather—Personal Objection—Waiver—Mora—Payment of rent without reservation.—The tenant of a farm, under a lease which contained an obligation by the landlord to burn one year with another a certain quantity of heather per annum, possessed under the lease for nine years, during which period, although he repeatedly complained of the landlord's failure to burn sufficient heather, he paid the rent each half year without deduction or reservation of any claim for damages, and took clean receipts therefor. In the tenth year he brought an action against the landlord for damages suffered in that and the preceding year, in consequence of the failure to burn sufficient heather. The landlord pleaded in defence that the tenant, by paying the rent up to the ninth year without reservation, was barred from claiming damages for default committed prior to that date.

Held, in the circumstances, that as the damage from failure to burn heather was cumulative, and as it was impossible to determine by what year the damage would declare itself, the tenant could not be assumed by his actings to have waived his claim.

Lease—Constitution—Verbal lease followed by written lease—Obligation inserted in written lease—Date from which obligation takes effect.—In 1895 a moorland farm was let verbally for nineteen years, and the tenant entered into possession. The parties were at variance as to the amount of heather-burning per annum that was to be undertaken by the landlord, and that question remained unsettled till 1902, when a lease was signed by the parties, in which the landlord undertook to burn, one year with another, one-twelfth part of the heather annually. The lease also bore that the farm was let "for the period of nineteen years from and after the term of Martinmas 1895, which, notwithstanding the date hereof, is declared to be the term of entry hereunder."

Held that the obligation to burn one-twelfth part of the heather annually ran from Martinmas 1895, and not from the date of the lease in 1902.

IN 1895 Sir James Henry Ramsay, Baronet, of Bamff, let the farm and grazings of Craighead and Watershiel on the estate of Bamff, to John Howison, farmer, Fingask, on a nineteen years' lease, at a rent

1st Division
Sheriff of
Perth.

Mar. 5, 1908.

Ramsay v.
Howison.

of £315 per annum. Howison entered into possession at Martinmas 1895, and thereafter paid his rent regularly each half year until Whitsunday 1905, when he declined to pay the rent due at that term, amounting to £157, 10s., on the ground that he had a counter claim against his landlord for damages arising, *inter alia*, out of insufficient heather-burning.

On 7th July 1905 Sir James Ramsay brought an action in the Sheriff Court of Perthshire, at Perth, against John Howison, concluding for payment of the rent due by Howison, viz., £157, 10s.

On 21st September 1905 John Howison brought a counter action in the Sheriff Court at Perth against Sir James Ramsay, in which he concluded, *inter alia*, for payment of £200, being his estimate of the damage suffered by him from insufficient heather-burning in the years 1904 and 1905, at the rate of £100 for each year. These actions were conjoined on 3d April 1906.

The lease already referred to, out of which these questions arose, had been entered into by verbal bargain between Howison and Mr John Panton, Blairgowrie, then factor for Sir James Ramsay, but since deceased. The farm consisted to a large extent of moorland, on which the heather-burning had been neglected for some years, and the parties were not agreed as to the amount of heather which the landlord should undertake to burn annually to put the grazing into proper condition. In July 1902, however, a draft lease was adjusted and signed by both the parties. The lease contained this provision:—"And with regard to heather-burning on the moorland of the farm hereby let, it is agreed upon, and the proprietor hereby undertakes to burn, weather permitting (except during the statutory close time from the eleventh day of April to the first day of November), one year with another, one-twelfth part more or less thereof during each year of the lease, the said heather-burning to be carried out under the supervision of the proprietor's head gamekeeper, the tenant giving the assistance of his shepherds in connection therewith. Declaring that no heather shall be burned on the lands hereby let except as herein provided for, under the penalty of two pounds sterling per imperial acre, and at that rate for any part of an acre of additional rent." The lease also bore that the let was "for the period of nineteen years from and after the term of Martinmas Eighteen hundred and ninety-five, which, notwithstanding the date hereof, is declared to be the term of entry hereunder."

In the action at the instance of Howison, the defender, Sir James Ramsay, pleaded, *inter alia*,:—(7) In any event, pursuer having paid his rent for the period of his possession up to Martinmas 1904 without specific reservation of any claim for compensation, cannot now maintain such claim, so far as arising prior to the said term of Martinmas 1904.

A proof was allowed and led. At the proof it was established that Howison constantly complained, particularly when paying his rent, of the failure to burn the heather in sufficient quantity, but he never made any specific claim or intimation that he would make a claim for damages resulting therefrom, and, until Whitsunday 1905, he had paid his rent each half year without reservation or deduction, and taken clean receipts therefor. It was further established that the years 1903 and 1904 were so wet that heather-burning was impossible, and consequently that no effort

was, or could have been, made to burn the heather in these two years.* Mar. 5, 1908.

On 26th December 1906 the Sheriff-substitute (Sym), pronounced an interlocutor in which, besides findings embodying the facts set forth above, he found in fact:—“(17) Finds with regard to heather-burning that, in the season 1896, a considerable amount of heather-burning was done, and the moor was partially broken up, and that in 1906, after the present dispute was going on, a considerable amount of heather-burning was done, but that in the intervening years, notwithstanding complaint and objection on the part of the tenant Howison, the landlord failed to perform, taking these years together, the obligation of burning, one year with another, one-twelfth of the heather each heather-burning season: (18) That the seasons of 1903 and 1904, and to a considerable extent that of 1905, were wet and unsuitable for heather-burning, but the other seasons between 1897 and 1902 were more suitable, and the obligation, making proper allowance for the bad years, was capable of fulfilment.” He also found in law:—“(1) With regard to heather-burning, that the tenant is not disentitled—having regard to the nature of the obligation, the uncertainty for some years of its position owing to the landlord’s action, and the manner in which it is to be fulfilled on an average of years—from seeking damages for its breach; assesses the damages at £100.”

Ramsay v.
Howison.

Sir James Ramsay appealed to the Sheriff (Johnston), who, on 16th February 1907, recalled the portions of the Sheriff-substitute’s interlocutor quoted above, and in place thereof found:—“(16) That having regard to the state of the weather in the years 1903, 1904, and 1905, and the amount of heather burned in 1906, no failure upon the part of the landlord to burn heather, in accordance with the provisions of the lease, is proved to have occurred subsequent to the spring of 1902: (17) That the tenant claims damages in respect of the failure of the landlord to burn sufficient heather in each of the years from 1897 to 1902 inclusive: (18) That the tenant paid his rent in full, without demanding any reservation in the receipt or intimating any claim for any neglect of heather-burning, down to the term of Whitsunday 1905, when he consigned the half year’s rent then due: Recalls the first finding in law in the said interlocutor and the relative decerniture, and, in place thereof, finds that the tenant is barred by delay in intimating his claim from any claim of damages in respect of failure to burn sufficient heather: Assoilzies the landlord from the conclusions for damages in respect of insufficient heather-burning: Recalls the award of expenses.”

Howison appealed to the Court of Session, and the case was heard on the 7th, 8th, and 12th November 1907.

Argued for the appellant;—The Sheriff had decided against the pursuer here on the ground either of *mora* or of waiver. Neither of

* After the action at the instance of Sir James Ramsay had been brought, Howison consigned in Court the amount of rent sued for in that action, and at the time when the two actions were conjoined the Sheriff granted decree for payment of the consigned sum to Sir James Ramsay, reserving all questions of expenses until the determination of the conjoined actions. Consequently the interlocutors pronounced in the conjoined actions treated the action at the instance of Howison as the principal action before the Court.

Mar. 5, 1908. these pleas in law was made out. It was always a question of circumstances whether payment of rent by a tenant must be held as a waiver of all his claims against the landlord up to that date, and in the circumstances here no such rule could apply. The damage done by failure to burn heather was cumulative, it did not have its full effect, or indeed any effect, in the year in which the failure occurred, and therefore, no damage having occurred, no damages could be claimed for the year in which the breach took place. Cases such as *Broadwood v. Hunter*,¹ where the damage was apparent year by year, were therefore inapplicable. The rule in *Broadwood*¹ had been departed from in other cases where the circumstances were different.² The tenant had here done all he could in giving the landlord warning by constant protests. He could not define his claim for damages until the damage had actually emerged, and in the particular circumstances here he was further prevented from doing so by the delay until 1902 in fixing the precise extent of the landlord's obligation. There was no question here of prejudice to the landlord by loss of evidence as in the case of *Emslie*,³ where the claim was for damages emerging during a period of years ending three years before the date of the action, for here the damages claimed were only for the last two years, and the amount of heather-burning done in previous years could easily be ascertained from an inspection of the ground. Nor was there any force in the argument that the failure could only be held to commence in 1902, either on the ground that the obligation to burn one-twelfth only began then, or that the tenant by signing the draft lease had waived all claims up to that date. The date of entry under the lease was the date from which all the conditions of the lease must be held to run.⁴ Indeed, this draft lease was really a defining of what were the conditions of the lease from its inception. That was borne out by the terms of the document itself, for it stated that Martinmas 1895 was to be taken as the date of its commencement. It was admitted that from the start the parties were agreed that the landlord should burn the heather, though the extent of that obligation remained a matter of controversy for some time. The signing of the draft lease was merely an acknowledgment by the landlord of what the original obligation really was. If the appellant was successful in displacing this plea in law, the fact that he had suffered damage and was entitled to reparation was amply made out by the evidence.

Argued for the respondent;—Where actings or omissions were taking place from which cumulative damages would arise, the person intending to claim damages must give timely intimation of the damage, or, on the ground of prejudice, he would lose his right of action. Such intimation must be specific, and could not be conveyed by mere grumbings,⁵ which were all that the appellant had proved here. Further, the payment of rent and the taking of clean receipts

¹ Feb. 2, 1855, 17 D. 340.

² *Hardie v. Duke of Hamilton*, Feb. 2, 1878, 15 S. L. R. 329; *Macdonald v. Johnstone*, June 12, 1883, 10 R. 959; *Johnstone v. Hughan*, May 22, 1894, 21 R. 777; *McDonald v. Kydd*, June 14, 1901, 3 F. 923; *Grahams v. Gordon*, June 16, 1843, 5 D. 1207.

³ *Emslie v. Young's Trustees*, March 16, 1894, 21 R. 710.

⁴ *Foulis v. McWhirter*, Jan. 14, 1841, 3 D. 343.

⁵ *Macdonald v. Johnstone*, 10 R. 959; *Johnstone v. Hughan*, 21 R. 777.

were in themselves proof of waiver of any claim for damages.¹ In Mar. 5, 1908. the circumstances of this case, therefore, the Sheriff was right in sustaining the plea in bar. Further, it was proved that in 1903 and 1904 heather-burning was impossible, therefore all the damage alleged here had arisen from the failure to burn a larger quantity of heather in the years up to 1902, and the appellant could found no claim on failure to burn heather in these years. Up to 1902 there was no agreement between the parties as to the amount of heather to be burnt, therefore there was no breach by the landlord. The agreement as to heather-burning was only arrived at in 1902, and it was absurd to say it acted retrospectively. It was itself in *de presenti* terms, and being only in an improbative document it could not override a previous existing arrangement, and did not fall under the same rules of interpretation as a formally executed lease. The intention of parties was clearly in support of this, for the landlord would never have signed a document that was to subject him retrospectively to a claim which at that time was non-existent. Further, the appellant had made no claim up to the signing of the lease, and therefore by signing it he had made a complete waiver of all claims, if he had any, up to that date. The case of *Foulis v. M^r Whirter*² did not apply to the present circumstances, for there there was a formal lease, it did not differ in any respect from the previous writings of the parties, and the judgment was not based on the lease alone, but also on the previous missives. Even if the Sheriff was wrong in sustaining the plea in bar, the evidence adduced at the proof had failed to substantiate the appellant's claim.

At advising on 5th March 1908,—

LORD M'LAREN.—This case comes before us on an appeal from the Sheriff Court of Perthshire in conjoined actions. In the first action Sir James Ramsay sued the appellant for £157, 10s., being half-yearly rent due at Whitsunday 1905, and was met by a claim to retain the rent against a larger sum of damages which was said to be incurred in the year 1904, chiefly in respect of insufficient heather-burning.

The second action was instituted by the appellant, and in it he claims damages incurred in the year 1905. There is also a claim for repairs to the house and fences, but this part of the case was not brought under review in the Court of Session. The actions were conjoined in the Sheriff Court.

The Sheriff-substitute awarded £100 of damages in respect of insufficient heather-burning, stating in his note that his award was made on the consideration that the tenant might have kept additional stock, and that prices of late had been good.

The Sheriff found "that the tenant is barred by delay in intimating his claim from any claim of damages in respect of failure to burn sufficient heather," and therefore assoilzied Sir James Ramsay from the conclusions under this head. In the note to his interlocutor the learned Sheriff states

¹ Broadwood v. Hunter, 17 D. 340; Baird v. Mount, Nov. 19, 1874, 2 R. 101; Emslie v. Young's Trustees, 21 R. 710; Elliott's Trustees v. Elliott, June 7, 1894, 21 R. 858; Hamilton v. Duke of Montrose, July 5, 1906, 8 F. 1026.

² 3 D. 343.

Mar. 5, 1908. that in his view it is unnecessary for him to determine the question whether there was default on the part of the landlord.

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Lord M'Laren.

It appears to me, however, that we cannot with advantage consider whether there was such delay in making a definite claim as would amount to a legal bar, until we have mastered the facts of the case, including such elements as the amount of heather burned from year to year, the state of the weather in the spring months in so far as it has interfered with burning of heather, and the condition of the moor at the time when the claim was made as compared with its condition when the tenant first entered on the possession of the farm.

The omission to burn the proper quantity for two or three years might not sensibly affect the value of the farm for grazing, and again, the inability to burn heather during, say, two consecutive seasons, even if it did affect the value of the farm, would not give the tenant a claim for damage.

But the effect of the heather being allowed to grow unchecked for a series of years is cumulative, and, *prima facie*, it is only when the tenant begins to suffer from the abnormal growth of the heather that his claim arises. In any view, it is only then that the attention of the tenant is directed to the subject, and that he is in a position to estimate the damage and to formulate a claim. For this reason I think we shall best get at the justice of the case if we begin by considering whether there was, in fact, a failure on the part of the respondent to keep down the heather to the proper extent.

The case is further complicated by reason of the parties being at variance as to the extent of the landlord's obligation to burn the moor. There is a concurrence of testimony that in 1895, when the appellant got possession of the farm of Craighead, the moor was not in good order, and the appellant would not have taken the farm except on the condition that it was to be made suitable for pasture by yearly heather-burning. But the terms of the lease, as often happens, were not arranged when the tenant got possession, and, as matter of fact, the lease was not executed until July 1902, the chief cause of the delay being the difference of view between landlord and tenant as to the extent to which the burning of the heather was to be carried. The appellant claimed that one-tenth of the moorland should be burned in each year. The respondent would only undertake to burn one-fourteenth—(see the evidence of Mr Ralston, factor in the intermediate years of the tenancy). Eventually the figure of one-twelfth was agreed on, and that figure was inserted in the lease executed in 1902.

It is maintained for the proprietor that this figure ought not to be applied retrospectively in estimating the damage under the present claim, but, in my opinion, there is not much substance in the argument. If the terms of the lease had been varied, if, for example, the original agreement had been to burn to the extent of one-fourteenth, and if, after the lapse of say seven years, the proprietor had agreed to the proportion of one-twelfth, plainly there would be no breach of contract in past years if the burning had been carried out in terms of the original agreement. But in the actual case there was no variation of the original contract. The contract was (by legal implication) that the moor should be burned annually to a reasonable extent. The parties were not at first agreed as to what should be con-

sidered a reasonable proportion, but eventually they agreed that one-twelfth Mar. 5, 1908. of the whole moor should be taken as a reasonable amount of burning in Ramsay v. fulfilment of the proprietor's obligation, and this quantity was inserted in a Howison. lease which, although only executed in 1902, gave entry as at Martinmas Lord M'Laren. 1895. I think this must be taken to be an estimate on which the parties were agreed and meant to be bound, of what they considered a fair fulfilment of the proprietor's obligation to burn reasonably. When, two years after the execution of the lease, it was found that the pasturage had deteriorated, I think the measure of damage is the loss the tenant proves that he has suffered from the neglect to burn to the extent of one-twelfth from the beginning. In that sense I see no difficulty in giving a retrospective effect to the clause in the lease, because it was not a variation, but an interpretation by joint consent of the original obligation.

[After reviewing the evidence as to insufficient heather-burning, his Lordship proceeded]:—I agree with the Sheriff-substitute that the respondent or his gamekeeper, for whom he is, of course, responsible, has not fairly carried out the agreement with the appellant as to burning, and that the damage for the two years to which the actions relate is proved to amount to £100.

There remains for consideration the ground of the Sheriff's judgment, which is that the appellant by paying his rent for a series of years before making a specific claim has departed from his claim of damage for future years.

Now, I think that in applying the principle of decision in such cases as *Broadwood v. Hunter*¹ to a case in which the uses of the land are different, and the conditions which determine liability are different, some caution is requisite; and it is proper to consider the principle which underlies the decisions, and to apply it, with the necessary reserve, to the altered conditions. There are two principles to be considered. The first is that where a proprietor is in breach of the contract of location, the tenant, and no other person, is the party entitled to sue for reparation, a principle which has lately been called in question, but may now, I hope, be held to be established. The other is, that a tenant may waive his claim, and that such a waiver may be inferred from his acts, even when he has not granted an express discharge. Whether in any particular case the tenant has waived his claim is a question of fact in which all the circumstances have to be considered. In this case, and according to the agreement, the tenant entered upon the occupation of a farm which was in very bad condition, with a legal expectation that in the course of his tenure the sheep-carrying capacity of the farm would be improved. But it was quite impossible to forecast the time when the expected improvement would be realised, because this depended partly on the weather conditions being favourable for burning, and partly on the system of burning, which to some extent was in the proprietor's discretion. If the burning was done in considerable tracts at a time, there would be a sensible improvement as soon as the grass began to grow, but if it were done in small patches scattered over the moor, the benefit might be eventually the same, but it would be longer in coming into

¹ 17 D. 340.

Mar. 5, 1908. operation. In any case, as the tenant entered upon an improving lease, he could not reasonably make a claim of damage until after the lapse of such a period of years as would be necessary to give the system a fair trial. The most he could do would be to insist on the agreement as to burning being carried out. In consequence of the death of Mr Panton, the first factor, we have not the advantage of his evidence, but I see no reason for doubting the accuracy of the appellant's statement that he complained to Mr Panton, year by year, of the inefficient way in which the burning was carried out, and pressed for a more speedy fulfilment of the landlord's undertaking in this respect. In the year after Panton's death, the parties were negotiating as to the terms of the written lease, and it was not until 1902, when the lease had been executed, and when there had been a six years' trial of the proprietor's system of burning, that the tenant can be said to be in a condition to judge for himself whether he had the materials for a specific claim. Up to this time the utmost effect that could be given to his omission to make a claim would be that he could not claim damage for any inconvenience he had suffered in the years that were past.

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Lord M'Laren.

Then, after 1902, the case was further complicated by the occurrence of two unfavourable years for burning; but in 1904 the appellant had satisfied himself that the respondent did not mean, unless compelled by legal means, to carry out fully his undertaking as to heather-burning. In this conclusion I think he is justified by the attitude taken up by the respondent's advisers at the proof, and also by the circumstance that in the year following the action the heather-burning was, for the first time, carried out in an efficient way.

Now, if the appellant had brought his action at an earlier period, he would very likely have been met by the defence that the heather-burning had not had a sufficient trial, and that he could not expect in so short a time to have the farm in good condition. There is really no criterion for determining at what particular year the damage had declared itself so as to put the tenant to an election either to waive his claim altogether or to enforce it. In all the circumstances I see no sufficient evidence of waiver, and I cannot think it would be a just or equitable result that the tenant must submit during the remaining years of his lease (for this is the Sheriff's judgment) to an actual refusal on the part of the landlord to fulfil his contract because he has not enforced his rights with the utmost strictness in the past. I am therefore of opinion that we should sustain the appeal and restore the judgment of the Sheriff-substitute, that the appellant is entitled to £100 as damage sustained during the years 1904 and 1905 through the negligent performance of the respondent's obligation to burn a fair proportion of the heather year by year in terms of the lease.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD PEARSON was absent at the advising.

THE COURT sustained the appeal, recalled the interlocutor of the Sheriff dated 16th February 1907, affirmed that of the Sheriff-substitute dated 26th December 1906, repeated the findings therein, and decerned.

CARMICHAEL & MILLER, W.S.—GILLESPIE & PATERSON, W.S.—Agents.

THOMAS LAWRIE, Pursuer (Reclaiming).—*Morison, K.C.—Gillon.*
 JAMES BROWN & COMPANY, LIMITED, Defenders (Respondents).—
Lees, K.C.—Burn Murdoch.

No. 100.

Mar. 6, 1908.

Lawrie v.
Brown & Co.,
Limited.

Master and Servant—Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), sec. 1, and Second Sched., pars. (8) and (14)—Recorded Memorandum of Agreement—Action of damages for breach of Agreement—Competency.—A memorandum of agreement, recorded under par. (8) of the Second Schedule of the Workmen's Compensation Act, 1897, bore to be "in the matter of an agreement under the Workmen's Compensation 1897," between L. and B. & Co., and set forth that L. had claimed compensation under the Act from B. & Co.; that the parties were agreed that the maximum compensation to which L. was entitled was 17s. 6d.; and that B. & Co. "agree in lieu of such compensation to give" B "regular employment as a foreman," and "to pay him the fixed weekly wage of 23s. . . . and also to pay him on the date hereof the sum of £90 sterling, and these in full of all his claims for compensation under the said Act."

B. & Co. paid £90 to L., and they also employed him on the agreed-on terms for about three years. They then dismissed him.

L. brought an action of damages for breach of contract against B. & Co., pleading that the memorandum of agreement embodied two agreements—(a) an agreement to pay £90 as compensation under the Act, and (b) a common law agreement to give the pursuer employment.

Held (aff. judgment of Lord Guthrie, Lord Ardwall reserving his opinion), that the action was incompetent in respect that the agreement being indivisible and being recorded, only the remedies provided by the Workmen's Compensation Act were available to L.

Master and Servant—Constitution of Contract—Agreement by master to give "regular employment" to servant.—By an agreement in settlement of a claim under the Workmen's Compensation Act, 1897, the master, in addition to agreeing to make immediate payment of a lump sum to the claimant, agreed to give the claimant "regular employment at a fixed weekly wage of 23s." After three years the master dismissed him.

Held (aff. judgment of Lord Guthrie) that the agreement did not give the claimant a right to permanent employment so long as he was willing and able to do the work.

ON 3d December 1903 an agreement in the following terms was recorded in the Sheriff Court Books at Edinburgh:—

2D DIVISION.
Lord Guthrie.

"To the Sheriff-clerk of the County of Midlothian.

"In the matter of an agreement under the Workmen's Compensation Act, 1897, between Thomas Lawrie, head fireman, Esk Mills Row, Penicuik,—*Applicant*; and James Brown & Company, Ltd., paper-makers, Esk Mills, Penicuik,—*Respondents*.

"Take notice that in the foresaid matter in which the applicant claimed compensation from the respondents in respect of the loss of an eye by accident arising out of and in the course of his employment as a workman in the service of the respondents at Esk Mills aforesaid on the 5th day of September 1903, the following agreement has been made between the parties, that is to say:—

"The said parties agree that the maximum compensation to which the applicant is entitled under the Act is 17s. 6d. per week, being one-half of his average weekly earnings, consisting of 30s. of regular wages and an average sum of 5s. of extra work at overtime wages, but subject to deduction, in terms of the second paragraph of the First Schedule of the said Act, of the average amount which he is now able

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to earn as regular and extra wages, and the respondents agree in lieu of such compensation to give the applicant regular employment as foreman over the workers at the settling ponds in connection with their works at Esk Mills, and to pay him the fixed weekly wage of 23s., with the usual additional pay for extra work, and also to pay him on the date hereof the sum of £90 sterling, and these in full of all his claims for compensation under the said Act in respect of the said injury.

"You are requested to record this memorandum pursuant to paragraph 8 of the Second Schedule of the above-mentioned Act." Then followed the date of the agreement and the signatures.

In November 1906 Lawrie raised an action against James Brown & Company, Limited, concluding for decree for payment of £300.

The pursuer set forth the circumstances of the accident which resulted in the injury to his eye, and averred:—(Cond. 3) "The defenders, recognising that the pursuer had a serious claim both at common law and under the Workmen's Compensation Act, 1897, at once began to negotiate a settlement with him. They were well aware that he had a wife and family dependent upon him. . . . Accordingly, they proposed that the pursuer should make an agreement with them under the Workmen's Compensation Act, in order that the pursuer might be enabled to earn substantial wages, and promised that they would receive into their employment one of the pursuer's children who was then of an age ready for work, and the younger ones as they came to be of an age for working. The defenders further . . . agreed to give the pursuer regular employment as a foreman over their workers at the settling ponds in connection with their works at Esk Mills, paying him a fixed wage of 23s. per week, with the usual additional pay for extra work, which they promised would be equal to one day per week or 3s. 10d. of additional wages. . . . In respect of the outlay, loss, &c., consequent on the injury to the pursuer's eye, the defenders further agreed to pay the pursuer £90 sterling. In so far as the said agreement related to the matters contemplated by the Workmen's Compensation Act, a memorandum of agreement was entered into between the pursuer and defenders (a copy of which is herewith produced), and was duly recorded in the Sheriff Court Books at Edinburgh on 3d December 1903." (Cond. 4) "Acting under the said arrangement the defenders paid the said £90, and took the pursuer back temporarily into their service, but in all other respects they have grossly failed to fulfil their said agreement, and have acted in direct violation of its terms. . . . In particular, the pursuer requested that two of his younger children should be given work as promised, but this the defenders refused. The defenders, in place of giving the pursuer the position of foreman at the settling ponds, compelled him to work as a general labourer. . . . The defenders also refused to give the pursuer any opportunity of earning wages for overtime. . . . In consequence of the pursuer's attempting to hold the defenders to the said agreement, he was dismissed by them without notice or reason assigned on 3d July 1906."

The pursuer pleaded, *inter alia*;—(1) The defenders never having implemented the obligation incumbent upon them to provide the pursuer with regular employment as foreman over the workers at the settling ponds, and having, by dismissing the pursuer from their service, caused him much loss, injury, and damage, they are liable in

reparation. (2) The defenders having wrongfully dismissed the pursuer from their service, are liable in reparation. Mar. 6, 1908.

The defenders pleaded, *inter alia*;—(1) The action is incompetent as laid, in respect, *inter alia*, that although the claim arises out of an agreement under the Workmen's Compensation Act, 1897, it seeks to add a remedy which the Act does not give. (2) The averments for the pursuer are not relevant or sufficient to support the conclusions of the summons, and the action should therefore be dismissed, with expenses. Lawrie v.
Brown & Co.,
Limited.

On 15th June 1907 the Lord Ordinary (Guthrie) assoilzied the defenders from the conclusions of the summons, and decerned.*

The pursuer reclaimed, and argued;—(1) The action was competent. No doubt the memorandum of agreement bore to be "in the matter of an agreement under the Workmen's Compensation Act, 1897," and if the document had embodied nothing else than an agreement under the Act the pursuer did not dispute that the action would have been incompetent;¹ but when the document was analysed it would be found that it embodied not one but two agreements, namely (a) a statutory agreement by which the defenders agreed to pay, and the

* "OPINION.—The defenders plead incompetency and irrelevancy.

"They say that the action is incompetent because the only claim stated by the pursuer against them arises out of an agreement under the Workmen's Compensation Act, 1897. That agreement, they admit, can be enforced in all its terms under the Act, but, according to them, no part of it can be made the ground for a claim for damages at common law, such as is made in this action. The pursuer has foreseen the difficulty, and has endeavoured in cond. 3 to avoid it by representing the statutory agreement as one contract and the agreement for regular employment, which is the basis of his present claim, as another and distinct contract. But this is not so, either in fact or in law. The whole stipulations are contained in one agreement. It is headed, 'In the matter of an agreement under the Workmen's Compensation Act, 1897,' &c., and, after detailing the terms of the agreement, including the undertaking by the defenders to give the pursuer 'regular employment as foreman over the workers at the settling ponds,' ends with these words, 'and these in full of all his claims for compensation under the said Act in respect of the said injury.' In these circumstances, it is unsound to maintain, as the pursuer does, that the case is the same as if the stipulation as to regular employment was in a separate document containing no reference to the Act. If the contract founded on by the pursuer is part of an agreement under the Act, as I hold it is, it is not disputed that it cannot be enforced in this action.

"I also sustain the plea to the relevancy. It is not necessary to consider the pursuer's averments as to the defenders' breach of a verbal contract to employ his children, and to afford him extra work, because it was explained that these are not matter of substantive claim. Nor is any case made of want of reasonable notice, if the pursuer was truly employed by the defenders, as alleged by them, at will. The pursuer's complaint is that, while the defenders undertook to give him 'regular employment,' they only did so for nearly three years and then dismissed him. I see no breach of contract by the defenders in thus acting, unless there be read into the agreement an obligation on them to give the pursuer regular employment for life, or at least, as the pursuer contended, so long as he is able and willing to serve them and does his work properly. I see no warrant for reading any such terms into the agreement, and I therefore hold the pursuer's averments of breach of contract irrelevant."

¹ Cochrane v. Traill & Sons, March 16, 1900, 2 F. 794.

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to earn as regular and extra wages, and the respondents agree in lieu of such compensation to give the applicant regular employment as foreman over the workers at the settling ponds in connection with their works at Esk Mills, and to pay him the fixed weekly wage of 23s., with the usual additional pay for extra work, and also to pay him on the date hereof the sum of £90 sterling, and these in full of all his claims for compensation under the said Act in respect of the said injury.

"You are requested to record this memorandum pursuant to paragraph 8 of the Second Schedule of the above-mentioned Act." Then followed the date of the agreement and the signatures.

In November 1906 Lawrie raised an action against James Brown & Company, Limited, concluding for decree for payment of £300.

The pursuer set forth the circumstances of the accident which resulted in the injury to his eye, and averred:—(Cond. 3) "The defenders, recognising that the pursuer had a serious claim both at common law and under the Workmen's Compensation Act, 1897, at once began to negotiate a settlement with him. They were well aware that he had a wife and family dependent upon him. . . . Accordingly, they proposed that the pursuer should make an agreement with them under the Workmen's Compensation Act, in order that the pursuer might be enabled to earn substantial wages, and promised that they would receive into their employment one of the pursuer's children who was then of an age ready for work, and the younger ones as they came to be of an age for working. The defenders further . . . agreed to give the pursuer regular employment as a foreman over their workers at the settling ponds in connection with their works at Esk Mills, paying him a fixed wage of 23s. per week, with the usual additional pay for extra work, which they promised would be equal to one day per week or 3s. 10d. of additional wages. . . . In respect of the outlay, loss, &c., consequent on the injury to the pursuer's eye, the defenders further agreed to pay the pursuer £90 sterling. In so far as the said agreement related to the matters contemplated by the Workmen's Compensation Act, a memorandum of agreement was entered into between the pursuer and defenders (a copy of which is herewith produced), and was duly recorded in the Sheriff Court Books at Edinburgh on 3d December 1903." (Cond. 4) "Acting under the said arrangement the defenders paid the said £90, and took the pursuer back temporarily into their service, but in all other respects they have grossly failed to fulfil their said agreement, and have acted in direct violation of its terms. . . . In particular, the pursuer requested that two of his younger children should be given work as promised, but this the defenders refused. The defenders, in place of giving the pursuer the position of foreman at the settling ponds, compelled him to work as a general labourer. . . . The defenders also refused to give the pursuer any opportunity of earning wages for overtime. . . . In consequence of the pursuer's attempting to hold the defenders to the said agreement, he was dismissed by them without notice or reason assigned on 3d July 1906."

The pursuer pleaded, *inter alia*;—(1) The defenders never having implemented the obligation incumbent upon them to provide the pursuer with regular employment as foreman over the workers at the settling ponds, and having, by dismissing the pursuer from their service, caused him much loss, injury, and damage, they are liable in

reparation. (2) The defenders having wrongfully dismissed the pursuer from their service, are liable in reparation. Mar. 6, 1908.

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¹ Cochrane v. Traill & Sons, March 16, 1900, 2 F. 794.

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pursuer agreed to accept, the sum of £90 as compensation under the Act; and (b) a common law agreement by which the defenders agreed to give the pursuer "regular employment." If the two agreements had been embodied in separate documents, the competency of an action laid on the common law agreement could hardly have been doubted. An agreement to give employment to a workman was obviously legal at common law; and the Act did not prohibit an employer and a workman from entering into such an agreement—the contracting-out clause of the Act¹ did not apply. The question, therefore, came to be—Did the circumstances that the two agreements were embodied in the same document, and that the document had been recorded under the Act, make the present action incompetent? The circumstance that the two agreements were in the same document was obviously in itself of no importance, and besides the £90 had been paid to the pursuer before the date of recording, so that the document had come to embody the common law agreement only. Then as to recording, the Act provided for payment of compensation in money and for nothing else,² and no amount of recording could convert an agreement to give employment into an agreement to pay money by way of compensation under the Act. If the pursuer could enforce the agreement only by way of proceedings under the Act, he could not enforce it at all, for the only way of enforcing such an agreement was by an action of damages for breach of contract, and the Act did not know of such a thing. In the first branch of *Robertson v. S. Henderson & Sons, Limited*,³ it was held that a common law action for reduction of an agreement on the ground of minority and lesion was competent, which shewed that where there were rights which could not be enforced by proceedings under the Act, the common law was available. The second branch of *Robertson v. S. Henderson & Sons, Limited*,⁴ had no bearing on the present case. No question was there raised as to enforcing an agreement to give employment; on the contrary the pursuer there argued that the promise of future employment in that case was according to its terms a mere promise which was not enforceable in any way, and consequently that he had suffered enorm lesion. Here on the other hand the document according to its terms embodied a contract—a contract by which the defenders "agreed" to give the pursuer "regular employment." That meant employment for life, or at all events for so long as the defenders' works existed and the pursuer was willing and able to do his duties. The defenders said that "regular" employment was opposed to "casual" employment. That distinction was illusory, since the defenders' real contention was that they were entitled to dismiss the pursuer at pleasure or at least on a short notice. If the pursuer had gone to arbitration under the Act he would have been entitled to 17s. 6d. for life. It was difficult to read the agreement as meaning that the pursuer gave up that right for £90 down and the chance of employment by the defenders.

Argued for the defenders;—(1) An injured workman had a choice of remedies; he might proceed by way of ordinary action, or he might proceed under the Workmen's Compensation Act; but if he elected to proceed under the Act he could not go back on that election—his

¹ Act, sec. 3.

² Act, sec. 1, and Second Sched. pars. (8) and (14) (b).

³ June 2, 1904, 6 F. 770.

⁴ June 16, 1905, 7 F. 776.

only remedies were those provided by the Act.¹ All that the first branch of *Robertson v. S. Henderson & Sons, Limited*,² decided was that an agreement as to compensation might be reduced on the ground of minority and lesion—obviously a very different kind of case from the present. Here the agreement bore to be an agreement under the Act; it had been recorded; and the effect of recording was that it became enforceable “in like manner as a recorded decree-arbitral.”³ That was the only remedy under the Act, and consequently the pursuer’s only remedy. To say, as the pursuer said, that there were here really two agreements, one statutory and the other at common law, and that he was entitled to enforce the common law agreement by an ordinary action of damages, was just another way of saying that, having begun proceedings under the Act he was entitled to stop these proceedings and begin proceedings at common law. There was plainly only one agreement here, and being in terms an agreement under the Act, it could be enforced, in so far as it was enforceable, only by the statutory remedy, which was to charge upon the recorded memorandum of agreement. Possibly such a charge might be inept and ineffectual in so far as the employment clauses of the agreement were concerned, but the second branch of *Robertson v. S. Henderson & Sons, Limited*,⁴ shewed that clauses of that sort, although not in themselves enforceable, might be a valuable consideration, and therefore part of the compensation under the agreement. However (2) it was not necessary to go into the question as to what remedy, if any, would have been available to the pursuer if he had averred a proper obligation on the part of the defenders to give him employment, for he had not relevantly averred such an obligation. “Regular employment” did not mean “permanent employment”; it meant what it said,—“regular employment” and not casual employment, i.e., on odd jobs. If the agreement had specified the period for which the future employment was to endure, the case would have been very different, but the agreement did not specify such a period, and the policy of the law was against contracts which had not a definite end, and the Court would not define what the parties themselves had left undefined.

LORD STORMONTH-DARLING.—I agree with the Lord Ordinary upon both points. He has decided the case by finding that the action is bad both as being incompetent and irrelevant. Now, nothing is better settled than that you cannot proceed both under the Workmen’s Compensation Act and also independently of it, and the Workmen’s Compensation Act provides for workmen, where there has been an agreement between the parties, a short and simple remedy for working out that agreement, first, by registering the agreement, and then by making it enforceable as a Sheriff Court decree to all effects. The agreement here was signed by both parties, and from the first it seems to have been determined that it should be registered under the Act. Now, when that is so I think that all other remedy is excluded. I quite agree that the judgment in the case of *Robertson v. S. Henderson & Sons, Limited*,² settles that in certain circumstances there may be an action at common law. There, an agreement had been made between a minor and his employers, and it was held that it was reducible

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¹ Act, sec. 1, subsec. (2) (b).

³ Act Second Sched., para. (8) and (14) (b).

² 6 F. 770.

⁴ 7 F. 776.

Mar. 6, 1908. by the workman on the ground of minority and lesion, but the ground of that decision on the competency was stated by Lord Kinnear in these words:—"The Act of Parliament gives compensation in certain circumstances, and allows it to be fixed either by agreement or by arbitration. But when it allows the compensation to be fixed by agreement it assumes that the agreement is valid and binding according to law." Now of course an agreement can only be reduced under the head of minority and lesion by an action at common law. Now, what is the agreement here, and what are the circumstances of this case? The agreement was a mixed one. In the first place, it provided what the compensation to which the applicant was entitled under the Act would have been, and as to that the parties are agreed. It said that the average weekly earnings were 30s., and that the maximum compensation would therefore have been 17s. 6d., being the half thereof and of an added sum of 5s. for average overtime. And then it went on to agree that in lieu of such compensation the respondents were to give the applicant regular employment as a foreman over the workers at the settling ponds in connection with their works at Esk Mills, and to pay him the fixed weekly wage of 23s. with the usual additional pay for extra work, "and also to pay him on the date hereof the sum of £90 sterling, and these in full of all his claims for compensation under the said Act in respect of the said injury."

Well, now, the compensation which is here referred to covers all the stipulations in his favour—that is to say, those stipulations which the respondents agreed to pay in lieu of compensation are, the £90 down and the undertaking to give regular employment as foreman over the workers at the settling ponds in connection with their works at Esk Mills at a weekly wage, with certain additional pay for extra work. It was these things which he agreed to accept as compensation under the Act, and that agreement was, as I have said, duly signed and recorded. It seems to me that the Lord Ordinary is quite right in saying that you cannot split an agreement of that kind into two. The compensation for the accident was a composite thing, part of which, I quite agree, would not have been enforceable at all, and so the Lord Ordinary held on the question of relevancy. But still I do not see how it was competent to split it into two as the workman proposes to do. He says, "I have got my £90—and that is all that was, strictly speaking, money compensation for the injury I received—but I propose to treat that separately altogether from the obligation to give regular employment in a certain capacity, which I see is not enforceable under the agreement, because it was open to a number of objections, and I can only enforce it at common law." Now, I think that is an illegitimate way of dealing with the agreement, and it was so held, as I read the agreement, in the subsequent case of *Robertson v. Henderson & Sons*,¹ because there the Court undoubtedly viewed the compensation as consisting partly of the promise or undertaking by the employers to give employment, although they admitted it was not enforceable at all.

Well, then, here the workman agreed to that, and it was a term of the agreement which he made under the Act, and the Lord Ordinary has held

¹ 7 F. 776.

that you cannot split it into two parts and treat the one part as compensa-
tion and the other as not compensation. I think it was all compensation, Mar. 6, 1908.
and the workman took it for what it was worth, and was bound to pro- Lawrie v.
ceed as the Act directed, namely, by registering the agreement, which he Brown & Co.,
did, and by charging upon it as a Sheriff Court decree. I agree with Mr Limited.
Lees that it is impossible to treat a Sheriff Court decree as a thing which is LdStormonth-
to be split into its parts and treated differently according as one part was Darling.
and the other was not, strictly speaking, enforceable.

That concludes the Lord Ordinary's mode of dealing with the plea of incompetency, and then he goes on to deal with the relevancy, and there again he holds that the pursuer's averments are objectionable as being not relevant, because his complaint is merely that the employers failed to give him regular employment as he considers it. Now, what is the fact? They took him on as foreman over the workers at the settling ponds and kept him there for two years and a half. However, there arose a dispute between them owing to his failure to obey the orders of the foreman over the whole workers, which undoubtedly he was bound to obey. It is not said that he was not put as foreman over the workers at the settling ponds, and it cannot be contended that he was not bound to obey the foreman over the whole workers. There also I think the Lord Ordinary was perfectly right, and therefore what I propose to your Lordships is to adhere to the interlocutor which the Lord Ordinary has pronounced in both branches.

LORD LOW.—I concur. I think that when the parties recorded the agreement under section 8 of the second schedule of the Act, they elected to abide by the Act, because the effect of recording the agreement was that, as it is put in the eighth section, they obtained what was equivalent to a County Court judgment in terms of the agreement; or if we take the words of subsection (b) of the 14th section of the schedule, what was equivalent to a recorded decree-arbitral in terms of the agreement. The pursuer having therefore chosen to take a decree which he can enforce, it seems to me that he must abide by the remedy which he has chosen, and cannot throw over the registration and appeal to this Court on the ground that this is a contract having nothing to do with the Workmen's Compensation Act at all.

But even if that view were not maintainable, I agree with the Lord Ordinary that the action falls to be thrown out on the ground that no relevant averment has been made. Under the agreement no doubt the employers bound themselves to give the workman regular employment as foreman over the workers at the settling pond, but no term of endurance of the employment is fixed. It was argued that the use of the word "regular" implied a term of endurance, but I do not think that is so, because I think that the word "regular" is used as distinguished from "occasional" or "intermittent," regular employment being employment which will enable the workman to earn wages regularly week by week. But as no term of endurance is fixed, I take it that the employment was necessarily employment at pleasure, and that is a contract which, in my judgment, cannot be enforced, because I do not think that the Court will ordain that to be done which may immediately be undone.

But I do not think it is necessary to go as far as that, because, assuming

Mar. 6, 1908. that the employers were bound at all events to give the workman employment for some time, they have done so. They have given him the stipulated employment and paid him regularly the stipulated wages for two and a half years, and it is perfectly plain that the reason why they dismissed him in the end was that there was a dispute about the kind of work he was to perform. In these circumstances I think that it is plain that the claim of damages for breach of contract is untenable. On both branches of the case, therefore, I agree with your Lordship in the chair and with the Lord Ordinary.

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Lord Low.

LORD ARDWALL.—I agree with the result at which your Lordships have arrived, that we should affirm the judgment of the Lord Ordinary, but I do so only on the question of relevancy, and that for the reasons stated by my brother Lord Low.

There was no duration here, and where this is so in a contract of service it is well settled that the duration of such contracts is what is customary in the employment. In the case of gamekeepers and gardeners, &c. it is usually held that the engagement is for six months or a year according to the custom of the country. With regard to workmen in a work of this kind, they usually are employed for the term of a single pay, which is generally a fortnight. I think, therefore, it is absurd to say that where, after the pursuer has been three years or so in the defenders' service, the parties having fallen out about the nature of the employment, the defenders have dismissed the pursuer, there is any relevant averment entitling him to damages, and accordingly on that ground I think the action is irrelevant, and that the defenders must be assolizied.

But I must say that I am not, without much further consideration, prepared to agree in holding that this action is incompetent. I am not convinced that it is illegal to insert an undertaking to give employment as part of a contract for compensation under the Workmen's Compensation Act. If it is not illegal to do so the question comes to be, How is such an agreement to be enforced? It is said, "Just register your memorandum, and go on and charge upon it." Now, that is all very well, but a contract of service, as is pretty well settled, is not a contract of which a Court of law will decern specific implement. But the service has come to an end, and the man has been discharged. What, then, does the pursuer's claim resolve into? If a relevant case had been stated, it would resolve into a claim of damages; but there is no procedure prescribed by the Workmen's Compensation Act for enforcing such a claim, and therefore I must say I am disposed to think that, if there had been a relevant case here, it was not incompetent to ask in an ordinary Court of law a remedy which could not be worked out under the Workmen's Compensation Act. We, however, have not a relevant action here, and accordingly I refrain from expressing a definite opinion on the question of competency.

The LORD JUSTICE-CLERK was sitting in the Court of Justiciary.

THE COURT adhered.

KIRK MACKIE & ELLIOT, S.S.C.—HAGART & BURN MURDOCH, W.S.—Agents.

JOHN WALLACE, Appellant.—*Craigie, K.C.—Mackenzie Stewart.* No. 101.
 R. & W. HAWTHORNE, LESLIE, & COMPANY, LIMITED, Respondents.—
C. D. Murray—Hossell Henderson. Mar. 7, 1908.

Master and Servant—Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), secs. 3 and 15—Contracting-out—Scheme certified under Act of 1897—Re-certification.—The Workmen's Compensation Act, 1906, came into operation on 1st July 1907. A workman entered an employment on 9th August 1907, and agreed to accept a scale of compensation provided by a scheme certified under the Workmen's Compensation Act, 1897,—the certificate bearing that the scheme was to expire on 31st December 1908. On 15th August 1907, when the scheme had not been re-certified under sec. 15 of the Workmen's Compensation Act, 1906, the workman was injured by an accident arising out of and in the course of his employment.

Held, on a construction of secs. 3 and 15 of the Act of 1906, that the workman having entered on his employment after 1st July 1907, he was not barred from obtaining compensation under the Act by having agreed to accept the provisions of a scheme certified under the Act of 1897, but which had not been re-certified under the Act of 1906.

JOHN WALLACE, 9 Tobago Street, Greenock, claimed compensation in an arbitration in the Sheriff Court at Greenock under the Workmen's Compensation Act, 1906,* from R. & W. Hawthorne, Leslie, & Wallace v. Hawthorne, Leslie, & Co., Limited. 2D DIVISION. Sheriff of Renfrew and Bute.

* The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), enacts :—

Sec. 3. “(1) If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, provides scales of compensation not less favourable to the workmen and their dependants than the corresponding scales contained in this Act, and that, where the scheme provides for contributions by the workmen, the scheme confers benefits at least equivalent to those contributions in addition to the benefits to which the workmen would have been entitled under this Act, and that a majority (to be ascertained by ballot) of the workmen to whom the scheme is applicable are in favour of such scheme, the employer may, whilst the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme; but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act.”

Sec. 15. “(1) Any contract (other than a contract substituting the provisions of a scheme certified under the Workmen's Compensation Act, 1897, for the provisions of that Act) existing at the commencement of this Act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this Act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this Act.

“(2) Every scheme under the Workmen's Compensation Act, 1897, in force at the commencement of this Act shall, if re-certified by the Registrar of Friendly Societies, have effect as if it were a scheme under this Act.

“(3) The Registrar shall re-certify any such scheme if it is proved to his satisfaction that the scheme conforms, or has been so modified as to conform, with the provisions of this Act as to schemes.

“(4) If any such scheme has not been so re-certified before the expira-

Mar. 7, 1908. Company, Limited, shipbuilders, St Peter's Works, Newcastle-on-Tyne, and H.M.S. "Agamemnon," Naval Construction Works, Dalmuir.

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Limited.

The Sheriff-substitute (Neish) refused the application, and stated a case for appeal.

The case set forth as follows :—

"This is an arbitration under the Workmen's Compensation Act, 1906.

"The appellant applied for compensation under the Workmen's Compensation Act, 1906, or, alternatively, under the Re-certified Scheme No. 107, which is marked B.

"The respondents maintained that the appellant is only entitled to compensation under the Certified Scheme No. 7, which is marked A.

"Parties' agents were heard by me on the 16th December 1907. No proof was led.

"The following facts were admitted :—

"On 15th August 1907 the appellant was employed by the respondents on board H.M.S. 'Agamemnon,' which was then lying at the Tail of the Bank opposite Greenock, for the purpose of undergoing official trials.

"On said date the appellant was injured on board said ship by an accident arising out of and in the course of his employment.

"The appellant entered the respondents' employment on 9th August 1907, and agreed to accept the scale of compensation provided by the St Peter's Works, Newcastle-on-Tyne, Accident Compensation Fund Scheme, which is marked A.

"The said scheme was certified as Scheme No. 7 by the Registrar of Friendly Societies on 10th December 1903, and the certificate did not expire till 31st December 1908.

"On 18th October 1907 the said Scheme No. 7 was re-certified as Scheme No. 107 by the Registrar of Friendly Societies, in accordance with the provisions of section 15 of the Workmen's Compensation Act, 1906. The said Scheme No. 107 is marked B.

"I held (1) that the appellant's claim for compensation under the Workmen's Compensation Act, 1906, was excluded by his having agreed to accept the scale of compensation provided by the Scheme No. 7, marked A; and (2) that the appellant was not entitled to the increased compensation provided by the Scheme No. 107, marked B. I therefore refused the application."

The questions of law were :—"(1) Is the appellant entitled to compensation under the Workmen's Compensation Act, 1906? (2) Is the appellant entitled to compensation under the Scheme No. 107, marked B?"

The nature of the arguments sufficiently appears from the opinions of Lord Low and Lord Ardwall.

At advising,—

LORD LOW.—The appellant entered the employment of the respondents on 9th August 1907, and he agreed to accept the scale of compensation

tion of six months from the commencement of this Act, the certificate thereof shall be revoked.

Sec. 16. "(1) This Act shall come into operation on the first day of July 1907, but . . . shall not apply in any case where the accident happened before the commencement of this Act."

provided by a scheme which had been certified under the Workmen's Compensation Act, 1897, by the Registrar of Friendly Societies, as Scheme No. 7, on 10th December 1903. The certificate bore that the scheme was to expire on 31st December 1908, and accordingly it had not expired when the Workmen's Compensation Act, 1906, came into operation on 1st July 1907. On 18th October 1907 scheme No. 7 was, with certain modifications, re-certified by the Registrar of Friendly Societies in accordance with the provisions of sec. 15 (3) of the Workmen's Compensation Act, 1906, as scheme No. 107.

Mar. 7, 1908.
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Limited.
Lord Low.

The appellant was injured on 15th August 1907 by an accident arising out of and in the course of his employment, and the question is, Whether he is entitled to compensation under the Workmen's Compensation Act, 1906, or only under Scheme No. 7? The answer to that question depends upon the construction of secs. 3 and 15 of the Act of 1906.

By section 3 it is provided that "if the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation" satisfies certain requirements, "the employer may, whilst the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act."

Now, the initial words of that section providing for certification of a scheme by the Registrar of Friendly Societies plainly refer to what may be done after the commencement of the Act, and accordingly under the final clause in the section a workman cannot be deprived after the commencement of the Act of his right to compensation under the Act by entering into a contract to the contrary, unless it be a contract to substitute for the provisions of the Act the provisions of a scheme of compensation certified by the Registrar after the commencement of the Act.

Now, the scheme of compensation which the appellant agreed to accept was not a scheme which had at the time when the agreement was made been certified by the Registrar after the commencement of the Act, and accordingly if the question raised depended only upon the third section it is clear that the appellant would not be barred by the agreement from claiming compensation under the Act.

The 15th section, however, which deals with contracts and schemes existing at the commencement of the Act, requires to be considered.

Subsection (1) provides that any contract, whereby a workman relinquishes any right to compensation, existing at the commencement of the Act, "other than a contract substituting the provisions of a scheme certified under the Workmen's Compensation Act, 1897, for the provisions of that Act," shall not, for the purposes of the Act (of 1906), be deemed to continue after the time at which the workman's contract of service would determine if notice were given at the commencement of the Act.

Then by subsection (4) it is provided that any scheme under the Act of 1897 in force at the commencement of the Act of 1906, which has not been re-certified before the expiration of six months from the commencement of

Mar. 7, 1908. that Act shall be revoked. Accordingly if a workman had before 1st July 1907, the date of the commencement of the Act of 1906, agreed to accept the provisions of a scheme certified under the Act of 1897, and if the scheme was still in force at the commencement of the new Act it would regulate the right of the workman to compensation for a period of six months after the commencement of the Act.

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—
Lord Low.-

That of course does not precisely meet the present case, because the appellant agreed to accept the provisions of a scheme (namely, Scheme No. 7), certified under the Act of 1897 after the commencement of the Act of 1906, but it to some extent aids the respondents' contention that the appellant is bound to accept compensation under that scheme.

The respondents' argument was that subsections (1) and (4) of section 15 when read together shewed that a scheme certified under the Act of 1897, the period of which had not expired at the commencement of the Act of 1906, continued, at all events for the period of six months, to be an operative scheme under the latter Act, and that such a scheme continued to regulate the rights of a workman who had agreed to it before the commencement of the new Act. That being so, there was, it was contended, no reason why the scheme should not have the same effect in regard to a workman who had agreed to it while it was still in operation although after the commencement of the new Act.

I recognise the force of that argument, but I do not think that it can be sustained in face of the provisions of subsection 2 of section 15. That subsection provides that "Every scheme under the Workmen's Compensation Act, 1897, in force at the commencement of this Act shall, if re-certified by the Registrar of Friendly Societies, have effect as if it were a scheme under this Act."

Now, at the time when the appellant agreed to accept the provisions of Scheme No. 7 it had not been re-certified by the Registrar, and therefore could not receive effect as if it had been a scheme under the Act. What is meant by a scheme under the Act is plainly a scheme certified by the Registrar in terms of section 3 after the commencement of the Act, and, as I have already pointed out, that section declares in unequivocal terms that no contract except a contract to accept the provisions of such a scheme shall bar a workman from claiming the compensation provided by the Act. No doubt if the construction which I put upon subsections (1) and (4) of section 15 be sound, an exception from the rule laid down in the third section is made in the case of a workman who at the commencement of the Act was under contract to accept the provisions of a scheme certified under the Act of 1897, but that is the only exception which I can find.

I have therefore arrived at a different conclusion from that of the learned Sheriff-substitute, and am of opinion that the appellant is not restricted by having agreed to accept the provisions of Scheme No. 7 from claiming compensation under the Act. I accordingly think that the first question should be answered in the affirmative, and that being so, the second question does not arise.

LORD ARDWALL.—I concur in the course which is proposed by Lord Low. I am of opinion that the appellant is entitled to compensation under the

Workmen's Compensation Act, 1906, and that the Sheriff's decision ought to be recalled. I do not think that the appellant's claim for compensation under the Act is excluded by his having agreed to accept the scale of compensation provided by the Scheme No. 7, marked "A." That scheme had been certified in terms of the Workmen's Compensation Act, 1897, on 10th December 1903, but at the time the appellant signed it it had not been re-certified after the passing of the Act of 1906, as provided by section 15, subsections 2 and 3, of that Act, and although subsequently the scheme is said to have been re-certified, yet that re-certification only took place after material alterations had been made upon it. The question is whether by signing the said Scheme "A" after the Act of 1906 had come into operation the appellant has contracted himself out of the operation of that statute. I am of opinion that he has not. Section 3 of the said Act of 1906 deals with the question of contracting out, and provides that that can only be done if the Registrar of Friendly Societies, after taking steps to ascertain the views of the employers and workmen, certifies that any scheme of compensation provides certain benefits therein specified, and if that shall have been done, the Act goes on to provide as follows:—"The employer may, while the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but saving as aforesaid, the Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act." Now, upon the facts stated in the case, it appears that the contract signed by the appellant had not been certified by the Registrar of Friendly Societies in terms of this section. Accordingly, as provided by the clause above quoted, the Act of 1906 applies notwithstanding the contract in question, which was made after the commencement of the Act. This matter is, in my opinion, quite clear so far as section 3 is concerned.

But it is said that the provisions of section 15 have the effect of rendering the scheme under the Workmen's Compensation Act of 1897 in force at the commencement of the Act of 1906 a valid scheme under the Act of 1906 if it is re-certified at any time before the expiration of six months from the commencement of the said Act, and in the present case this has been done. I cannot accept this reasoning. I think the result of subsection 2 of section 15 is, that until what one may call an old scheme is re-certified by the Registrar of Friendly Societies it has not effect as if it were a new scheme under the Act of 1906, so far as regards workmen signing it after the commencement of the Act are concerned. Accordingly the scheme signed by the appellant was not at the time he signed it equivalent to a new scheme under section 3 of the Act of 1906. It was argued that if this be so, the Act of 1906 makes it impossible for workmen or employers to enter into a contract taking themselves out of the Act during the period elapsing between the commencement of the Act and the adjustment of a scheme under section 3, or the re-certifying of an existing scheme under the Act of 1897. It is, I think, possible that this is the effect of the Act of 1906, but this defect is not of much moment, for it only affects workmen who are entering employment for the first time between the commencement of the Act and the certification or re-certification of a scheme,

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Mar. 7, 1908. and does not prevent even them from contracting themselves out of the Act so soon as a new scheme shall have been certified or an old one re-certified. Wallace v. Hawthorne, The terms of section 3 are quite absolute, and, in my opinion, they are not Lealie, & Co., Limited. altered by the provisions of subsections 2, 3, and 4 of section 15, which are intended to save contracts current at the commencement of the Act, and Lord Ardwall. also, under certain conditions, to utilise in whole or in part schemes then in force as schemes under the 1906 Act.

LORD STORMONTH-DARLING concurred.

The LORD JUSTICE-CLERK was sitting in the Court of Justiciary.

THE COURT answered the first question of law in the affirmative; found that that superseded answering the second question of law; recalled the dismissal of the claim; and remitted to the arbiter to proceed.

BALFOUR & MANSON, W.S.—MORTON, SMART, MACDONALD, & PROSSER, W.S.—Agents.

No. 102.

ARCHIBALD HUNTER (David Jack's Executor), First Party.—
A. M. Anderson.

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ROBERT DOWNIE, Second Party.—*Wark.*

Jack's
Executor v.
Downie.

Succession—Testament—Words importing gift of heritage—Titles to Land Consolidation Act, 1868 (31 and 32 Vict. cap. 101), sec. 20.—A testator by his will, dated in 1905, appointed an executor whom he directed to realise "all my estate," and to pay certain legacies. He further directed that "the residue of my estate," after payment of the legacies, should be divided among his family. The testator died possessed of both heritable and moveable property.

Held that the heritable property had been validly conveyed by the will to the executor, and that he had power to sell the same.

1ST DIVISION.

DAVID JACK died on 22d October 1906, leaving a will in the following terms:—"I, David Jack, Christmas Card Publisher, residing at Fairview Strand, in the City of Dublin, hereby revoke all Wills and Testaments heretofore made by me: I appoint Archibald Hunter, of Roselea Drive, Dennistoun, in the City of Glasgow, to be the sole executor of this my last Will and Testament. I direct my said executor immediately after my death to realise all my estate and pay all my just debts and testamentary expenses. I give and bequeath" [certain legacies]. "I direct that the residue of my estate, after the payment of the aforesaid legacies, shall be divided equally between my wife, Lucy Annie Jack, my son, James Jack, and my son, David Jack."

In addition to certain moveable estate, the testator owned a heritable property situated in Glasgow. His executor, being desirous of realising this property, exposed it for sale, when it was purchased by Robert Downie.

Questions having arisen as to the executor's title to the heritable property, and his power to sell it, a special case was presented, to which the parties were (1) Jack's executor, and (2) Robert Downie.

The first party contended that the whole estate, heritable and moveable, which belonged to the testator was validly and effectually

conveyed to him by the will, and that there was an implied power of Mar. 7, 1908. sale therein.

The second party contended that the first party had no title to said heritable property, as it was not conveyed to him by the will; that the will dealt only with moveable estate, and that there were no words of direction or conveyance therein applicable to heritage in virtue of which a notarial instrument could be expedited thereon in terms of the Titles to Land Consolidation (Scotland) Act, 1868.* He further contended that even if the property were effectively conveyed to the first party under the will, there was no power of sale given to him therein.

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The questions of law were:—"1. Has the said heritable property which belonged to the deceased been validly conveyed under said will and testament to his said executor, the first party hereto? (3) In the event of the first question being answered in the affirmative, has the first party, as executor foresaid, power to sell said heritable property?"

Argued for the first party;—No special words were required in a will to convey heritage.¹ An executor had the same powers as a trustee.² The testator's intention to deal with his heritage appeared from the terms of the will, which was universal in form, and in par-

* The Titles to Land Consolidation (Scotland) Act, 1868 (31 and 32 Vict. cap. 101), section 20, enacts:—"From and after the commencement of this Act it shall be competent to any owner of lands to settle the succession to the same in the event of his death, not only by conveyances *de presenti*, according to the existing law and practice, but likewise by testamentary or *mortis causa* deeds or writings, and no testamentary or *mortis causa* deed or writing purporting to convey or bequeath lands which shall have been granted by any person alive at the commencement of this Act, or which shall be granted by any person after the commencement of this Act, shall be held to be invalid as a settlement of the lands to which such deed or writing applies, on the ground that the grantor has not used, with reference to such lands, the word 'dispose,' or other word or words importing a conveyance *de presenti*; and where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain with reference to such lands any word or words which would, if used in a will or testament, with reference to moveables, be sufficient to confer upon the executor of the grantor, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be deemed and taken to be equivalent to a general disposition of such lands within the meaning of the 19th section hereof by the grantor of such deed or writing in favour of the grantee thereof, or of the legatee of such lands, and shall be held to create and shall create in favour of such grantee or legatee an obligation upon the successors of the grantor of such deed or writing to make up titles in their own persons to such lands and to convey the same to such grantee or legatee; and it shall be competent to such grantee or legatee to complete his title to such lands in the same manner and to the same effect as if such deed or writing had been such a general disposition of such lands in favour of such grantee or legatee, and that either by notarial instrument or in any other manner competent to a general disponee."

¹ Titles to Land Consolidation (Scotland) Act, 1868 (31 and 32 Vict. cap. 101), sec. 20.

² Executors (Scotland) Act, 1900 (63 and 64 Vict. cap. 55), sec. 2.

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ticular, from the direction to realise "all" his estate. There was a presumption against partial intestacy. Wills in similar terms had been held to convey heritage.¹

Argued for the second party;—The appointment of an executor indicated the intention of the testator to deal only with his moveable estate. The word "estate" did not necessarily include heritage.²

LORD PRESIDENT.—The question before us is whether the executor of the late Mr Jack is in a position to give a good title to certain heritable property sold by him as executor, and that depends, in the first place, on whether the executor had right to the subjects in question, and secondly, whether he had power to sell them.

The first of these questions depends on the terms of the will and on the 20th section of the Titles to Land Act, 1868 (31 and 32 Vict. c. 101). I need not quote the section, for your Lordships are familiar with its terms. The whole point of the section turns on the question whether the words used by the testator shew an intention to deal with heritable estate. If they do so, then the section provides that the mere absence of technical terms will not matter.

I think, looking to the terms of the will before us, there is no doubt that Mr Jack meant to dispose of his heritable estate, for he says,—“I direct my said executor . . . to realise all my estate,” and then after leaving various legacies, he goes on to direct him to divide the residue of the estate between his wife, Lucy Jack, and his sons, James and David Jack.

Now, whether the use of the word "estate" would or would not in itself be sufficient to indicate that the will was meant to apply to heritable property, I think it is perfectly clear that, when the words used are "all my estate," the whole estate, both real and personal, was meant to be conveyed. If that is so, it is obvious that the executor has right to the heritable estate, and that he has power to sell it. It would be absurd to suppose that the testator meant that the heritage was not to be realised, but to be conveyed *pro indiviso* to the beneficiaries under the will. If the executor has power to sell, it follows that he can give a good title to the purchaser.

I propose accordingly that we should answer the first and third questions in the affirmative. The second question is not one which should have been put to the Court.

LORD M'LAREN.—The 20th section of the Titles to Land Consolidation Act, 1868, deals with the language necessary to pass estates from the dead to the living, and for the purpose of abolishing the peculiarity which existed in the old law with reference to heritable estate, the statute made the provision that the language used to pass moveable estate should now be sufficient to pass heritable estate if it is used with reference to heritable estate. But the 20th section does not profess to solve the question what actual words will suffice to shew that the testator intended to dispose of his heritable

¹ Copland's Executors v. Milne and Others, *supra*, p. 426; Forsyth v. Turnbull, Dec. 16, 1887, 15 R. 172; M'Leod's Trustee v. M'Luckie, June 28, 1883, 10 R. 1056; Aim's Trustee v. Aim, Dec. 15, 1880, 8 R. 294.

² Grant v. Morren, Feb. 22, 1893, 20 R. 404; Urquhart v. Dewar, June 13, 1879, 6 R. 1026.

estate by will. Now, I think the decisions upon the latter point are on the Mar. 7, 1908. whole consistent, and they proceed upon the principle of ascertaining ^{Jack's} whether the testator had heritage in view when he made his will. In one *Executor v. Downie.* case the word "property" was held to be sufficient to pass heritage, and the word "estate" seems to me to be quite as general and as sufficient to pass ^{Lord M'Laren.} heritage unless where it is used in a more limited sense. I observe that in the case of *Grant v. Morren*,¹ where it was held that the will was not habile to convey heritage, I expressed the view that the "estate" there conveyed was confined in meaning to such estate as an executor might administer. But that case is distinguished in two important elements from the case before us. First, there was in *Grant's* case¹ no formal gift or direction, but only a bare appointment of an executor to perform the duties of an executor; while here, after appointing an executor, the testator goes on to bequeath legacies and to direct that his estate shall be realised and divided. But I also agree with your Lordships in holding that the word "all" is important. In cases like that of *Grant*¹ the words "my estate" may be controlled by subsequent expressions and by the terms of directions given to the executor, but that is only if the words themselves are ambiguous; and where, as in the present case, the word "estate" is joined with the word "all" there is no ambiguity, and there is no necessity of drawing inferences from other parts of the deed to explain what is already clear, and still less to limit the generality of a clause which on the face of it is a universal bequest of the testator's estate.

LORD KINNEAR.—I think that the first question in this case is solved by a consideration of two propositions, both of which have been stated by Lord President Inglis in two different cases, viz., (1) that the first question in cases of this kind is whether words importing a gift have been used in a will or testament with reference to land, and (2) that that question must be answered in the affirmative if the words employed describe either heritable estate in particular, or the testator's whole estate without distinguishing between heritable and moveable. If this is sound, the application is easy, because the testator here directs that "all" his "estate" is to be realised, and then, after certain legacies have been paid, that the residue of "my estate" is to be divided between his wife and his sons. I do not think it can be disputed that if he had said in terms, "all my estate, heritable and moveable," his intention would have been quite plain, in spite of the appointment only of an executor. It is just as plain in the will as it stands, because if a man has heritable as well as moveable estate, the direction to realise "all my estate," is not carried out if only his moveable estate is realised.

Upon the question of the power to sell, I think that follows as a matter of course, for the reasons stated by your Lordship.

LORD PEARSON was absent.

THE COURT answered the first and third questions of law in the affirmative.

C. STRANG WATSON, Solicitor—W. I. HAIG SCOTT, S.S.C.—Agents.

No. 103. ALEXANDER DEMPSTER, Claimant (Appellant).—*Watt, K.C.*—*Spens*.
 WILLIAM BAIRD & COMPANY, LIMITED, Respondents.—
McClure, K.C.—*R. S. Horne*.

Mar. 7, 1908.

Dempster v.
 Baird & Co.,
 Limited.

Master and Servant—Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), sec. 1 (3)—Arbitration proceedings—Competency—Unrecorded agreement not acted on for seven years.—In March 1899 a miner sustained injuries, by which he was totally incapacitated for his work, and by agreement with his employers he was paid compensation under the Workmen's Compensation Act, 1897, from March 1899 till May 1900, at the rate of 14s. 4d. per week, being half his previous wages (the statutory maximum). No memorandum of the agreement was ever recorded, and it was never formally varied or ended under the Act. In May 1900 the employers ceased the weekly payments, and the workman returned to their service, in which he remained working and earning wages, when he was able, as a pit bottomer, till April 1907, when, as the result of his injuries in 1899, he became totally incapacitated for work. No compensation was paid to the workman between May 1900 and April 1907.

In 1907 the workman claimed compensation as from May 1900, and the employers having refused to pay compensation as claimed, he instituted arbitration proceedings under the Act. The employers maintained that in respect of the agreement arbitration was incompetent.

Held that there was no subsisting agreement between the parties, and that consequently arbitration proceedings were competent.

Expenses—Stated Case—Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37)—Expenses of adjusting stated case.—Where the appellant in a stated case under the Workmen's Compensation Act, 1897, had been allowed the expenses of the stated case, the Court, following the practice adopted in the case of *London and Edinburgh Shipping Co. v. Brown*, 1905, 7 F. 488, modified the expenses to be allowed for adjusting the stated case at the sum of £3, 3s., including the fee of £1 paid to the Sheriff-clerk.

2D DIVISION.
 Sheriff of
 Ayrshire.

ALEXANDER DEMPSTER, miner, Muirkirk, in 1907 instituted arbitration proceedings under the Workmen's Compensation Act, 1897, in the Sheriff Court at Ayr, against William Baird & Company, Limited, carrying on business at Muirkirk. The Sheriff-substitute (Shairp) having dismissed the application as incompetent, Dempster appealed.

The stated case for appeal was as follows:—

"This is an arbitration under the Workmen's Compensation Act, 1897, in which the said Alexander Dempster (who, on or about the 1st day of March 1899, whilst in the employment of the said William Baird & Company, Limited, in Lightshaw No. 1 Pit, Muirkirk, was struck by a fall of rock from the roof of said pit, and sustained severe injuries to his back, and also severe internal injuries) in an ordinary application or petition, and not by a minute, craves the Court to ascertain and fix such weekly payments as may be found to be due and payable to him under and in terms of the said Act, and to grant an award against the said William Baird & Company, Limited, in his favour, finding him entitled to such weekly payments, beginning the first payment as on the 28th day of May 1900 for the week preceding that date, and so on weekly thereafter until he is again able to earn his full wages, or such weekly payment is varied, with interest on each weekly payment at the rate of 5 per centum per annum from the date when the same became and becomes payable till payment, with expenses.

"The following facts were admitted or proved:—(1) That, as the result of the said injuries received by him, the said Alexander

Dempster was totally incapacitated for his work as a miner from the ^{Mar. 7, 1908.} said 1st day of March 1899—the date of the said accident—until the 21st day of May 1900. (2) That his average weekly earnings in the ^{Dempster v. Baird & Co., Limited.} employment of the said William Baird & Company, Limited, during the twelve months previous to the date of said accident were 28s. 8d. (3) That in the fourth article of the applicant's condescendence it is averred that 'the applicant, by agreement with the respondents, received compensation, under the Workmen's Compensation Act, 1897, from the 15th day of March 1899 until the 21st day of May 1900, at the rate of 14s. 4d. per week'; and the answer of the said William Baird & Company, Limited, to this averment is, 'Admitted.' That, accordingly, under an agreement entered into between the applicant and the said William Baird & Company, Limited, they agreed to pay to him, and he agreed to accept and receive from them as compensation, under said Act, for his said injuries, the sum of 14s. 4d. weekly from the 15th day of March 1899. That it was not averred or proved that such agreement had been ended or varied, and that no memorandum of said agreement was sent to the Sheriff-clerk, or recorded by him in the special register. (4) That, on or about the 21st day of May 1900, the said William Baird & Company, Limited, ceased to pay to the said Alexander Dempster the said weekly payments, but gave him employment as a pit bottomer, and that the said Alexander Dempster worked when he was able for the said William Baird & Company, Limited, as a pit bottomer from about the said 21st day of May 1900 till about the 1st day of April 1907, when, as the result of his said injuries, he became totally incapacitated for even light work, and ceased working altogether. And (5) that the said William Baird & Company, Limited, refused to pay him compensation from and after the said 21st day of May 1900.

"On these admitted or proved facts I sustained pleas in law stated for the said William Baird & Company, Limited, to the effect that their liability to pay compensation under the said Act to the said Alexander Dempster having been settled by agreement between him and them (a memorandum of which agreement might have been recorded by the said Alexander Dempster, in terms of section 8 of the Second Schedule to the Workmen's Compensation Act, 1897, and upon an extract of which recorded memorandum the said William Baird & Company, Limited, might have been charged to pay to the said Alexander Dempster the weekly payments agreed upon), his application for arbitration was incompetent; and I accordingly dismissed the application, and found the said Alexander Dempster liable to the said William Baird & Company, Limited, in their expenses of process."

The question of law for the opinion of the Court is:—"Was the Sheriff-substitute right in holding that, the compensation due to the applicant having been settled by agreement between him and the respondents, the proper course for the applicant to have adopted was to have recorded a memorandum of said agreement, and charged the respondents thereunder; and that the present application for arbitration is incompetent, because an agreement as to the compensation to be paid to the applicant by the respondents has been entered into between the parties?"*

* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), enacts:—Sec. 1, subsec. 3. "If any question arises in any proceedings under

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The case was heard before the Second Division on 21st and 22d January 1908.

Argued for the claimant and appellant;—There was no subsisting agreement between the parties. The original agreement had been brought to an end by the termination of the workman's incapacity, and his return to work. No compensation had been paid or demanded under it for seven years. In these circumstances it must be held that the parties had agreed to terminate the agreement. No memorandum had been recorded. There was therefore nothing here equivalent to a decree which could be held to remain in force till formally abrogated. The workman could not have recorded the original agreement at the date when his incapacity recurred. As there was no subsisting and enforceable agreement, arbitration proceedings were competent.¹ The parties were at issue as to the amount and duration of the compensation.² The case of *Dunlop v. Rankin & Blackmore*³ proceeded on the view that there was there a subsisting agreement.

Argued for the respondents;—Where there was an agreement arbitration was excluded.⁴ The Sheriff as arbiter had jurisdiction to determine whether he had jurisdiction, and for that purpose to determine whether or not there was a subsisting agreement.⁵ Here he had determined that there was a subsisting agreement. That was a question of fact on which his decision was final and not subject to review. But apart from that there was here a subsisting agreement. The only ground of the workman's claim was the agreement. An agreement subsisted until it was reviewed or modified, or ended under the Act. At least it continued in force as long as there was incapacity on the part of the workman, as there was here. The fact that payments had been discontinued for a time was irrelevant. The workman might waive his right to payments under an agreement in whole or in part for any particular period, but that did not terminate the agreement. The workman's proper course was to record a memorandum of the agreement.⁶ Once there was an agreement, parties could proceed only as on agreement, and could not resort to arbitration as if there had never been an agreement. This was so even if the parties had come to disagree. The only competent course in that case was to apply for alteration of the agreement in the way provided

this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies) or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration in accordance with the Second Schedule to this Act."

¹ Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), sec. 1 (3); *Colville & Sons, Limited, v. Tighe*, 1905, 8 F. 179, *per* Lord Stormonth-Darling, at pp. 186-7, and Lord Low, at pp. 189-90; *Strannigan v. Baird & Co., Limited*, 1904, 6 F. 784, *per* Lord Kinneir, at pp. 792-3.

² Workmen's Compensation Act, 1897, sec. 1 (3).

³ 1901, 4 F. 203.

⁴ Workmen's Compensation Act, 1897, sec. 1 (3); *Colville & Sons, Limited, v. Tighe*, 1905, 8 F. 179; *Dunlop v. Rankin & Blackmore*, 1901, 4 F. 203.

⁵ *Colville & Sons, Limited, v. Tighe*, 1905, 8 F. 179, *per* Lord Kyllachy, at p. 183.

⁶ Workmen's Compensation Act, 1897, Second Schedule (8); *Dunlop v. Rankin & Blackmore*, 1901, 4 F. 203.

by the Act.¹ The *dicta* of Lord Stormonth-Darling and Lord Low in *Tigue*,² and of Lord Kinnear in *Strannigan*,³ founded on by the appellant, were *obiter*.

Mar. 7, 1908.
Dempster v.
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At advising on 7th February 1908,—

LORD JUSTICE-CLERK.—This is a very exceptional and peculiar case. The workman, whose injury occurred in the early part of 1899, agreed with his employers to accept a certain weekly payment in respect of incapacity, and this was paid down to May 1900. At that time payments as for compensation were stopped, and the workman was taken back into the employment as a bottomer, and paid by wages for his work. He neither asked for nor received any money in name of compensation for the injury. No agreement was registered, and for seven years the work was continued to him, and the wages for the work given to him. Then a new state of matters arose. The injury he had received had not been cured, for he again became incapacitated by reason of the injury, and now remains incapacitated.

Such being the facts, the question arises whether the workman, being now incapacitated by the injury incurred seven years ago, is entitled to ask for compensation in an arbitration. The Sheriff-substitute has held that he cannot competently do so—that as there was an agreement for compensation in 1899, the workman's course was to register a memorandum of that agreement in terms of the Act, and insist on his compensation being paid to him under it. I am of opinion that the view of the Sheriff-substitute is erroneous.

The agreement of 1899 was one on the footing of total incapacity, and when in 1900 total incapacity ceased, the agreement must have been modified if the master so required, either by a new agreement or, if the agreement was put on the register, by the Sheriff being called upon to reduce the amount payable. No such proceedings took place. The master simply refused to pay any more, in respect he was employing the workman and paying him wages, and the workman was accepting the wages and claiming no compensation. The course of things, therefore, during the seven years was not regulated by the agreement—there was no agreement which applied to the circumstances, for an agreement based on ascertained total incapacity, and implemented by payments applicable only to total incapacity, could not apply to a case where a workman was earning the full wages of the employment which he was offered and accepted, and was receiving nothing else.

The workman now comes forward demanding to be paid compensation for all the past seven years, and to this end brings a petition in ordinary form for an arbitration under the statute. I cannot hold that he is debarred from instituting such a proceeding, he being now incapacitated. I say nothing as to whether he can succeed in his demand for compensation during the seven years when he was in employment on wages. The only question before the Court now is whether his present proceeding is bad from incompetency. The question put raises that question only, and I

¹ Workmen's Compensation Act, 1897, First Schedule (12).

² 1905, 8 F. 179, at pp. 186 and 189.

³ 1904, 6 F. 784, at p. 792-3.

Mar. 7, 1908. have no hesitation in answering it in the negative. The result will be that the case must go back to the Sheriff for further procedure.

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LORD STORMONTH-DARLING.—If the facts stated by the Sheriff had admitted of it, there would have been a great deal to be said for his view in law that the proper course for the workman to have adopted was to have registered a memorandum of agreement, and that the course which he actually did adopt, viz., to bring an application for arbitration, was incompetent. The argument in support of the Sheriff's view comes somewhat strangely from the employers, because it is to all appearance very much against their interest.

But I do not think that the facts, viewed as a whole, warrant that conclusion, and I think we are bound to take the facts as they are stated, without regard to the pleadings of parties.

The agreement admittedly made, and for fourteen months acted on, viz., from 15th March 1899 to 21st May 1900, was not a recent agreement, and a good deal has happened since then. First, on 21st May 1900, the employers ceased to make the weekly payments which they had agreed upon, and gave the workman employment as a pit bottomer. It is not said at what wage; but whatever it was it was wage and not compensation which the workman presumably accepted, for it is expressly found that the original agreement of 15th March 1899 was never ended or varied under paragraph 12 of Schedule I. of the Act. Then a period of seven years elapsed; and it is further found that on 1st April 1907 the workman became totally incapacitated for even light work "as the result of his said injuries," and that he ceased working altogether. Finally, it is found that the employers "refused to pay him compensation from and after the said 21st day of May 1900."

I do not understand how that is consistent with there being a continuing and subsisting agreement during all that period of more than seven years that the employers should pay him compensation at the full rate of 14s. 4d. weekly. In other words, I do not understand how it can be said that there was an agreement, when both parties shewed by their conduct that there was no agreement. If there was no such subsisting agreement, how can the Sheriff's finding in law be justified? It is suggested that the Sheriff must have been satisfied on that head, or he would not have pronounced his finding in law. I admit that Lord Kyllachy at one point of his opinion in *Colville v. Tigus*¹ (p. 183) said that the statutory tribunal "might have to decide incidentally whether some agreement submitted to it as excluding its jurisdiction is a real agreement and a subsisting agreement." But he also said (p. 184) that "if the Sheriff thought (as perhaps he might) that there was no subsisting agreement—that on its just construction the alleged agreement came to an end when the incapacity in fact ceased—his duty was to proceed to arbitrate (under section 1, subsection 3); but, doing so, to reject the applicant's claim as wholly unfounded. There was no third course open to him." In my own opinion in *Colville v. Tigus*,¹ I see I expressed the view (at p. 187) that the application for arbitration in that

case was "competently brought," and Lord Low's opinion was distinct (p. 190), that "there was nothing in the Act which, when there is only an unrecorded agreement to pay compensation during incapacity, compels the employer to continue payment after the incapacity has in fact ceased." The actual decision in *Colville v. Tighe*,¹ in the course of which *Dunlop v. Rankin & Blackmore*² was cited, was that the employers "were not liable to pay compensation to the respondent from the date at which his incapacity ceased to the date of the arbitrator's award." The facts of that case were that the accident happened on 24th August 1903, that the employers agreed with the workman to pay him compensation at a certain rate during the period of his incapacity; that this agreement was not recorded; that the employers made payments to him in terms of the agreement down to 14th December 1903; that they then ceased to make payments, alleging that the workman's incapacity had ceased and offering him work at full wages, which he declined; that in March 1905 the workman instituted proceedings by way of arbitration before the Sheriff; that the Sheriff found that incapacity had ceased by 14th December 1903, but ordained the employers to make payment to the workman at the agreed-on rate from 14th December 1903 to 12th July 1905, being the date of his award; and he assoilzied the employers from any claim for future compensation.

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Now, these facts are not precisely similar to those in the present case, but they resemble them very closely. In particular, they resemble them in respect that years had elapsed since the original agreement had been made—in *Colville's* case¹ two, in this case more than seven years—and that a different kind of contract, viz, an agreement for wages, had been substituted for an agreement to pay compensation. In *Dunlop v. Rankin & Blackmore*² I admit there was the same feature as in the present case of a refusal by the employers to continue payments under the original agreement, and yet the Court seems to have held that the workman was still entitled to have the agreement recorded, and they remitted to the Sheriff to dismiss the application for arbitration. But the agreement in that case was *de recenti*, i.e., within a year from the date of the accident, and the sole reason for the application for arbitration would seem to have been to provide for the event of supervening incapacity. I do not therefore think that the case has any real application. The more recent case of *Beath & Keay v. Ness*,³ where a workman had returned to the same employment on wages, and the cases which have followed it, seem to be much more in point.

In short, I am of opinion that we are entitled and bound, as in every case of mixed fact and law, to take the facts of the case as a whole, in order to do justice between the parties, and, if we are satisfied that the agreement of 15th March 1899 has ceased to be since 21st May 1900, and is not now, a subsisting agreement, that we should so hold, and that we should answer the sole question of law—which is, whether the present application for arbitration is incompetent—in the negative, and remit to the Sheriff to proceed with it as may be just.

LORD LOW.—So long ago as 1st March 1899 the appellant was injured

¹ 8 F. 179.

² 4 F. 203.

³ 1903, 6 F. 168.

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while in the employment of the respondents, and an agreement was entered into whereby the respondents agreed to pay to the appellant as compensation under the Act 14s. 4d. weekly, that being the statutory maximum amount. The respondents paid that amount to the appellant weekly from 15th March 1899 until the 21st May 1900. No memorandum of the agreement has been recorded, and the Sheriff-substitute states that "it was not averred or proved that such agreement had been ended or varied." The Sheriff-substitute then states that on 21st May 1900 the respondents ceased to pay the weekly payments to the appellant, but gave him employment as a pit-bottomer, and that he worked in that capacity from 21st May 1900 till 1st April 1907, when, as the result of his injuries, he became totally incapacitated. I assume, although it is not stated in the case, that during that period the appellant was paid wages.

In these circumstances the appellant instituted arbitration proceedings under sec. 1 (3) of the Act, in which he claims compensation from and after 21st May 1900.

The Sheriff-substitute has dismissed the application as incompetent, on the ground that the proper course for the appellant to follow was to record a memorandum of the agreement and charge the respondents thereon.

Now, the agreement entered into between the parties in 1899 being an agreement under the statute was of course only an agreement on the respondents' part to pay compensation to the appellant during incapacity. Further, the amount fixed by the agreement being the maximum amount allowed by the statute was payable only during total incapacity. Whenever the appellant ceased to be totally incapacitated the respondents were entitled to have the amount fixed by the agreement reduced, and it could have been reduced either by an arbiter in an application for review of the weekly payments, or by agreement. Now, from the 21st of May 1900 until the 1st of April 1907, a period of nearly seven years, the appellant was not totally incapacitated, because during that period he was working and receiving wages. We are not told what the amount of his wages was, but we are told that he received no compensation. In these circumstances it seems to me that during the seven years the rights and obligations of parties could not possibly be regulated by the original agreement. The natural inference from the facts which are stated is that during that period the respondents gave the appellant employment according to his capacity, and that in consideration thereof, and of the wages which he thereby earned, he made no claim for compensation. If, however, that was what happened, the parties were during these seven years proceeding upon an agreement, express or implied, which was different from, and for the time superseded, the original agreement. It is perhaps possible that all the time the appellant was claiming compensation as well as wages, but if so, then there was no agreement applicable to the circumstances, because as the appellant was earning wages he could not claim the maximum amount, which was all that the original agreement provided for.

The appellant is now claiming that he was entitled to some compensation during the whole of the seven years, and the question really is whether he has adopted a competent method of enforcing that claim. If I am right in thinking that in consequence of the change of circumstances—the partial

recovery of the appellant, and his employment by and receipt of wages from Mar. 7, 1908. the respondents—the original agreement could not be appealed to as settling the rights and obligations of parties during the seven years, I think that the appellant was entitled to make an application under section 1 (3) of the Act, because his claim raises questions as to whether he is entitled to compensation at all during the seven years, and if so to what amount—questions in regard to which the parties are not agreed.

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No doubt it would have been competent for the appellant to register a memorandum of the original agreement, and to charge the respondents thereon, and if that had been done the question of the appellant's right to compensation during the seven years could have been raised by a suspension of the charge. But, although such a proceeding might be competent, I think that it would be less consonant with the intention of the Legislature than the course which the appellant has adopted, because it was evidently intended that such questions should, as far as possible, be kept out of the Courts of law, and determined by arbitration.

I have dealt solely with the question of the pursuer's claim for compensation during the seven years, because it appears that that is the only matter in controversy, the respondents' counsel having stated that they admitted the appellant's rights to, and are willing to pay to him, full compensation from the date when he again became totally incapacitated.

It was argued, however, that all inquiry is excluded, and that there is no room for arbitration, in respect that the Sheriff-substitute has stated as matter of fact that it was not averred or proved that the original agreement had "been ended or varied." That statement, however, must be read along with that which immediately follows in regard to what happened during the seven years. But when these two statements are read together it seems to me to be plain that all that the Sheriff-substitute means when he says that the original agreement has not been ended or varied is, that it has not been formally ended or varied, as, for example, by the determination of an arbiter under an application for review of the weekly payments.

I am therefore of opinion that the question in the case should be answered in the negative, and the case remitted back to the Sheriff-substitute.

LORD ARDWALL.—This stated case, both as regards the statement of facts and the question of law, is a far from satisfactory document.

The first part of the question of law is put on this assumption,—“The compensation due to the applicant having been settled by agreement between him and the respondents,” and the second part of the question is put upon this assumption, that “an agreement as to the compensation to be paid to the applicant by the respondents has been entered into between the parties.” These assumptions appear to amount to this, that at the date when the arbitration proceedings were initiated there was a subsisting agreement between the workman and the employers as to the rate of compensation to be paid to him at that and any future time until the weekly payment thereby provided should be ended, diminished, or increased in terms of section 12 of the First Schedule of the Act, or otherwise ended.

If this is so, it is surprising that the Sheriff-substitute or anyone else could consider it necessary to have a stated case at all, because under subsec-

Mar. 7, 1908. tion 3 of section 1 of the Workmen's Compensation Act, 1897, arbitration is only competent if the question as to the amount of compensation is "not settled by agreement," and according to the question and statement of the case the compensation due to the appellant was and is "settled by agreement"; but I agree with your Lordships that we are not bound to answer the question as put, but must take the real facts of the case apart from the gloss put upon them by the Sheriff-substitute.

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It is, I think, apparent that at the date of the commencement of the arbitration proceedings the unrecorded agreement which was entered into, and which had no definite period of endurance, had by common consent been allowed to lapse, and further, that at the date of the arbitration the parties were in dispute as to what compensation should be paid for the present and the future. Accordingly I have no difficulty in holding that when the arbitration proceedings commenced, the agreement of 1899, such as it was, had lapsed, and that an entirely new state of matters had arisen, in which the parties were in dispute regarding the amount of compensation payable to the applicant, and regarding which compensation accordingly the arbitration was perfectly competent.

I accordingly agree that we should answer the question put in the case by finding that in the circumstances the appellant's application for arbitration was competent, and should remit to the Sheriff-substitute to proceed with the same.

THE COURT pronounced this interlocutor:—"Answer the question of law . . . in the negative: Therefore sustain the appeal, recall the dismissal of the application, and remit to the arbitrator to proceed thereon as accords: Find and declare accordingly, and decern: Find the appellant entitled to his expenses of the stated case, and remit the same to the Auditor to tax and to report."

In his account of expenses the appellant's agent charged the sum of £5, 9s. for the preparation of the stated case prior to its presentation in Court. In this sum was included the fee of £1 payable to the Sheriff-clerk for preparing the case under the Act of Sederunt of 3d June 1898, sec. 9 (a). A large part of the amount charged, which was set forth in detailed items, was for correspondence and attendances with the Sheriff-clerk and the respondents' agents in connection with representations made by the appellant regarding the proposed statement of facts and question of law in the draft stated case as issued by the Sheriff-clerk. Of the sum so charged the Auditor allowed £5, 0s. 8d.

The respondents objected to the Auditor's report in respect that he had allowed the sum of £5, 0s. 8d. for the items charged in connection with the preparation of the stated case, which they maintained should not be charged at more than £2, 2s. At the discussion on the objection to the Auditor's report, which took place before the Second Division (Lord Stormonth-Darling, Lord Low, and Lord Ardwall) on 7th March 1908, counsel for the objectors (the respondents) in support of the objections cited *London and Edinburgh Shipping Co. v. Brown*¹ and *M'Govern v. Cooper & Co.*²

¹ 1905, 7 F. 488.

² 1901, 4 F. 249.

Counsel for the appellant contended :—The rule established by the case of *Brown*¹ was that a successful party who had been found entitled, as here, to the expenses of the stated case was entitled to the expenses fairly and reasonably incurred by him in connection with the preparation of the stated case. The successful party in *Brown*¹ was the respondent, and so there the fee of £1 to the Sheriff-clerk paid by the appellant was not included in the £2, 2s. allowed. It was plain that £2, 2s., including the fee of £1, was less than was fair and reasonable. What was disallowed in *Brown*¹ was a fee to counsel and charges for instructions to and attendance with counsel. There was no such fee or charges here.

LORD STORMONTH-DARLING.—We shall adopt the practice in *Brown's* case¹ to the extent of modifying the fee to be allowed to the appellant at three guineas, which includes the £1 paid to the Sheriff-clerk.

J. A. KESSEN, S.S.C.—M. J. BROWN, SON, & CO., S.S.C.—Agents.

PARISH COUNCIL OF PAISLEY, Pursuers (Respondents).—*MacRobert*. No. 104.
PARISH COUNCIL OF ROW, Defenders (Appellants).—*D.-F. Campbell—Orr Deas—Carmont*. Mar. 11, 1908.

PARISH COUNCIL OF GLASGOW, Defenders (Respondents).—*Clyde, K.C.—Hunter, K.C.—W. Thomson*. Parish Council of Paisley v. Parish Councils of Row and Glasgow.

Poor—Settlement—Derivative Settlement—Loss of—Deserted Wife—Nothing known as to Husband—Presumption.—W., who was born in the parish of Glasgow and had a residential settlement in the parish of Row, in October 1901 deserted his wife and children, and was not heard of again. The wife went to reside in Paisley, and in April 1902 received parochial relief from Paisley. Row reimbursed Paisley for the advances made. After doing so for two and a half years Row repudiated further liability, on the ground that the husband had lost his settlement in that parish by non-residence for the statutory period of three years, and that his wife's settlement, which was derived from him, had lapsed also.

In an action by the relieving parish against Row and against the Parish Council of Glasgow, held (by First Division with three consulted Judges) that the wife was the pauper; that her settlement remained unchanged during chargeability; and that Row was still liable for her support.

Observations per the Lord President as to the application of the presumption of life in poor-law cases.

Beattie v. Adamson, 5 Macph. 47, followed.

ON 28th October 1905 the Parish Council of the parish of Paisley raised an action in the Sheriff Court at Glasgow against the Parish Council of the parish of Row and the Parish Council of the parish of Glasgow, for relief of advances made and to be made by the pursuers to or on account of Mrs Elizabeth Craig Logan or Wright, Paisley.

The pursuers subsequently, by minute, restricted their claim to the sums disbursed up to the end of October 1905.

The following narrative of the facts, which were not in dispute, is taken from the note of the Sheriff-substitute (Fyfe):—

“Daniel Wright was born in Glasgow in 1859, but he resided at Shandon for thirteen years prior to October 1901, thereby acquiring a residential settlement in Row parish. In October 1901 he dis-

¹ 1905, 7 F. 488.

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appeared and has not since been heard of. He left his wife and family at Shandon. The deserted wife and three dependent children went to Paisley, where they seemed to have struggled along without parish aid till April 1902. The wife then applied to Paisley Parish, and she, being a proper subject for relief, Paisley, on 22d April 1902, granted her relief. Paisley Parish gave statutory relief notice to Row Parish on 14th May 1902, and Row recognised liability. Row reimbursed Paisley down to January 1905. Row then declined to pay upon the ground that the settlement of the wife in Row was only a derivative settlement following that of her husband, and that the husband's settlement in Row (which was only a residential settlement) had lapsed in October 1904, that is, when he had ceased to reside in the parish for three years, the wife's settlement lapsing with it.

"Paisley, then, in January 1905, gave statutory notice of chargeability to Glasgow, the parish of the husband's birth," which repudiated liability.

In October 1901, when he deserted his wife, Wright was admittedly an able-bodied man.

The defenders the Parish Council of Row pleaded;—(2) In respect that the said Daniel Wright, who was an able-bodied man not entitled to relief, has not resided in the parish of Row since October 1901, he lost his residential settlement in that parish in November 1904, and on intimation thereof to the pursuers as condescended upon, the liability of the said parish ceased, and the defenders the Parish Council of the parish of Row are therefore entitled to absolvitor.

The Parish Council of Glasgow pleaded that the wife was the pauper, and that her settlement could not change during chargeability.

On 18th December 1905 the Sheriff-substitute (Fyfe) pronounced this interlocutor:—"Finds (1) that pursuers since 22d April 1902 have been affording relief to Elizabeth Craig Logan or Wright, a deserted wife with three dependent children, who is a proper subject of relief; (2) that pursuers disbursed said relief on behalf of the parish of Row; (3) that up till January 1905 these defenders reimbursed pursuers; (4) that these defenders have since failed to pay; (5) that the sums sued for are payments for which these defenders are bound to reimburse pursuers; (6) that no relevant case has been stated against the other defenders the parish of Glasgow: Therefore dismisses the action *quoad* the first defenders: Decerns as craved, qualified by minute of restriction, No. 10 of process, against the second defenders the Parish Council of the parish of Row," &c.*

* "NOTE.—(After the narrative above quoted)—It is clear that Paisley must be relieved, and the question is whether liability rests with Row or Glasgow.

"Row has been bearing the burden all along, for Paisley was only paying on behalf of Row. It is a circumstance of importance that the chargeability has been continuous since relief was first given in April 1902. Accordingly, Glasgow pleads the recognised principle that settlement cannot change during the currency of chargeability, and so that this action, so far as laid against Glasgow, is irrelevant, or at least premature. In other words, Glasgow pleads that Row cannot escape liability unless Row can either locate the deserting husband or prove that he is dead.

"The question in effect comes to be this: Which parish has the *onus* of proof as regards the whereabouts of the husband?

"It is important to note that the wife never was a pauper in her own right. Row relieved her only because at the time she became chargeable

On 14th March 1906 the Sheriff (Guthrie), on appeal, adhered.

The Parish Council of Row appealed to the Court of Session.

On 22d November 1907 the case was appointed to be heard before the First Division along with three Judges of the Second Division.

The case was heard on 4th February 1908 before the Lord President, the Lord Justice-Clerk, and Lords M'Laren, Kinnear, Stormonth-Darling, Ardwall, and Guthrie.

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Argued for the appellants ;—In questions of parochial relief, desertion was not equivalent to death to the effect of giving a deserted wife the capacity to acquire a settlement different from that of her husband.¹ The settlement of a wife, even though deserted, was derived from that of her husband, and when his settlement changed, her settlement, and her consequent chargeability, changed also.² This appeared by contrast with the rule under the Lunacy Act, 1857, section 75.³ The principle that continuous chargeability prevented a change of settlement only applied in cases where the pauper had a settlement in his or her own right.⁴ The case of *Beattie v. Adamson*⁵ was distinguishable. In that case the judgment proceeded upon the admission of parties that the health of the pauper was such that its father could never be called upon to support it,⁶ and accordingly its settlement was wholly dissociated from that of its father. Applying these principles, the Parish Council of Row were relieved of liability if they succeeded in shewing that the deserting husband had lost his residential settlement in Row, and this they had done by proving his absence from Row for more than the statutory period.⁷ It was not necessary to prove that he had not died within the statutory period, for the presumption was in favour of life.⁸ Nor was it necessary to prove that he had acquired a settlement elsewhere, for the loss of his

the husband (not being absent three years) still had a residential settlement in Row, and it is urged for Row that the principle of no change of liability during continuity of relief applies only where a pauper has a claim of relief in her own right, and does not therefore apply to the present case.

"There is no definite authority upon the point raised, but I think the principle is the same upon whatever ground the relieving parish originally became liable. The parish which is saddled with the liability must go on bearing it until that parish can shift it—that is, in the present case, Row must go on paying till Row can do one of three things, (1) discover the husband in an able-bodied condition to support his wife ; or (2) prove that, if he is alive and not able-bodied, the husband had, subsequent to October 1901, acquired a residential settlement in some other parish ; or (3) prove that the husband is dead.

"Row's plea that Glasgow is liable is founded only upon the non-residence of the husband in Row parish for three years. But that negative fact is not, in my opinion, sufficient to interrupt the continuity of relief. Row must be able to plead something positive before Row can drop the burden on to another parish."

¹ *Rutherglen Parish Council v. Glasgow Parish Council*, May 15, 1902, 4 F. (H. L.) 19.

² *Wallace v. Turnbull*, March 20, 1872, 10 Macph. 675.

³ 20 and 21 Vict. cap. 71.

⁴ *Hunter v. Henderson*, Jan. 30, 1895, 22 R. 331 ; *Anderson v. Paterson*, June 12, 1878, 5 R. 904.

⁵ Nov. 23, 1866, 5 Macph. 47.

⁶ *Beattie v. Adamson*, 5 Macph. 47, per Lord Justice-Clerk Inglis, at p. 52.

⁷ Poor-Law (Scotland) Act, 1898 (61 and 62 Vict. cap. 21), sec. 1.

⁸ *Dickson on Evidence*, sec. 116.

Mar. 11, 1908. existing settlement had, so far as the appellants were concerned, the same effect as the acquisition of a new one.

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Argued for the respondents (Parish Council of Glasgow);—When a pauper in receipt of parochial relief was chargeable against a parish in virtue of a settlement there—either original or derivative—that parish remained liable until it could prove that the pauper had acquired a settlement elsewhere.¹ In the present case, even on the assumption that the settlement of the wife changed with that of her husband, the *onus* was not discharged by shewing that the husband had been absent from Row for more than the statutory period. He might have died within that period, for in this case there was no room for the presumption of life.² On the facts as ascertained, it was the wife and not the husband who was the pauper, and so long as she remained the pauper, and chargeable, her settlement could not be changed.³

At advising,—

LORD PRESIDENT.—In October 1901 Daniel Wright, who was by trade a gardener, and was living in Row with his wife and three dependent children, deserted his family. His birth parish was Glasgow, where he was born on 11th July 1859. He had, however, acquired a settlement by residence in the parish of Row. In April 1902 his deserted family, who had gone to Paisley, obtained parochial relief from Paisley. In these circumstances Paisley sent notice to Row claiming relief from that parish in respect of the settlement by residence. Row admitted liability, and continued to maintain the wife and children down to January 1905. At that date Row notified Paisley that the deserting husband had lost his settlement in Row by non-residence, repudiated liability for further advances, and called upon Paisley to claim against Glasgow, the husband's birth parish. Paisley notified Glasgow accordingly, but was by them referred back to Row as the parish still liable. It is matter of admission that liability is upon one or other of the defenders. It is further admitted (1) that there has been no break in the chargeability of the wife since relief was first given by Paisley in 1902; and (2) that from the date of his leaving Row in October 1901 the husband has not been back in that parish. It is not admitted that no settlement has meantime been acquired by him in any other parish; and the case must be decided on the footing that he has simply not been heard of since he deserted his family in 1901.

Had this case come up for decision before the case of *Rutherglen*⁴ was decided in the House of Lords, the solution would have been easy. The deserted wife had no husband, for desertion was equivalent to death. Being therefore the pauper, there could obviously be no change in her settlement during the continuance of chargeability. But the *Rutherglen* case⁴ destroyed the doctrine of desertion being equivalent to death, and the real question argued in this case is whether the House of Lords judgment carries as a corollary the deciding of this case in favour of Row. Technically speaking, the House of Lords decided no more than this: that

¹ Greig v. M'Leod, March 7, 1860, P. L. M. ii. 593; Graham on Poor-Law, p. 98.

² Greig v. Simpson and Craig, May 16, 1876, 3 R. 642, *per* Lord Deas, at p. 644.

³ Beattie v. Adamson, 5 Macph. 47.

⁴ 4 F. (H. L.) 19.

a deserted wife whose husband was still known to be alive could not Mar. 11, 1908. acquire an industrial settlement for herself, and that consequently on her relapse into pauperism her settlement was as it had always been, *i.e.*, her husband's settlement. But I need scarcely say that if I thought the opinions of the noble and learned Lords, or the logical deduction to be drawn from these opinions, lead to a certain conclusion, I should hold myself bound to follow them. I am, however, of opinion that the House of Lords judgment in the *Rutherglen* case¹ does not really touch the considerations on which this case must be decided. The whole difficulty, I think, arises from not distinguishing between derivative pauperism (if I may coin an expression to make my meaning clear), which is one thing, and derivative settlement, which is another. It is necessary for me to press this point, because the learned Sheriff-substitute whose judgment, affirmed by the Sheriff, is under appeal, and whose conclusions I agree with, begins his opinion with a proposition which, if true, would, I think, entirely vitiate the conclusions which follow. He says,—“It is important to note that the wife never was a pauper in her own right.” If she was not, then the husband was the pauper at the moment she became chargeable. And just as by working elsewhere he can acquire a new residential settlement although his wife is getting relief (*Wallace v. Turnbull*),² so also by his absence merely, he can (the doctrine of desertion as equivalent to death being exploded) lose the residential settlement he acquired, and revert to his birth settlement. Indeed it would come to this, that unless you could presume him dead (for which upon the dates there is certainly no ground) he might have a settlement in any parish in Scotland except only Row, where alone it is positively known he has not been for the last three years. This argument, upon the assumption made, seems to me irresistible. But I think the assumption is clearly wrong. When a wife is found deserted and unable to support herself, it is she who is a proper object of parochial relief, and it is she who is the pauper. If this were not so, then *Wallace v. Turnbull*² would be bad law, because a man cannot be a pauper and at the same time acquire a residential settlement. Then comes the question, What is her settlement? Being a wife her settlement is necessarily derivative from her husband—it is a mere accident whether at the moment when the wife's settlement has to be sought for the husband's settlement is his birth settlement or a residential settlement. In either case it fixes the settlement of the pauper, the deserted wife. Nothing after that can, I think, happen until there is a change of circumstances. Putting out of view the possibility of some extraneous aid being given to the wife, which, of course, would put an end *de facto* to her chargeability, the only change of circumstances must consist in the discovery of the husband alive, for, if he is dead, it is clear that the settlement of the widow, as she now is, continues what it has been all through the period of chargeability. If the husband is discovered alive, then, if he is able-bodied, it is he who is bound to support his wife, and if he is not, then he becomes the pauper, and the wife a dependent on him, her relief being his relief, and the parish ultimately liable being the parish of the settlement of the

¹ 4 F. (H. L.) 19.² 10 Macph. 675.

Mar. 11, 1908. pauper, the husband, as that settlement is then discovered to be. All this seems to me really decided in terms by the case of *Beattie v. Adamson*.¹

Parish Council of Paisley v. There a pupil child subject to fits was held in fact to be a proper object of relief in its own right. Its settlement was necessarily the settlement of its father, which happened at the time of the inception of relief to be a residential settlement. The father subsequently lost that residential settlement. The child received continuous relief. It was held that the parish of the residential settlement was still liable, notwithstanding that the father, from whom the settlement was originally derived, had admittedly lost his own settlement therein, and had either acquired a new residential settlement, or reverted to his birth settlement. I can see no difference in principle between that case and this. The effect of the discovery of the father alive is different, because, although able-bodied, he was poor and was not liable to support a child in the state of health that this one was, whereas, in this case, the husband, if able-bodied, however poor, is liable to support the wife. But in that case if the father had been in affluent circumstances, the child would have ceased to be in a position *de jure* to receive relief, the chargeability would have ended, and the settlement of the child would then have followed the settlement of the father, just as here the settlement of the wife would follow that of the husband if discovered.

Ld. President. ment. The child received continuous relief. It was held that the parish of the residential settlement was still liable, notwithstanding that the father, from whom the settlement was originally derived, had admittedly lost his own settlement therein, and had either acquired a new residential settlement, or reverted to his birth settlement. I can see no difference in principle between that case and this. The effect of the discovery of the father alive is different, because, although able-bodied, he was poor and was not liable to support a child in the state of health that this one was, whereas, in this case, the husband, if able-bodied, however poor, is liable to support the wife. But in that case if the father had been in affluent circumstances, the child would have ceased to be in a position *de jure* to receive relief, the chargeability would have ended, and the settlement of the child would then have followed the settlement of the father, just as here the settlement of the wife would follow that of the husband if discovered.

The fallacy of the opposite argument may, I think, be tested in another way. It is said that the husband has certainly lost his settlement in Row. Now, that is necessarily based on the assumption that he lived for three years after he disappeared, for, if he died within the three years, then his settlement in Row remains a historic fact unaltered, and the case comes to be the ordinary one of a widow who, at the moment of pauperism, still retains the derivative residential settlement of her husband, and it is well settled that so long as she remains a pauper no change takes place. Now, while I agree that there is no presumption that the disappeared man is dead, yet, if Erskine's view be the true one (see Inst. iv. 2, 36), the presumption of life would not be available where the person pleading it did not do so in defence, but needed it to found his plea. In one of the cases Lord Deas, although he does not express it in the same words, seems to have held the same opinion, because he said he did not think the presumption of life was applicable to poor-law cases.²

For these reasons I am of opinion, though on grounds differently expressed, that the decision of the Sheriffs is right, and should be affirmed.

LORD JUSTICE-CLERK.—I concur.

LORD M'LAREN.—I concur in your Lordship's opinion. I will only add that the first principle to be applied to cases of this kind is that every pauper who has a claim for relief must continue to be supported by the parish of settlement until that parish can establish a claim against some other parish. If the husband of this woman could be traced, it would either be found that he had acquired a settlement in some other parish, or that he had not. If he had another settlement, then, of course, the woman

¹ 5 Macph. 47.

² Greig v. Simpson and Craig, May 16, 1876, 3 R. 642, at p. 644.

would be entitled to relief from that quarter, and the new settlement would be liable on exactly the same ground as Row is at present liable, viz., the ground of derivative settlement. But the case is, that nothing whatever is known about the deserting husband, and it cannot be assumed that he has acquired a new settlement, or that he has reverted to his birth settlement, or that he has any settlement in this world at all. He may be dead for anything we know to the contrary.

Mar. 11, 1908.
Parish Council
of Paisley v.
Parish
Councils of
Row and
Glasgow.
Lord M'Laren.

While I agree with your Lordship that this is a case of a pauper receiving relief in her own right, because her husband is not a pauper—has never applied for relief—that does not seem to me really to be decisive of the question, which I think depends upon the principle that Row must continue to be liable until the Parish Council is able to shew that there is another parish against whom a preferable claim can be made.

LORD KINNEAR.—I agree with the Lord President.

LORD STORMONTH-DARLING.—I am of the same opinion.

LORD ARDWALL.—I am of the same opinion.

LORD GUTHRIE.—I am of the same opinion also.

LORD PEARSON was absent.

THE COURT dismissed the appeal, and affirmed the interlocutors of the Sheriff and the Sheriff-substitute.

A. C. D. VERT, S.S.C.—THOMAS CROW, Solicitor—MACKENZIE, INNES, & LOGAN, W.S.
—Agents.

MRS C. D., Petitioner.—*Cullen, K.C.*—*Hon. William Watson.*

No. 105.

A. B., Respondent.—*Dickson, K.C.*—*R. S. Horne.*

Feb. 27, 1908.

Minor and Pupil—Custody and Access—Access to child by divorced wife—Guardianship of Infants Act, 1886 (49 and 50 Vict. cap. 27).—Circumstances in which the Court refused to ordain the father of a boy seven years of age to allow the mother (who had been divorced from the father for adultery) access to the boy, on the ground that it might be prejudicial to the boy.

C. D. v. A. B.

IN December 1907 Mrs C. D., wife of E. D., and at one time the wife of A. B., presented a petition in which she prayed the Court to find that she was entitled to access at all reasonable times to the only son of her marriage with A. B.

A. B. lodged answers.

The petitioner averred:—(2) In April 1898 the petitioner, then a domiciled American, was married to the respondent, a domiciled Scotsman, in New York. Two children were born of the marriage, viz.:—the son, who was born in November 1900, and a daughter, born in October 1903. On 8th June 1905 the Superior Court of the State of Indiana, U.S.A., pronounced a decree, at the instance of the petitioner, dissolving the marriage on the ground of the respondent's cruelty, and giving the custody of the boy to the respondent and of the girl to the petitioner. In September 1905 the petitioner was married to E. D. and resided with him in New York. The respondent "being advised that, in view of his Scots domicile, said decree of divorce was ineffectual, obtained decree of divorce from the petitioner on the ground of adul-

Feb. 27, 1908. and kept by him from" her mother "until February 1906. In August 1906 the petitioner came to London in the hope of seeing her son, but was unable to do so. In April 1907" her mother "offered, on condition of being allowed a limited custody of the boy, to maintain, clothe, and educate him, and to make an *inter vivos* settlement in trust for his behoof of a sum sufficient to yield £150 to £200 per annum. . . ." Her mother "resided in England, with the exception of one or two short absences, from February 1906 until 1st August 1907, since which date she has resided in Scotland, and she is willing to make a home in this country where the boy could be received by the petitioner." The petitioner then (Reply 6) made averments of specific acts of cruelty by the respondent to the boy.

Argued for the petitioner;—The petitioner asked for access merely, and not for custody. The fact that a mother had been divorced for adultery was not *per se* necessarily a ground for refusing to allow her reasonable access to her child; it was a question depending on the circumstances of the particular case,¹ especially since the Guardianship of Infants Act, 1886,² sec. 5 of which directed that the wishes of the mother were to be taken into account equally with those of the father,³ and under which the leading consideration was the interest of the child.⁴ *Prima facie* it was not in the interest of a child that it should be wholly separated from its mother. Here, the only allegation against the petitioner was the adultery, which took place several years ago, and it was present character and conduct that was the important consideration.⁵ The averments of the respondent were not sufficiently specific to justify the inference that it would be to the danger of the child's moral or physical welfare that his mother should see him. *Handley v. Handley*,⁶ on which the respondent founded, went upon a consideration of the English Divorce Act, and the judgment of the Court of Appeal was simply a refusal to interfere with the discretion of the Judge who tried the action for divorce. *Bowman v. Graham*⁷ was decided before the Act of 1886. The statement that the petition was really presented in the interest of the petitioner's mother was without foundation. It was nothing to the purpose that the petitioner's usual place of residence was in America, for she proposed to come to Scotland in order to see the child.⁸

Argued for the respondent;—Where a woman had been divorced on the ground of adultery, the Court would not, against the wish of the father, give her a right of access to a child unless in very exceptional circumstances⁹; that rule had not been altered by the Guardianship of Infants Act, 1886.¹⁰ Sec. 5 of the Act did not apply to cases of divorce for adultery, but sec. 7 did so apply, and left the common law unaltered. There was nothing in the circumstances of

¹ *Symington v. Symington*, March 18, 1875, 2 R. (H. L.) 41.

² 49 and 50 Vict. cap. 27.

³ *Mackellar v. Mackellar*, May 19, 1898, 25 R. 883, *per* Lord McLaren, at p. 884; *Sleigh v. Sleigh*, Jan. 20, 1893, 30 S. L. R. 272.

⁴ *Stevenson v. Stevenson*, June 5, 1894, 21 R. (H. L.) 96.

⁵ *A. C. v. B. C.*, Nov. 12, 1902, 5 F. 108, *per* the Lord Justice-Clerk, at p. 111.

⁶ L. R., [1891] P. 124.

⁷ July 17, 1883, 10 R. 1234.

⁸ *Allan v. Allan's Trustees*, July 20, 1869, 41 Scot. Jur. 617.

⁹ *Bowman v. Graham*, 10 R. 1234; *Bent v. Bent*, 1861, 30 L. J., Mat. 175; *Clout v. Clout*, 1861, L. J., Mat. 176.

¹⁰ *Handley v. Handley*, L. R., [1891] P. 124.

the present case to take it out of the ordinary rule; on the contrary, Feb. 27, 1908. the circumstances shewed that it would probably not be for the interest of the child that the petitioner should be allowed a right of access to him. C. D. v. A. B.

LORD STORMONTH-DARLING.—In this case the one thing that is perfectly clear is that the interest of the child is the main question for the Court to consider. The next circumstance of importance is that the parents of this child have already agreed as to its custody; what the mother now asks for is that she should be allowed to have access. Now, I quite admit that in the ordinary case access is a thing which would not be denied to a mother—that is to say, where she has been innocent of any conjugal transgression. But the law is the same, as I understand it, both in England and in Scotland where the mother has not been innocent in her conjugal relations. In Scotland the law is settled by the case of *Bowman*¹ (which had reference to a case of access alone), that where the wife has been divorced for adultery the matter of access to the children ought in general to be left in the husband's hands. The law is the same in England, as is established by the case of *Handley*,² and it is important to notice that that was after the passing of the Guardianship of Infants Act, 1886. A strong Court there held practically the same as the Court here did in *Bowman's* case,¹ that there was not a sufficient ground for interfering with the arrangements made for a child by the husband in the case of an erring mother, even where only access was asked for, and that was after taking into account the passing of the Guardianship of Infants Act, which was referred to in the argument. Now, here we have indications in the shape of letters that at the time when these proceedings first had their origin in America the grandmother of this boy was strongly of opinion that it was not in his interest that his mother (who was her own daughter) should have access to him. I do not say that that is by any means conclusive, though I must say that the evidence so far as it goes is very clear that, whoever was fond of the boy, the grandmother certainly was, and therefore any expression of opinion that came from her was deserving of the highest consideration.

It is true, and she admits it in her petition, that if she is to have such access, it will be necessary for her to come over from America to this country, for it is only here that she asks for or could obtain access to him. From the nature of the situation, however, it follows that access by a mother resident in America and coming over to this country for the purpose of seeing her child would almost necessarily take the form of a temporary custody. The child is at present residing in Glasgow in the house of his paternal grandmother, and is attending the Glasgow Academy. What future arrangements shall be made for his education it lies with his father to make, and he has indicated that he may ultimately send him to an English public school, but that is of course entirely in the future. The child is at present only seven years old. I am ready to decide this case upon the footing simply that it is not for the interest of the child at present that the mother's petition for access should be granted, and that she has

¹ 10 R. 1234.

² L. R., [1891] P. 124.

Feb. 27, 1908. averred no circumstances, she being the guilty spouse, to warrant us in
C. D. v. A. B. interfering with the husband's arrangements and with the clear rule of the
Scots law.

LORD LOW.—I am of the same opinion. When on the 8th June 1905 the decree of divorce was pronounced by the Supreme Court of the State of Indiana (which appears to have been really an arranged divorce) the order of the Court was that the husband (the present respondent) should have the custody of the son of the marriage and the petitioner the custody of the daughter of the marriage, and neither party seeks now to alter that order. The petitioner, however, now says that she has a great affection for her son, and that it is a great grief for her never to see him, and she comes to this Court to be allowed access to him in this country. Now a good deal has happened since the proceedings in the American Court. In 1907 the respondent brought in this Court an action of divorce on the ground of adultery against the petitioner, and it was proved that about the same time as the proceedings were going on in America the petitioner was living in adultery with a Mr E. D., and the learned Judge who tried the case found that there was no evidence that the present respondent was aware that that was going on. The pursuer subsequently married Mr E. D., and now she is living with him in America.

I think that the natural desire of a mother to see her child is by no means to be left out of consideration in a case of this sort; and the fact that she has been divorced for adultery is not in itself a sufficient reason for refusing access. But the main consideration is the welfare of the child, and in this case I have come to the conclusion that there would be serious risk that it would be contrary to the welfare of the son that access should be granted. I do not for a moment suggest that the petitioner would intentionally, or even consciously, say or do anything which might have a demoralising effect upon the boy, although I doubt very much if he would in any case actually benefit by intercourse with her. What I chiefly fear, however, is the effect which she might have on his relations with his father. The upbringing, education, and settlement in life of the boy is a duty which the father has to perform, and it is of the utmost importance that he should have the respect and confidence of his son. I greatly fear that the petitioner's influence would almost inevitably be in an opposite direction, because it is evident that she has very bitter, perhaps vindictive, feelings against the respondent; and her history, and what may be gleaned of her character from the correspondence, suggest that she would not be likely to exercise a wise self-control. These considerations, especially in view of the law laid down in the cases of *Bowman*¹ and *Handley*,² satisfy me that the petition should be refused.

LORD ARDWALL.—I agree with what has been said by your Lordships. I think there is nothing in these proceedings to shew that it is for the welfare of the child that the relations between him and his mother, which several years ago were broken off with her full consent, should now be resumed. On the contrary, I think that it is better that he should see and know as

¹ 10 L. 1234.

² [1891] P. 124.

little as possible of her in the circumstances. In the next place, with regard Feb. 27, 1908.
to the law of the matter, it is quite settled that a father is entitled to the C. D. v. A. B.
custody of his child—it is for him to direct what shall be done with the child, and that his wishes are paramount unless it can be shewn that they Lord Ardwall.
are unreasonable, or that there is some good and just cause for running counter to them.

The only doubt I have in this case has been raised by the conduct of the father as shewn in his letters; they seem to me to shew that he has treated most unfairly the grandmother of this child, who has behaved in a most proper and ladylike manner throughout, and who has a strong affection for the child; but this is not sufficient to affect our judgment, as the father, being responsible for the education and upbringing of the child, must just take his own course.

LORD JUSTICE-CLERK.—If I thought that the decision of your Lordships was to be taken as meaning that a decision at a particular time on a question such as this was final, and could never be reviewed or modified by the Court at a later date, I should have great difficulty in concurring in what is proposed to be done. The question whether a parent is to be suffered to have access to a child is one which, although decided to-day, may be varied or altered at a later date if ground can be shewn for it. What may be unfavourable to the interests of the child at one time may not be so at a later date. Therefore the judgment your Lordships propose is upon the present state of matters, and as your Lordships all hold that the present petition must be refused I do not dissent from that judgment. If cause can be shewn at any later date why what is now done should be recalled or modified, the Court will be bound to consider the application. That being so, I am not placed in the position of holding that the mother can never, whatever the change of circumstances, be allowed to see her child during childhood, which would be a thing I could not assent to.

THE COURT pronounced this interlocutor:—"Refuse the prayer of the petition; and decern: Find the respondent entitled to expenses, and remit," &c.

J. & A. F. ADAM, W.S.—A. C. D. VERT, S.S.C.—Agents.

JAMES FENTON M'ARTHUR AND ANOTHER (M'Arthur's Executors), No. 106.
First Parties.—*Sol.-Gen. Ure—Wilton.*

JAMES FENTON M'ARTHUR AND OTHERS, Second Parties.— Mar. 11, 1908.
Sol.-Gen. Ure—Wilton.

MRS MARGARET ANDERSON M'ARTHUR OR GUILD AND ANOTHER, M'Arthur's
Third Parties.—*Dickson, K.C.—Chree.* Executors v.
Guild.

MRS AGNES MOOK OR M'ARTHUR, Fourth Party.—*Sol.-Gen. Ure—Wilton.*

Succession—Special Legacy—Specific Bequest of Heritage—Sale of Subject—Suspensive Condition—Ademption.—A testator by his will bequeathed to his daughter, as a special legacy, a hotel of which he was the proprietor. Shortly before his death the testator sold the hotel to William Steven, and signed a minute of sale which bore that "it shall be a condition of this agreement being binding on both parties that Mr Steven applies for and obtains a transfer of the licence certificate of the said hotel." The transfer

Mar. 11, 1908. was not obtained until after the death of the testator, and thereafter a formal conveyance was executed in favour of the purchaser, and the price paid.

M'Arthur's
Executors v.
Guild.

In a special case the question was put whether the bequest of the hotel had been adeemed. *Held* (by the First Division with three consulted Judges) that the contract of sale being subject to a suspensive condition—namely, the transfer of the licence—the hotel remained part of the testator's estate at his death, and accordingly that the legacy had not been adeemed, and that the price of the hotel belonged to the daughter.

Opinions that even if there had been no suspensive condition there had been no ademption, the hotel, or the right to its price, remaining part of the testator's estate.

Heron v. Espie, June 3, 1856, 18 D. 917, and *Pollok's Trustees v. Anderson*, Jan. 22, 1902, 4 F. 455, *commented on and explained*.

1ST DIVISION.
with three con-
sulted Judges.

PETER M'ARTHUR, Perth, died on 16th April 1906, leaving a will executed in 1905. By his will, two of the testator's sons were appointed his executors, and after various special bequests the testator conveyed to them the whole residue of his means and estate, heritable and moveable, with power to realise and divide the same among the residuary legatees named therein.

The third head of the will was as follows :—“(Thirdly) I dispoñe, assign, and bequeath to my daughter, Mrs Margaret Anderson M'Arthur or Guild, residing in Strathmiglo, Fifeshire, wife of James Guild, hotelkeeper there, whom failing, to her child or children in equal right (first) the property in Strathmiglo, consisting of the Royal Hotel and premises therewith connected, with the pertinents and the writs and title-deeds thereof; (second)” (certain other properties).

By minute of sale, dated 5th March 1906, the testator sold the Royal Hotel, Strathmiglo, to William Steven, Kinross, at the price of £1400 sterling, with entry at Whitsunday (15th May) 1906, at which date the price was declared to be payable. The minute, which was signed by the testator and by Mr Steven, stated :—“(7) It shall be a condition of this agreement being binding on both parties that Mr Steven applies for and obtains a transfer of the licence certificate for the said Royal Hotel, Strathmiglo.” It was also provided that William Steven, the purchaser, should, within seven days from the date of the minute of sale, consign £400 in the Bank of Scotland in Perth on deposit-receipt in the joint names of the testator and himself, in part payment of the purchase price. The said sum of £400 was consigned in said bank upon 12th March 1906, “to await the settlement of the price of the Royal Hotel, Strathmiglo, repayable on the joint indorsement of the said William Steven, Esq., and Peter M'Arthur, Esq., residing at 61 George Street, Perth.” A transfer of the licence certificate in favour of Mr Steven was obtained at the Licensing Court held on 17th April 1906, the day after the death of the testator, and a formal conveyance of the property was thereafter executed in his favour, and the balance of the price paid.

Questions having arisen as to the rights of parties in consequence of the sale of the hotel, a special case was presented, which stated the facts above narrated.

The parties to the case were :—(1) The executors under the will, (2) and (4) the residuary legatees, and (3) Mrs Guild, to whom the hotel had been bequeathed.

The first, second, and fourth parties maintained that the bequest of the said Royal Hotel to the third party was adeemed by the sale thereof concluded between the testator and the purchaser thereof,

under and by virtue of the said minute of sale and consignment of Mar. 11, 1908. part of the price, and that the said £400 consigned in bank as afore-
said, together with the balance of the said price of £1400, formed part M'Arthur's Executors v. Guild. of the residue of the estate of the testator. The third party contended that the said bequest was not adeemed, in respect that the testator had executed no conveyance thereof prior to his death in favour of the purchaser, and was then still feudally vest therein as proprietor thereof.

The question of law was:—"Was the bequest by the testator to the third party of the said heritable property known as the Royal Hotel, Strathmiglo, adeemed?"

The case was argued before the First Division, with three consulted Judges, on 4th and 5th February 1908.

Argued for the first, second, and fourth parties;—When heritage was sold voluntarily, the price was moveable from the moment the sale was completed.¹ In the present case the sale was completed at the moment when the minute of sale was signed, it being immaterial that no conveyance had been executed,² and the condition as to the acquisition of the licence being merely resolute and not suspensive. Accordingly, at the date of the testator's death the subject of this special bequest had been converted from heritage into moveable estate, and thus had ceased to exist in the form in which it was bequeathed. The subject of the bequest having ceased to exist, it followed that the legacy had been adeemed.³ The case of *Pollok's Trustees v. Anderson*,⁴ relied on by the third party, was wrongly decided, and should be overruled, in so far as it decided that where the subject of a special legacy had been sold before the death of the testator the special legatee had a claim on the price. There was no authority for this proposition, and it was contrary to the decision of the whole Court in the case of *Heron v. Espie*.⁵

Argued for the third party;—The sole test in a question of ademption was whether or not the title to the property in question was in the testator at the time of his death.⁶ So long as the testator remained proprietor of the subject, it was irrelevant to consider any obligations into which he had entered with regard to it, or his intentions as evidenced by such obligations. In this respect ademption was distinguished from conversion, where intention was a relevant consideration.⁷ Applying this test to the present case, it was clear that at the date of his death—which was the date at which the will must be

¹ 2 Bell's Comm. 6; *Chiesley v. His Sisters*, Dec. 22, 1704, M. 5531; *Wilson v. Wilsons*, Nov. 29, 1808, F. C.; *Heron v. Espie*, June 3, 1856, 18 D. 917; *Ramsay v. Ramsay*, Nov. 15, 1887, 15 R. 25; *Macfarlane v. Greig*, Feb. 26, 1895, 22 R. 405.

² *Watts v. Watts*, 1873, L. R., 17 Eq. 217; *Farrar v. Earl of Winterton*, 1842, 5 Beav. 1; *Curre v. Bowyer*, 5 Beav. 6, note.

³ *Jack v. Lauder*, July 27, 1742, M. 11,357; *Pagan v. Pagan*, Jan. 26, 1838, 16 S. 383; *Chalmers v. Chalmers*, Nov. 19, 1851, 14 D. 57; *Congreve's Trustees v. Congreve*, June 27, 1874, 1 R. 1102; *Anderson v. Thomson*, July 17, 1877, 4 R. 1101.

⁴ Jan. 22, 1902, 4 F. 455.

⁵ 18 D. 917.

⁶ *Pollok's Trustees v. Anderson*, 4 F. 455; *Emalie v. Groat*, Feb. 25, 1817, *Hume's Dec.* 197; *M'Laren on Wills*, sec. 738, *et seq.*; *Justinian's Inst.* ii. 20, 12.

⁷ *Buchanan v. Angus*, May 15, 1862, 4 Macq. 374; *Anderson v. Thomson*, 4 R. 1101; *Bell's Trustee v. Bell*, Nov. 8, 1884, 12 R. 85; *Ersk. Inst.* ii., 2, 14 and 17; *M'Laren on Wills*, sec. 428.

Mar. 11, 1908. held to speak¹—the testator was still feudally vested in the hotel, and the proprietor of it. The English cases were of no value in this connection, as by English law a contract of sale passed the property.² *Pollok's Trustees v. Anderson*³ was directly in point, and, indeed, the present case was *a fortiori*, for in *Pollok*³ the sale was unconditional, whereas here it was dependent on a suspensive condition which was not purified until after the death of the testator. *Heron v. Espie*⁴ did not conflict with *Pollok*,³ and, indeed, had no bearing at all on the doctrine of ademption, for it dealt merely with the point whether a compulsory sale had the same effect as a voluntary sale in a question of conversion.

At advising on 11th March 1908,—

LORD PRESIDENT.—The late Mr M'Arthur of Perth left a will in which he disposed of the whole of his property. By the third head he provided as follows:—"Thirdly, I dispoine to my daughter, Mrs Margaret Anderson M'Arthur or Guild (first) the property in Strathmiglo consisting of the Royal Hotel and premises therewith connected, with the pertinents and the writs and title-deeds thereof." He afterwards went on to make other bequests, and left a residuary clause. Accordingly there was no doubt that the Royal Hotel was a special bequest. Shortly before his death he executed a minute of sale with a Mr Steven of Kinross, under the terms of which he sold to Mr Steven the said hotel at the price of £1400, and by the seventh article of the deed provided that, "It is to be a condition of this agreement being binding on both parties, that Mr Steven applies for and obtains a transfer of the licence certificate for the said Royal Hotel, Strathmiglo." Mr Steven accordingly made the application for the transfer of the licence to the licensing authority, but the day before the Court met Mr M'Arthur died. The Court met and granted the transfer of the licence, and accordingly there is no doubt that Mr Steven is entitled to a conveyance, and he has consigned the £1400. The question arising in this special case is whether the £1400 belongs—as representing the hotel—to the special legatee, or whether it falls into residue, the special legacy having been adeemed. At one time or another there has been a good deal of discussion as to what amounts to proof of ademption, but the leading authority is the judgment of Lord Thurlow in the case of *Stanley v. Potter*,⁵ following on the previous case of *Ashburner v. Macquire*,⁶ where, after remarking that the test of ademption was whether the thing remained at the testator's death, he continued,—"The idea of proceeding on the *animus adimendi* has introduced a degree of confusion into the cases which is inexplicable, and I can make out no precise rule from them upon that ground. . . . It will be a safer and clearer way to adhere to the plain rule which I before mentioned, which is to inquire whether the specific thing given remains or not." That doctrine

¹ *Hyslop v. Maxwell's Trustees*, Feb. 11, 1834, 12 S. 413; *Nimmo v. Murray's Trustees*, June 3, 1864, 2 Macph. 1144; *Denholm's Trustees v. Denholm*, *supra*, p. 43; Bell's Prin. sec. 1864.

² *Inglis v. Mansfield*, April 10, 1835, 1 Sh. & M. 203, *per* Lord Brougham, at p. 338; *In re Bridle*, 1879, 4 C. P. D. 336.

³ 4 F. 455.

⁴ 18 D. 917.

⁵ 1789, 2 Cox, 180.

⁶ 1786, 2 Br. C. C. 108.

has been fully adopted in the law of Scotland, and there is no clearer proof of this than is given by the case of *Anderson v. Thomson*,¹ where the late Lord Justice-Clerk Moncreiff acknowledges that doctrine, and says that although in his opinion it is utterly at variance with any principle of jurisprudence, it is so firmly established that he has no alternative but to apply it. I need scarcely say that no more striking proof can be given of the authority of a rule than its acceptance by a Judge who personally is convinced that it is a bad rule. Now, taking that doctrine as settled, it seems to me that the decision of this case is not doubtful. We have to look to see whether the trustees at the moment of death could find the thing in the truster's estate. I think it is quite clear here that at the moment of death the truster was still the proprietor of the subject. He had entered into an agreement that if a certain condition were purified he would be bound to sell the subject, but at the moment no one could know whether the condition would be purified. I think the condition was purely suspensive. Upon that simple ground I think there can be no doubt that there was no ademption of this legacy. The property, accordingly, when it came to be sold, was the property of the legatee, and consequently the price belongs to her, because it was her property that was sold.

But I do not want to stop here, although this is enough for the decision of the case, for there is no doubt that this case was taken to test whether the decision of the Second Division in *Pollok's Trustees v. Anderson*,² really conflicts with the decision of the whole Court in *Heron v. Espie*.³ *Pollok's Trustees*² was not the same as this case, as it did not involve the question of a suspensive condition. It was the case of a voluntary sale, where missives had been signed, but the testator had died without having executed a conveyance to the purchaser. The Second Division found that the property belonged to the testator at the time of his death, and that the legacy had not been adeemed. It is argued that this decision cannot stand with *Heron v. Espie*.³ At the first hearing of this case I was inclined to agree with this, but I have come to be clearly of opinion that *Pollok's Trustees*² was quite rightly decided, and that *Heron*,³ so far from being in opposition, really supports the views upon which *Pollok's Trustees*² was decided. In *Heron v. Espie*,³ a property had been taken by means of compulsory notice by a railway company. The company had consigned a sum and entered into possession. An arbitration had taken place and the actual price fixed, and all that remained to be done was to grant a conveyance. In that position of matters the quondam owner of the property died and left a general settlement covering both his heritable and moveable property. This settlement was reduced *ex capite lecti quoad* the heritable property, and the point was whether the heir or the executor took the consigned price. Now, had it been a voluntary sale there could have been no question. There would have been conversion upon the authority of *Chiesley*,⁴ and all the cases that have followed since. But here there was no conversion by the act of the owner, and accordingly the doctrine was pressed that the infestment of the quondam owner was still undisturbed by any new infestment in favour of the

¹ 4 R. 1101.³ 18 D. 917.² 4 F. 455.⁴ M. 5531.

Mar. 11, 1908. company. The minority held that the price ought to go to the heir, and the majority only came to the opposite conclusion because they held that the effect of what had happened was to effect a statutory transference which transferred the land without infestment, and left the right in the quondam owner as not a right of property, but only a right to receive the price, which being moveable *in se* could not go to the heir. As the Lord Justice-Clerk expressed it (page 922)—“I hold that to be real corporal and complete possession of the lands, as much as if infestment had been taken.” Lord Wood says (page 939)—“The seller was dispossessed of the lands and had no interest in them remaining in him, his right having been absolutely converted into a direct right to payment of the fixed price only.” The contrary view, that there was no such divestiture and that consequently the subject remained heritable in the *hereditas* of the seller, is developed by Lord Deas. Now, it matters not for the moment which of the conflicting views was right. Either it remained heritable, or if it did not, it did not because something had occurred which transferred the property in the land itself in spite of the standing infestment in the quondam owner, a result which could not have occurred in a voluntary sale. If it had been a voluntary sale, of course the property would have been moveable, but only on the principle of conversion, which depends on the will of the owner and testator. It seems to me that the moment that you settle that intention is neither here nor there in a question of ademption, *Heron v. Espie*¹ becomes really an authority, not at variance with, but in favour of *Pollok's Trustees v. Anderson*.²

I would further add that the English authorities quoted to us do not seem to me to touch the question, for the simple reason that by English law the contract of sale passes the property—the exact opposite being true by the law of Scotland, and the law not having been altered as to heritable property though it has been as to moveable.

I am, therefore, for answering the question of law in the negative.

LORD JUSTICE-CLERK.—I concur.

LORD M'LAREN.—If this had been an unconditional sale I should have been disposed to say that the legacy was adeemed, for though this is heritable property I think the question properly falls to be tested by the doctrine of ademption, because that doctrine comes from the Roman law, which recognised no difference between moveable and immoveable estate. Both are covered by the same principle, viz., that if the testator after making a special legacy by will has parted with the subject, it is no longer in the power of the testamentary representatives to make over the property, and therefore the legacy ceases to have effect. The only difference in the case of a conditional sale is that there is no sale until the condition is purified. There might be cases in which a personal right to the land effeired to the purchaser from the moment the contract of sale was made, subject only to a resolutive condition, and in such a case I might be disposed to think that the personal right was a sufficient withdrawal of the property from the testator's general estate to lead to the conclusion that the legacy had been

¹ 18 D. 917.

² 4 F. 455.

adeemed. But it is not necessary to consider that question, which might come to be important in reference to the peculiarity of our law as to heritable and moveable estate. For the decision of this case I think it is enough to say that it was a conditional sale, and that there was not even a personal right in the purchaser to the property at the date of the testator's death. The testator was the undivested owner of the subject of a contract, which contract his representatives would be bound to fulfil. So I think the legatee took the property, subject of course to the terms of the contract.

LORD KINNEAR.—I am of the same opinion. I agree with what your Lordship has said in reference to the case of *Pollok*,¹ which we are directly invited to reconsider. But for my own part, I think that even if that case had been decided differently I should still have come to the same conclusion upon the question now before us, because there was a much more plausible argument for ademption in the case of *Pollok*¹ than in the present. In *Pollok*¹ the testator had directed his trustees to convey certain subjects to certain persons, but before his death he had sold them with entry at a certain term. He died before a conveyance was executed, but undoubtedly under an absolute obligation to convey, which neither he nor his representatives could have refused to implement. But the present testator was under no absolute obligation to convey the subjects. He had entered into a contract for the sale of the subjects subject to a condition that the intending purchaser should apply for and obtain a licence certificate. The testator died before the application was made, and therefore at the date of his death it was quite uncertain whether the contract would become binding or not. I think that constitutes a material distinction between the two cases. For a similar reason I think the case of *Heron v. Espie*² has no application. In that case a railway company had taken possession of lands under statutory powers, and had consigned a sum of money to meet the price. The true amount of the price had been ascertained by arbitration, and the proprietor of the land died before the disposition to the railway company had been signed. There is a great deal of learned discussion in the opinions of the Judges, but I think the material point is that throughout the discussion the assumption was that the transaction of purchase and sale had come to an end, and that there was no question as to any right in the lands, but only with reference to the money. This is clearly brought out in the terms of the interlocutor, because the judgment of the Court "finds that the right to demand payment of the price due by the railway company for the stripe of ground referred to was a personal right in the person of the deceased William Simpson, and that the said price was part of" his "moveable estate." The result of the whole discussion therefore was to find that the price of land sold was personal and not heritable property. For the actual decision of the present case I agree with your Lordship in the chair, that we must look to the doctrine of ademption as laid down by Lord Thurlow in the case of *Ashburner v. Macquire*,³ and repeated in the case of *Stanley v. Potter*.⁴ The

¹ 4 F. 455.² 2 Br. C. C. 108.³ 18 D. 917.⁴ 2 Cox, 182.

Mar. 11, 1908. principle is that when a particular thing has been specifically bequeathed the claim of the special legatee will be defeated if the thing in question is not in existence or not within reach of the testator's executors at his death.

M'Arthur's Executors v. Guild. The reason is, as his Lordship expressed it in the second of the two cases Lord Kinnear. mentioned above, that "one must consider it in the same manner as if a testator had given a particular horse to A B—if that horse died in the testator's lifetime, or was disposed of by him, then there is nothing on which the bequest can operate." And then he goes on to say that the idea of proceeding upon the supposed *animus adimendi* leads to confusion, and that no rule can be safely adopted except to inquire (1) whether there is a special legacy, and (2) whether the thing bequeathed remained at the testator's death. I think that doctrine has been followed too consistently to be called in question now, and I cannot say that my reliance on it is shaken even by the criticism of so very eminent a Judge as Lord Justice-Clerk Moncreiff in the case of *Anderson*.¹ His Lordship thought the doctrine contrary to principle because it displaced what ought to be the sole rule in the construction of wills, viz., to ascertain and give effect to the intention of the testator. But I cannot see that the case of *Ashburner*² throws any doubt on this cardinal rule of construction, or affects it in any way. For the doctrine comes into operation only after the will has been construed. The first question, and the question which Lord Thurlow thought was generally the question of difficulty, is whether there is a special legacy, and that is a question of construction in which the intention of the testator is the proper subject for inquiry. The question whether the thing bequeathed remains or not is a question of fact, not a question of intention. Applying that rule in the present case it appears to me that the testamentary gift of the hotel was a bequest of a specific subject, and the only question which we have to consider is whether that subject remained a part of the deceased's estate at his death. For the reasons given by your Lordship I think it did remain. It remained subject to a contract which bound the testator, but at the date of the death it was a contract which was still in suspense; when it did come into operation the legatee was bound also, as a gratuitous taker under her father's will, but her obligation was to complete the sale by conveying the property in return for payment of the price.

LORD STORMONTH-DARLING.—I concur in the opinion of your Lordship in the chair.

LORD ARDWALL.—I am of opinion that the bequest of the Royal Hotel, Strathmiglo, in favour of the party of the third part did not, in the circumstances set forth in the special case, suffer ademption.

Any apparent difficulties that arise on the authorities can, I think, be satisfactorily explained if care is taken to distinguish between cases of conversion and cases of ademption. *Heron v. Espie*³ does not appear to me to conflict with the decision which it is proposed to pronounce, and the case of *Chalmers*,⁴ which was a case of ademption, was very different from the present, for in

¹ 4 R. 1101.

³ 18 D. 917.

² 2 Br. C. C. 108.

⁴ 14 D. 57.

that case the house bequeathed to the pursuer had been taken by a railway company, the price thereof paid, and a disposition thereof in favour of the railway company granted two months before the testator's death. Accordingly, at that date the testator had been absolutely divested of all right to the house in question. The case of *Pollok's Trustees v. Anderson*¹ is an authority directly applicable to the present case, but the present case is, I think, *a fortiori* of that one. The question whether or not ademption of a bequest of a specific subject has taken place depends solely upon this other question, whether or not the subject of the bequest was at the date of the testator's death in existence, and formed part of his estate. In the present case, although a minute of sale had been entered into between the testator and a person of the name of William Steven, yet the contract thereby concluded was subject to a suspensive condition, and was not binding upon both parties unless and until (1) the purchaser applied for, and (2) obtained a transfer of the licence for the hotel, the second of these conditions depending upon third parties for its fulfilment. The testator died on 16th April 1906, and at that date the transfer of the licence had not been granted, and of course the price had not been paid, nor had a conveyance of the subjects been executed. Accordingly, the subject of the bequest formed part of the testator's estate at the time of his death, and was carried by his settlement directly to the party of the third part, subject to her obligation to carry out the contract of sale and her right to receive the stipulated price in return for a conveyance of the property.

Mar. 11, 1908.
M'Arthur's
Executors v.
Guild.
Lord Ardwall.

LORD GUTHRIE.—I concur in the opinion of your Lordship in the chair.

THE COURT answered the question of law in the negative.

MACRAY & HAY, W.S.—W. G. LEWIS, S.S.C.—Agents.

WILLIAM SIME (Liquidator of The Humboldt Redwood Company, Limited), Petitioner.—*Grainger Stewart*.

ARCHIBALD COATS AND OTHERS, Respondents.—*Macmillan*.

THE MERCHANT BANKING COMPANY AND OTHERS, Respondents.—*Hunter, K.C.—R. S. Horne*.

No. 107.

Mar. 13, 1908.

Liquidator of
The Hum-
boldt Red-
wood Co.,
Limited, v.
Coats.

Company — Memorandum — Inconsistency between Memorandum and Articles of Association—Provisions in the Articles for preferential treatment of one class of shareholders.—The memorandum of association of a limited company provided:—"The capital of the company is £250,000, divided into 139,092 ordinary shares of £1 each, and 110,908 deferred shares of £1 each."

The articles of association provided that the ordinary shares should have a preferential ranking as to dividend; and that, in the event of a winding-up, the shares of the company should be repaid "in the order in which the shares or stocks are entitled to rank for payment of dividend."

In the winding-up of the company the deferred shareholders maintained that the provision in the articles for the preferential ranking of the ordinary shareholders in a winding-up was inconsistent with the memorandum of

Mar. 13, 1908. association, and was therefore invalid; and that the surplus assets fell to be distributed equally among all the shareholders.

Liquidator of
The Humboldt Red-
wood Co.,
Limited, v.
Coats.

Held that there was no inconsistency between the articles and the memorandum of association, and that in the winding-up the ordinary shareholders were entitled to payment of their capital in full before the deferred shareholders received anything on account of their capital.

Andrews v. Gas Meter Company, L. R., [1897] 1 Ch. 361, approved.

1ST DIVISION. ON 18th January 1908 William Sime, C.A., Edinburgh, liquidator of the Humboldt Redwood Company, Limited, a company registered under the Companies Acts, presented a petition to the Court under these Acts, and particularly under section 138 of the Act of 1862, for the determination of a question which had arisen in the winding-up of the Company.

The petition set forth that the memorandum of association of the Company provided, article 5:—"The capital of the Company is £250,000, divided into 139,092 ordinary shares of £1 each, and 110,908 deferred shares of £1 each."

That the articles of association of the Company provided, by article 43:—"The holders of ordinary shares of the Company shall be entitled to receive out of the profits of each year a cumulative preferential dividend at the rate of 10 per cent per annum on the amount for the time being paid up on the ordinary shares held by them respectively, and the surplus profits in each year shall belong to the holders of the deferred shares." And by article 137:—"In the event of the Company being dissolved and wound up, the different shares or stocks of the Company shall be repaid out of the assets of the Company as realised, in the order in which the shares or stocks are entitled to rank for payment of dividend."

That the liquidator had in hand a balance of about £9000 for distribution among these shareholders, and that "the ordinary shareholders maintain that they are entitled to distribution amongst them of the whole remaining assets of the Company, up to any amount not exceeding their paid-up capital, being £1 per share, in preference to any payment to the deferred shareholders, and some of the deferred shareholders dispute the rights of the ordinary shareholders to this preference."

The question which the petitioner submitted to the Court was:—"Whether the ordinary shareholders are entitled to receive payment of their capital in full before the deferred shareholders receive anything on account of their capital or not?"

Answers were lodged by Archibald Coats and certain other shareholders, all of whom held a larger number of ordinary shares than deferred shares.

Answers were also lodged for the Merchant Banking Company, Limited, and the liquidators thereof, who were holders of 30,808 deferred shares.

The petition was heard on 13th March 1908, when the respondents Archibald Coats and others argued;—The provision in the articles of association that the ordinary shareholders were to have priority of payment in a winding-up was not in any way inconsistent with the memorandum. The memorandum merely fixed the amount of the division into shares of the capital and left it to the articles to define the rights *inter se* of the shareholders, both as to dividend and repayment of capital. Such provisions could quite competently be embodied in the articles, and that there was no special sanctity with regard to the rights *inter se* of shareholders was shewn by the fact that even by

resolution or by amendment of the articles preferences between different classes of shareholders could be created.¹ Mar. 18, 1908.

Argued for the respondents the Merchant Banking Company, Limited, and Liquidator;—Article 5 of the memorandum did not provide for any preference in a winding-up between the two classes of shareholders. If a preference had been intended it should have been provided for in the memorandum, and a preference not being in the memorandum it could not be competently embodied in the articles.² Further, nothing in the articles inconsistent with the provisions in the memorandum could have any effect, and the preference founded on here was so inconsistent.³ On both these grounds, therefore, the provisions in the articles for the preferential payment of the ordinary shareholders in a winding-up were invalid, and the assets fell to be distributed equally among all the shareholders.

Liquidator of
The Hum-
boldt Red-
wood Co.,
Limited, v.
Coats.

LORD PRESIDENT.—The first matter that is before your Lordships in this case is the determination of a question which has arisen in the winding-up of the Humboldt Redwood Company, and which is brought before your Lordships by Mr Sime, the liquidator in the voluntary winding-up of that Company. The question, as put by the liquidator, is this—"Whether the ordinary shareholders are entitled to receive payment of their capital in full before the deferred shareholders receive anything on account of their capital or not?" That question is one of the simplest, and must be solved by reference to the constituting documents of the Company. The memorandum of association provides in article 5 that "the capital of the Company is £250,000, divided into 139,092 ordinary shares of £1 each, and 110,908 deferred shares of £1 each." The articles of association provide by article 137 that "in the event of the Company being dissolved and wound up, the different shares or stocks of the Company shall be repaid out of the assets of the Company as realised, in the order in which the shares or stocks are entitled to rank for payment of dividend." And by the 43d article it is provided that "the holders of ordinary shares of the Company shall be entitled to receive out of the profits of each year a cumulative preferential dividend at the rate of 10 per cent per annum on the amount for the time being paid up on the ordinary shares held by them respectively, and the surplus profits in each year shall belong to the holders of the deferred shares."

Now, there can only be one meaning to these words. It is too clear to admit of argument that the ordinary shareholders are to be paid in full before the deferred shareholders get anything. But the argument is that these provisions in the articles of association are bad as being contrary to the terms of the memorandum, and the well-known doctrine is invoked that the memorandum is the ruling document and overrides anything in the articles of association that may be contrary to its provisions.

As far as I can see there is no inconsistency between the two documents here. The memorandum only states that the capital of the Company is to be

¹ Bangor and Portmadoc Slate and Slab Co., 1875, L. R., 20 Eq. Ca. 59; Andrews v. Gas Meter Co., L. R., [1897] 1 Ch. 361.

² The Companies Act, 1862 (25 and 26 Vict. cap. 89), secs. 8 and 12.

³ Guinness v. Land Corporation of Ireland, 1882, L. R., 22 Ch. Div. 349.

Mar. 13, 1908. divided in certain proportions between two classes of shares. Mr Hunter Liquidator of The Humboldt Redwood Co., Limited, v. Coats. Ld. President. says the inference from that is that these shares are to rank equally as to divisions of assets. There is no authority for that proposition, and I think the matter is determined by the decision in *Andrews v. Gas Meter Company*,¹ where Lindley, L. J., says, — "These decisions turned upon the principle that although by section 8 of the Act the memorandum is to state the amount of the original capital and the number of shares into which it is to be divided, yet in other respects the rights of the shareholders in respect of their shares and the terms on which additional capital may be raised are matters to be regulated by the articles of association rather than by the memorandum, and are, therefore, matters which (unless provided for by the memorandum, as in *Ashbury v. Watson*,²) may be determined by the Company from time to time by special resolution pursuant to section 50 of the Act. This view, however, clearly negatives the doctrine that there is a condition in the memorandum of association that all shareholders are to be on an equality unless the memorandum itself shews the contrary. That proposition is in our opinion unsound. Its unsoundness was distinctly pointed out by Lord Macnaghten in *British and American Trustee and Finance Corporation v. Couper*."³ To all there said I respectfully subscribe. All that the memorandum does here is to say that there shall be two classes of shareholders, but it leaves it to the articles of association to prescribe their respective rights. The answer, therefore, to the question put by the liquidator must be in the affirmative.

LORD M'LAREN and LORD KINNEAR concurred.

LORD PEARSON was absent.

THE COURT answered the question in the affirmative.

W. & F. HALDANE, W.S.—GRAHAM, JOHNSTON, & FLEMING, W.S.—
TODD, MURRAY, & JAMIESON, W.S.—Agents.

No. 108. THE SUMMERLEE IRON COMPANY, LIMITED, Petitioners (Appellants).—
Dickson, K.C.—Hon. W. Watson.

Mar. 13, 1908.

ARCHIBALD MACLAREN LINDSAY AND OTHERS, Objectors
(Respondents).—*Cooper, K.C.—Lippe.*

Summerlee
Iron Co.,
Limited, v.
Lindsay.

Police—Building Regulations—Height of Buildings—Consent of Corporation—Burgh—Dean of Guild—Appeal to Dean of Guild—Questions to be considered by Dean of Guild—Procedure in Dean of Guild Court—Glasgow Building Regulations Act, 1900 (63 and 64 Vict. cap. cl.), sec. 60.—The Glasgow Building Regulations Act, 1900, sec. 60, provides, by subsec. (1), that no building, "except with the consent of the Corporation," shall be erected above a certain height; and by subsec. (3), that whenever the Corporation consents to any building being erected beyond the statutory height "the owner or lessee of any lands or heritages within one hundred yards of the site of any intended building who may deem himself aggrieved

¹ L. R., [1897] 1 Ch. 361.

² 30 Ch. D. 376.

³ L. R., [1894] A. C. 416, 417.

by the grant of such consent may . . . appeal to the Dean of Guild, Mar. 13, 1908. who shall have power to deal with the case as shall seem to him just."

Held that in disposing of such an appeal the Dean of Guild is not limited to the consideration of whether the Corporation in giving their consent were acting capriciously or *ultra vires*, but must also take into consideration whether the individual owner appealing is, as a result of his proximity, unduly prejudiced by the increased height; and that the Dean of Guild should not take into consideration the invasion of any legal rights of the individual owner, such legal rights falling to be vindicated in the petition for lining.

Observed that in disposing of such an appeal the Dean of Guild ought to apply his expert knowledge, and, where possible, dispose of the matter summarily without a proof.

(SEE *ante*, 1907, S. C. 1161.)

On 17th June 1907 Archibald Maclaren Lindsay, Robert Meldrum, and John Lumsden Oatts, solicitors in Glasgow, the proprietors of certain ground abutting on Regent Street Lane there, appealed to the First Division against two interlocutors pronounced by the Dean of Guild in Glasgow in connection with a petition for lining, presented by the Summerlee Iron Company, Limited, for authority to erect certain buildings to abut on Regent Street Lane, within 100 yards of the appellants' property. The buildings proposed to be erected exceeded the limitation of height provided for in the Glasgow Building Regulations Act, 1900, and one of the interlocutors that the appellants appealed against was an interlocutor of the Dean of Guild dismissing an appeal at their instance under sec. 60 (3) of that Act,* against the consent of the Corporation being granted to the proposal to exceed the statutory height. The other interlocutor appealed against was an interlocutor of the Dean of Guild granting the lining craved.

1st DIVISION.
Dean of Guild
Court,
Glasgow.

On 13th July 1907 the First Division recalled the interlocutors appealed against, and remitted to the Dean of Guild to consider whether the consent of the Corporation had been given in knowledge of the true interpretation of the statutory provisions applicable, "and if he is satisfied that such consent has been so given, and does not propose to recall that consent in virtue of the powers given to him by said subsection (3) of section 60 of the said Act, to dismiss the appeal taken to him," and to grant the lining.†

On 20th December 1907 the Corporation of Glasgow, having reconsidered the matter in the light of the interpretation of the statutory provisions laid down by the First Division, of new gave their consent to the buildings being erected beyond the statutory limit of height.

On 14th January 1908 Messrs Lindsay, Meldrum, and Oatts appealed to the Dean of Guild, under sec. 60 (3) of the Building Regulations Act against that consent, and the appeal was conjoined with the original petition for lining.

In art. 9 of the note of appeal the appellants stated that they considered themselves aggrieved by the proposal to which the Glasgow Corporation were alleged to have given consent, *inter alia*, for the following reasons:—“(3) The erection of the buildings to the height proposed would be detrimental to the interest of adjoining proprietors and occupiers by unnecessarily restricting air space and light, and in the event of fire would become a serious danger to

* Quoted in rubric.

† Reported *ante*, 1907, S. C. 1161.

Mar. 13, 1908. adjoining proprietors. (4) No reasons exist on account of site or otherwise for relaxing the statutory height of the building, and the fact of its being more remunerative to the Summerlee Iron Company, Limited, to have increased height is no reason for such consent being granted. (5) The granting of consent has resulted in the Corporation conferring an unnecessary pecuniary advantage on the Summerlee Iron Company, Limited, to the detriment of adjoining proprietors, and the amenity, health, and safety of the neighbourhood."

Summerlee
Iron Co.,
Limited, v.
Lindsay.

On 24th February 1908 the Dean of Guild pronounced an interlocutor allowing the appellants a proof of their averments (3), (4), and (5) in art. 9.*

The respondents, the Summerlee Iron Company, Limited, appealed to the Court of Session, and the appeal was heard on 12th March 1908.

Argued for the Summerlee Iron Company;—The Dean of Guild should not have allowed a proof here, but should have disposed of the matter summarily, and the consent of the Corporation being given, and the objections already disposed of on their merits on the former occasion, he should have granted the lining. The averments remitted by the Dean of Guild to probation were largely irrelevant, and, so far as relevant, were such as could, and should, have been disposed of by him with the assistance of his expert advisers without a proof. The appeal was provided to the Dean of Guild Court just because it was a Court of experts who could dispose of such matters summarily, and by allowing a proof the Dean of Guild was in fact unjustifiably declining his own jurisdiction.

Argued for Archibald Maclaren Lindsay and others;—The statute provided that the Dean of Guild in such an appeal should have "power to deal with the case as shall seem to him just." There was no limitation as to his method of dealing with it, and no enactment that he must dispose of it summarily. Here in the exercise of his discretion he had decided that to inform his mind properly a proof was necessary. Such an exercise of his discretion was perfectly valid, and should not be disturbed.

At advising on 13th March 1908,—

LORD PRESIDENT.—When this case was before us in this Division on the former occasion we pronounced an interlocutor to this effect:—"Recall *in hoc statu* the interlocutors of the Dean of Guild, dated 3d June 1907, in the respective processes, and remit to him to consider whether as a matter of fact the consent of the Corporation has been knowingly given to a building which, under section 62 of the foresaid Act, must be held as

* In his note the Dean of Guild, after referring to the new consent given by the Corporation, continued:—"That consent being now in process, the duty of the Dean is to say whether or not he sees any reason to interfere with it. The objectors take exception to the consent on several grounds. Some are technical; the others deal with what may be said to be the practical side of the matter. The Dean thinks it would be unfortunate if by any pronouncement of his upon the technical pleas the case would reach the Court of review without all the relevant considerations upon the practical side of the matter having been ascertained. He has, therefore, before answer allowed a proof of the averments as to the detriment which the objectors would suffer by the building proposed to be erected by the petitioners being authorised."

abutting on two streets, and if he is satisfied that such consent has been so given, and does not propose to recall that consent in virtue of the powers given to him by said subsection 3 of section 60 of the said Act, to dismiss the appeal taken to him, with or without expenses as to him shall seem just, and to grant the lining in the petition therefor." The case went back to the Dean of Guild, and as the Dean of Guild was not certain as to whether as a matter of fact the consent of the Corporation had been knowingly given to a building which must be held as abutting on two streets, he asked the Corporation to that effect, as, indeed, was indicated as the appropriate course by the opinion pronounced by myself in that case. The result of that was that the Corporation confessed that they had not viewed the case from that standpoint, and therefore they quite rightly again considered the matter from the standpoint which the Court had given them, namely, that this was a building which was to be held as abutting upon two streets. Having done so, they again gave their consent. Against that consent an appeal was again taken to the Dean of Guild so that he might, as it is expressed in the interlocutor, "recall that consent," if he wished to do so, under the powers of subsection 3 of section 60.

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Now, it is quite true that the Dean of Guild had already pronounced, so to speak, an opinion on the merits of this matter when the former consent was given, but I have no doubt whatsoever that technically the Dean of Guild was perfectly entitled, if he wished, to reconsider the matter, because the old consent was gone as inapplicable, and this was a new consent; and I do not say a word against the technical propriety of the appeal being taken, in order that the Dean of Guild might this time refuse his consent, if so advised. The Dean of Guild, however, upon that matter has not, as yet, indicated whether he consents or not, but he has pronounced an interlocutor to this effect:—"Before answer, allows to the objectors a proof of their averments in article 9 (3), (4), and (5) of their note of appeal." Now, the averments there referred to, of which proof has been allowed, are as follows:—(His Lordship read the averments quoted *supra*).

Before I deal with these averments perhaps it may be as well to say a word upon what I think the Dean of Guild has got to consider upon this matter. The section which gives the Dean of Guild appeal is the third subsection of the 60th section of the Glasgow Building Regulations Act,¹ which, after providing that the Corporation's consent shall be advertised, says it "shall not be acted on till twenty-one days after such publication; and the owner or lessee of any lands and heritages within 100 yards of the site of any intended building who may deem himself aggrieved by the grant of such consent, may, within twenty-one days of such publication, appeal to the Dean of Guild, who shall have power to deal with the case as shall seem to him just." Now, the Dean of Guild made certain observations—not in this case, but in the last *—as to what that appeal really meant, and

¹ 63 and 64 Vict. cap. cl.

* The observations to which his Lordship referred were contained in the Dean of Guild's note to his interlocutor of 3d June 1907, and were as follows:—"If the power competent to the Dean of Guild in an appeal under this section is to be taken to be absolute, the position would seem to be somewhat anomalous. The appeal is an appeal from the discretion of a

Mar. 13, 1908. we had not occasion on the last occasion to deal with that, so I shall deal with it now.

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I do not think that the view that the Dean of Guild there took is quite correct. I think he took too restricted a view of his own powers. He seemed to think that, because the appeal was given from a public body to one person, namely, himself, all that he had to do was to see that the public body had not acted capriciously, or in any way *ultra vires*, but that he could not consider the matter on the merits. I do not think that there is necessarily any such limit. Nor do I think that there is anything to be surprised at in the Legislature giving an appeal from a public body to one person, seeing that that public body fails in two respects, first, it is not a judicial body, and, secondly, it is not a body that necessarily has among its number any member practically skilled in these matters—and seeing that the Dean of Guild enjoys both those advantages. The scheme of the statute seems to me clear enough. There are certain restrictions made upon height, which are, I suppose, made for the good of everybody concerned. Well, then, these restrictions are allowed to be dispensed with by the Corporation; and I think the matter which the Corporation in that question has to decide is a question, so to speak, of public policy. If they think that, in their view as custodiers of the town, it is a bad thing that the restriction should be dispensed with, then they will not give their consent; on the other hand, if they think there is no harm from the public point of view, they may dispense with the restriction and give their consent.

But then comes in the question of individuals; because there is no doubt that one person may have, from his local situation, a great deal more interest than another even although the thing which is being dealt with is, so to speak, a matter of public interest. A very obvious illustration is this: it is a matter of public interest whether a certain street should be shut up, but it is very much more a matter of interest to the man who lives in a house near the street, and perhaps uses that street every day as a convenient way of getting to his business, than to somebody else, who is equally a citizen, but who lives two miles away at the other end of Glasgow. And, therefore, I

public body to the discretion of a single Judge. If it were necessary in the present case to form an opinion as to the precise limits of the power of the Dean of Guild in an appeal such as the present, the Dean would be inclined to conclude that the right of review is more limited than was assumed at the debate. When Parliament confers upon a public body a power that body must act within the limits of the power, and it must act in good faith and not in any arbitrary or capricious manner. A discretion exercised within these bounds is not one which is likely to be presumed to be subject to the veto of another tribunal consisting of one man. The Dean is therefore inclined to think that under the appeal contemplated by section 60 (3), his function, like the function of any legal tribunal when reviewing an administrative act, is to see that the power conferred on the Corporation has been exercised within its limits, and has been exercised not in bad faith and not in any arbitrary or capricious manner. But these views are not of importance in this case, because assuming that the Dean's review is not limited, and that the discretion vested in him is as full as that vested in the Corporation, the Dean would in this case reach the same conclusion as the Corporation, and relax the restriction as to height in the locality where the building in question is proposed to be erected."

think properly, the statute provides for a second consideration being given to Mar. 13, 1908. the question in the light of how the height of the building is going to affect private people. But then, I think it is very necessary to say that I do not consider that this has anything to do with what may be called private people's legal rights. Private people's legal rights—rights of servitude, rights of prospect, and so on—have nothing to do with this matter, because they are, of course, perfectly safeguarded in the process of lining, which this is not. If a person has a servitude of light which is going to be affected by the building which is proposed to be put up, the proper place for him to appear is not in this question as to height, but in a question of decree for lining, and there he will have his right made good if he can. It must be remembered that these restrictions are purely statutory restrictions, and not under the common law at all. A man at the common law, if he is not restrained by other rights in his neighbour—of servitude or building conditions or something of that sort, all of which, as I have said, can be made good in the decree of lining—of course may build his house as high as the Tower of Babel. But then comes in this Building Regulations Act, which says that, except on certain conditions, he shall not. Well, then, after the Town-Council consents, the neighbour says,—“But, then, this is going to affect me in a peculiar way.” I think he has got a right to say so, and I think it falls within the province of the Dean of Guild to consider his objection in an appeal under sec. 60, subsec. (3), but I think he must shew his hurt, not upon any ground of private injury—for that he must do in the lining—but upon what I may call the public ground which he says presses upon him more severely than it would do upon other people.

I now revert to the Dean of Guild's interlocutor, and I first take the averments upon which he has allowed proof. I think that the third is in itself a good averment,—that is to say, “the erection of the buildings to the height proposed would be detrimental to the interest of adjoining proprietors and occupiers by unnecessarily restricting air space and light.” I can imagine that a building could be so high and so big that it would, as a public matter, really hurt the air and light of the neighbourhood, and I think the adjoining proprietor should be able to say,—“Well, that is so, and I am one of the people who would be specially hurt by it.” I again call attention to the fact that a restriction of light does not mean a question of servitude. If he has got that, he must make it good in the lining. This must be a public detriment, but one which a particular person feels more than others. But it seems to me that averment (4) is no averment at all. Really, if I may say so without offence, it is ridiculous to allow proof upon averment (4) to prove a negative,—“that no reasons exist.” I cross that averment out altogether. Averment (5) seems to me to be, as to part of it, entirely irrelevant—the part where it talks about conferring unnecessary pecuniary advantages on the Summerlee Iron Company, for that is neither here nor there—and, so far as it is relevant at all, it seems to me nothing more than a repetition of averment (3) without the specification given in averment (3), because, whereas the detriment is explained in averment (3), it is not explained in averment (5) at all. I therefore cross out averment (5), because I think it has not added anything to averment (3). And that leaves averment (3) alone.

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Now, as to the allowance of the proof itself, while I want to make it perfectly clear to the Dean of Guild that we should certainly never interfere with him in taking the best means he can for the expiscation of a case, and while I also want to make it clear that there might be such specific averments as to particular things as, if not admitted, might make it perfectly proper for him to have a proof before he comes to his decision, yet it seems to me perfectly clear that the class of averment that is made in article (3) is an averment which is not meant to be expiscated by putting people in the witness box ; it is meant to be decided by the Dean of Guild himself as a practical man, for which reason it is that he is selected. Holding these views, and expressing them so, I wish to say that I hope the Dean of Guild will not misunderstand me. I propose that we should recall the Dean of Guild's interlocutor, and remit to him to pronounce his judgment, whether he thinks there is any reason for interfering with the consent which has been granted by the Corporation.

LORD M'LARN.—I think it is necessary to keep in view that this is an appeal in a process which is preliminary to the regular application to the Dean of Guild Court for authority to build. I should have thought that it would be a more convenient mode of procedure if it had been enacted that the Dean of Guild, when the case comes before him for hearing, should be entitled, notwithstanding the consent given by the Town-Council, to refuse the additional height upon public grounds. But that is not done ; the provision is that there may be an appeal from the authority given by the Town-Council to exceed the height prescribed for ordinary uses. Now, I think, although this is not the ordinary Dean of Guild jurisdiction, it must have been intended that the Dean of Guild should proceed according to the same methods of inquiry and procedure as in his ordinary jurisdiction, because, if it had been an appeal in which the parties were expected to adduce expert evidence on either side, it would, I venture to think, be more convenient if that appeal had been to the Sheriff rather than to the Dean of Guild. The Dean of Guild, in his note, remarks that he considers it a somewhat anomalous thing that there should be an appeal from the whole Council to a single member of it, and so it would be if this were an appeal in which evidence were to be taken and dealt with as in a regular action. But then, in my view, that is not the intention of the Legislature. In the present case it happens that the parties were heard before a committee of the Town-Council upon the question whether the necessary consent should be given, but that was owing to the peculiar position into which the case had got. In the ordinary case, I take it, when the appellant goes to the Town-Council in the first instance, there is no argument, and, if he makes a *prima facie* case before the Committee of the Town-Council, he may get their consent to the extension of the height of his building ; and then that is safeguarded by the provision that there may be an appeal to the Dean of Guild Court at the instance of other parties. Now, that is not like an ordinary appeal from a whole body to one of its members, because the consent given in the first instance is given upon an *ex parte* application. I suppose it is thought more convenient that the hearing should be before a single member of the Town-Council, and one who is specially conversant with these

questions, rather than before the Town-Council or its Committee. In any case, as the appeal is given to the Dean of Guild, I think it must have been intended that he should proceed in the summary manner which is appropriate to his jurisdiction. It would be very much to be regretted if in these applications the case should go through all the stages of an ordinary action.

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I cannot help thinking that in allowing a proof the Dean of Guild was largely influenced by a consideration which he mentions in his note, that the proof might be useful in the event of the case going to a higher Court. There have been previous appeals in this case—I think this is appeal C, and probably he contemplated that there would be appeals with other letters, and that the Court might need evidence to enable the point to be decided finally. But in the view which your Lordship has taken—in which I entirely concur—that this is to be treated as summary procedure, if cause can be shewn against the decision which the Dean of Guild has given, with the aid of the expert members of his council, we have always power to remit to a man of skill to give us such information as may enable us to check the conclusions to which the Dean of Guild Court has come. That is a power we have rarely had occasion to exercise, but it exists. And it is a better mode of dealing with these questions than by having a proof with half-a-dozen experts on each side coming to different conclusions. I therefore agree that this case should be remitted back for the purpose of having it decided by the Dean of Guild in a summary manner, in accordance with the practice of his Court.

LORD KINNEAR.—I agree with your Lordship in the chair, and I only desire to add a single observation with reference to the future procedure. I agree that the Court ought to be very slow to interfere with the discretion of the Dean of Guild, or any other magistrate, in the course of procedure which he has thought necessary to adopt in order to inform his own mind. But, then, I think that, on the remit which your Lordship proposes, the Dean of Guild will have a different question to consider from that which he disposed of in the interlocutor under appeal, because it is now fixed that two out of three of the averments which he thought ought to go to proof are irrelevant. The remaining averment raises a question of fact, but one on which the Dean of Guild himself is an expert authority. According to the ordinary course of procedure in this Court, in an appeal from the Dean of Guild Court, the usual method for reaching a decision of practical questions of this kind is to remit to the Dean of Guild to decide on an inspection of the premises, or on a consideration of the plans, if he thinks an inspection unnecessary. The question being limited, as it will now be by the judgment proposed, the Dean of Guild will not be precluded by his former judgment from taking the course which seems most expedient under the altered circumstances of the case. It will be for him to consider whether he is or is not in a position to pronounce his own opinion without extrinsic evidence. I therefore agree in the course your Lordship proposes.

LORD PEARSON was absent.

THE COURT recalled the interlocutor of the Dean of Guild, and

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remitted to him to pronounce his judgment on the question whether there was any reason for interfering with the consent granted by the Corporation.

WEBSTER, WILL, & CO., S.S.C.—ERSKINE DODS & RHIND, S.S.C.—Agents.

No. 109.

MRS ALEXANDRINA ALLAN M'INROY OR LINDSAY, Appellant.—

Orr, K.C.—D. P. Fleming.

Mar. 14, 1908.

Lindsay v.
Stewart
M'Glashen &
Son, Limited.

STEWART M'GLASHEN & SON, LIMITED, Respondents.—*C. D. Murray—MacRobert.*

Master and Servant—Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), sec. 7, subsec. (2)—Dependants—Wife living apart from husband and not supported by him—Child living with wife and supported by her.—In 1895 a wife voluntarily left her husband, and a month afterwards gave birth to a child. By means of her earnings as a weaver, and the assistance of the relatives with whom she lived, she supported herself and her child, never asking for and never receiving alimony from her husband. In 1907 her husband was killed by accident in the course of his employment as a workman.

Held that neither the wife nor the child were either wholly or in part dependent upon the earnings of the workman at the time of his death, and accordingly that they were not entitled to compensation under the Workmen's Compensation Act, 1897.

Turners Limited v. Whitefield, June 17, 1904, 6 F. 822, *followed*.

2D DIVISION.
Sheriff of the
Lothians and
Peebles.

MRS ALEXANDRINA M'INROY OR LINDSAY, for herself, and as tutor and administrator-in-law to her pupil daughter, Isabella Walker Lindsay, claimed compensation under the Workmen's Compensation Act, 1897, from Stewart M'Glashen & Son, Limited, sculptors, Edinburgh, on account of the death of William Jamieson Lindsay, the husband and father of the claimants, and instituted arbitration proceedings under the Act in the Sheriff Court at Edinburgh. The Sheriff-substitute (Guy) refused to award compensation, on the ground that the claimants were not "dependants" within the meaning of the Act.* At the request of Mrs Lindsay, he stated a case for appeal.

The case set forth the following facts as admitted or proved:—“(1) On 13th June 1907 the said William Jamieson Lindsay was a workman in the employment of the respondents, and on that day he met with an accident arising out of and in the course of his employment with them at their yard at Warriston Road, Edinburgh, which is a factory within the meaning of said Act, by being crushed against a wall of the yard by a block of stone which was being raised by a crane, and he died almost instantaneously; (2) the appellant, Mrs Alexandrina Allan M'Inroy or Lindsay, is the widow of the said William Jamieson Lindsay, and her pupil child, the said Isabella Walker Lindsay, who was born on 8th January 1896, is the only child of the deceased and her; (4) the deceased and the appellant, the said Alexandrina Allan

* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), enacts:—Sec. 7, subsec. (2), *inter alia*,—“‘Dependants’ means . . . (b) in Scotland, such of the persons entitled according to the law of Scotland to sue the employer for damages or *solatium* in respect of the death of the workman as were wholly or in part dependent upon the earnings of the workman at the time of his death.”

M'Inroy or Lindsay, were married on 26th August 1895; (5) in December 1895, and shortly before the birth of the said Isabella Walker Lindsay, the said Alexandrina Allan M'Inroy or Lindsay left her husband, and went to reside with her mother and brothers in Dundee; (6) the said Alexandrina Allan M'Inroy or Lindsay stated her reason for leaving her husband to be his cruelty, but she led no evidence corroborative of this, and she took no proceedings against her husband; (7) since leaving her husband the appellant has worked as a weaver, and by this means, and with assistance from her mother and brothers, has maintained herself and her said pupil child, born on 8th January 1896, and an illegitimate child, to which she gave birth on or about 30th January 1903; (8) since the separation neither the said Alexandrina Allan M'Inroy or Lindsay nor her daughter, Isabella Walker Lindsay, received any aliment or support from the deceased; (9) at the date of the said William Jamieson Lindsay's death neither the said Alexandrina Allan M'Inroy or Lindsay nor her child, the said Isabella Walker Lindsay, was in fact dependent either wholly or partially upon his earnings."

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The question of law was:—"Whether the said Mrs Alexandrina Allan M'Inroy or Lindsay and her pupil child, or either of them, were wholly or in part dependent upon the earnings of the deceased at the time of his death, within the meaning of the Workmen's Compensation Act, 1897?"

Argued for the appellant;—The Sheriff-substitute was wrong. As to the wife, there was a legal obligation upon the husband to support her,¹ and therefore an initial presumption in fact and in law, which doubtless might be displaced, that she was dependent upon him.² The *dictum* of the Lord President in *Baird & Co., Limited, v. Birsztan*³ that there was no such presumption was unsound. There was nothing in the present case to overcome that presumption, the facts that at the time of his death the workman was not contributing to his wife's support, and that she was living upon other resources, partly her own earnings, partly the charity of relatives, being quite consistent with a state of dependence upon him. These facts had all been present in previous decisions, in which the claimants had nevertheless been held to be dependants.⁴ To overcome the presumption it was necessary to shew that the wife was voluntarily living apart from her husband, and had ceased to look to him for support.⁵ The facts here shewed that the separation was not voluntary but due to the husband's cruelty. *Addie & Sons' Collieries, Limited, v. Trainer*,⁶ was in Lord Moncreiff's words "altogether exceptional," and threw no light on the present case. As to the child, all the arguments adduced for the wife applied *a fortiori* to its case, a pupil child being incapable of discharging its

¹ See *Main Colliery Co. v. Davies*, [1900] A. C. 358.

² *Cunningham v. M'Gregor & Co.*, May 14, 1901, 3 F. 775; *Sneddon v. Addie & Sons' Collieries, Limited*, July 15, 1904, 6 F. 992; *Williams v. Ocean Coal Co., Limited*, [1907] 2 K. B. 422.

³ Feb. 2, 1906, 8 F. 438, at p. 441.

⁴ *Cunningham v. M'Gregor & Co.*, May 14, 1901, 3 F. 775; *Sneddon v. Addie & Sons' Collieries, Limited*, July 15, 1904, 6 F. 992; *Coulthard v. Conssett Iron Co., Limited*, [1905] 2 K. B. 869; *Williams v. Ocean Coal Co., Limited*, [1907] 2 K. B. 422; *Queen v. Clarke*, [1906] 2 I. R. 135.

⁵ *Turners Limited v. Whitefield*, June 17, 1904, 6 F. 822.

⁶ Nov. 22, 1904, 7 F. 115.

Mar. 14, 1908. claim against its father, as it was suggested the wife had done in this case.

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Argued for the respondents ;—The question was purely one of fact. Were the wife and child actually dependent upon the deceased's earnings at the time of his death ?¹ That the husband was under a legal obligation to support them was immaterial,² and created no legal presumption in favour of dependence.³ Admittedly the mere fact that at the time of his death a husband was not contributing to his wife's support, and that she was living by charity and her own exertions, did not necessarily make her independent of his earnings in the sense of the statute provided she still looked to him as her permanent source of support. As soon as she ceased so to look, as the wife had for long done here, she *ipso facto* ceased to be dependent upon his earnings. It was just in this essential element that the cases founded on by the appellant⁴ were distinguishable from the present. In all of them the wife still looked to her husband. The present case was directly ruled by *Turners Limited v. Whitefield*,⁵ which was exactly in point. There was no difference in principle between the case of the wife and child, the only question in the latter's case also being, was there in fact dependence ? Here there was not.⁶

LORD STORMONTH-DARLING.—So far as one case can be an authority for the decision of another, I think that the nearest case to the present is the case of *Turners Limited v. Whitefield*.⁶ In that case a wife had been living apart from her husband for fourteen years, and was not in fact supported by him at the time of his death, but by an illegitimate son. In these circumstances it was held that she was not dependent on her husband's earnings, and was not entitled to compensation. Mr Orr has pointed out that in that case there was no formal severing of the family tie such as by a deed of separation ; but neither is there here. In fact, the separation took place by the wife leaving the husband and going to reside with her mother and brothers in Dundee about four months after the marriage, and about eleven years and a half before the husband met with his fatal accident in the respondents' works in Edinburgh, which occurred on 13th June 1907. The Sheriff does not say that the wife was in desertion. She stated her reason for leaving her husband to be his cruelty, but she led no evidence corroborative of this, and she took no proceedings against her husband. The Sheriff had therefore no means of judging whether her reasons were good or bad. But whatever they were, all we know is that she left him

¹ *Main Colliery Co. v. Davies*, [1900] A. C. 358 ; *Moyes v. William Dixon, Limited*, Jan. 13, 1905, 7 F. 386.

² *Turners Limited v. Whitefield*, June 17, 1904, 6 F. 822, Lord Adam, at p. 824 ; *Rees v. Penrikyber Navigation Colliery Co.*, [1903] 1 K. B. 259.

³ *Baird & Co., Limited, v. Birsztan*, Feb. 2, 1906, 8 F. 438, Lord President, at p. 441.

⁴ *Cunningham v. M'Gregor & Co.*, May 14, 1901, 3 F. 775 ; *Sneddon v. Addie & Sons' Collieries, Limited*, July 15, 1904, 6 F. 992 ; *Coulthard v. Consett Iron Co., Limited*, [1905] 2 K. B. 869 ; *Williams v. Ocean Coal Co., Limited*, [1907] 2 K. B. 422 ; *Queen v. Clarke*, [1906] 2 I. R. 135.

⁵ June 17, 1904, 6 F. 822.

⁶ *Rees v. Penrikyber Navigation Colliery Co.*, [1903] 1 K. B. 259 ; *Addie & Sons' Collieries, Limited, v. Trainer*, Nov. 22, 1904, 7 F. 115.

voluntarily, and that at the time of his death they had been living apart Mar. 14, 1908. since December 1895, a period of time nearly corresponding to the period of separation in *Turners Limited v. Whitefield*.¹ That being so, I take the case simply upon the footing that the wife's action in leaving her husband was voluntary and unexplained. Shortly after the separation she gave birth to a child by the husband, and on 30th January 1903 she gave birth to an illegitimate child. Since leaving her husband the appellant has worked as a weaver, and by this means, and with the assistance of her mother and brothers, she has maintained herself and her two children.

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Darling.

The Sheriff has found that since the separation neither the wife nor the child has received any aliment or support from the deceased, and that at the date of his death neither the wife nor the child was in fact dependent on his earnings. Now, the question which the Sheriff has decided by the first of these findings was a question purely of fact, but the question on which the second finding was pronounced was a question of mixed fact and law, and I quite concede that that question can be brought before this Court, because it is ultimately a question on the construction of the Act, and therefore a question of law. The Sheriff seems to have been satisfied that the claimants were persons who would have been entitled to sue for *solutum* and damages in respect of the death of the workman. But he had also to consider the question whether they were wholly or in part dependent on the earnings of the deceased, and he has decided that question by holding that they were not so dependent at the time of his death. There I am of opinion that the Sheriff is right, or, to put the matter as it would be put in England, that he has properly directed himself. I think that there is no flaw in the conclusion which he has drawn from the facts he has found.

A number of cases were cited to us, which I do not propose to go over. I proceed on the broad facts of the case—on the fact that the spouses voluntarily separated nearly twelve years ago, on the fact that the husband was never made liable (because, as I gather, he was never asked) to support his wife and child, and on the further fact that he did not contribute a single penny to their support down to the day of his death. Now, in these circumstances, can it be said that the Sheriff was wrong in the conclusion to which he has come? I think not.

It was argued by Mr Orr that the husband was liable in law to support his wife. Now, it is true that he might, in certain circumstances, have been called on. But does the husband's legal obligation affect the matter at all? I agree with the opinions expressed by Lord Adam and Lord Kinnear in the case of *Turners Limited v. Whitefield*,¹ that the fact of the husband being under a legal obligation to support his wife does not alter the fact that she was not dependent on him at the time of his death. Lord Adam says: "The facts found shew that she separated from her husband some fourteen years ago, when she cast in her lot with some illegitimate children of her own, by whom, and partially by her own exertions, she was being maintained at the time of the death. I do not think that the fact that the husband was under a legal obligation to support her makes any

Mar. 14, 1908. difference. It does not alter the fact that she was not dependent on his earnings at the time of his death." Lord Kinnear agrees with Lord Adam, for he says: "I agree with what has been said by Lord Adam, that the question does not depend merely upon the legal liability of a husband to support his wife, because the section in question requires that two conditions shall have been satisfied. In the first place, it is provided that the person said to be a dependant shall be a person 'entitled, according to the law of Scotland, to sue the employer for damages or *solatium* in respect of the death of the workman.' That condition is satisfied when the woman claiming compensation is in the position of a wife who is legally entitled to be supported by her husband. But then the statute goes on to prescribe as a second condition that the claimant must be such a person among those already described as was 'wholly or in part dependent upon the earnings of the workman at the time of his death.' I do not think it necessary to define the word 'dependent' more exactly than the statute defines it. But I am not prepared to say that its meaning is exhausted when it is said to cover those who were in fact supported by the deceased workman up to the time of his death." I agree with every word of that. I think that the Sheriff was right in holding that, while the claimants here answer the description of persons "entitled, according to the law of Scotland, to sue the employer for damages or *solatium* in respect of the death of the workman," they do not, either of them, answer the description of person dependent on the earnings of the deceased at the time of his death.

Lindsay v.
Stewart
M'Glashen &
Son, Limited.
—
LdStormonth-
Darling.

LORD LOW.—(After stating the facts)—Now, I think that as regards the widow the case is a very plain one. As I have said, she voluntarily left her husband some eleven years before his death. She never received, or apparently asked for, any aliment from him during that period, but supported herself. Now, I think that if a wife voluntarily leaves her husband and chooses her own line of life, and supports herself by her own earnings, it is impossible to say that in any reasonable sense she is either wholly or partially dependent on his earnings at the time of his death, so I have no doubt that the Sheriff-substitute is right in his view about the widow.

The case of the child is more difficult, because a pupil child cannot choose his own line of life and cannot earn his own livelihood, and there is no doubt that in one sense every pupil child may be said to be dependent on its father, because the father is under an obligation to support it. Now, if a father deserted a pupil child and refused to support it, and if that child were kept from starvation only by charity from others, I would have no hesitation in saying that, although the father was not in fact supporting it at the time of his death, yet the child was, within the meaning of the statute, dependent on the earnings of the father. That, however, is an extreme case in one direction, and I think an equally extreme case in the other direction might be supposed—for instance, if a child had independent means which were administered by trustees, and which were ample for his support, and by which he was in fact supported, it is plain that he would not be dependent on the earnings of his father. But between such extreme cases there may be a great variety of circumstances where the question whether or not a pupil child was dependent on the earnings of the father

at the time of his death would be attended with considerable difficulty. Mar. 14, 1908. It is perhaps impossible to lay down a rule which will be applicable to every case, but I am inclined to think that as good a test as can be found is that given by Lord Moncreiff in the case of *Cunningham v. M'Gregor & Company*.¹ That was the case of a wife, but I think the case of a child is substantially the same, and what Lord Moncreiff said was that the question whether a wife was or was not entitled to claim compensation depended on whether she had at her husband's death means of support of a more or less permanent and substantial character. Now, applying that test here we find that this pupil child had been supported by his mother for very nearly eleven years prior to the father's death, which gives the support the character of substantial permanency, and there is nothing to suggest that at the time of the father's death the support which the pupil child was receiving had come to be of a precarious character. I am therefore of opinion that in the case of the child, as in the case of the mother, the determination of the Sheriff-substitute was right, and accordingly I concur that the question of law should be answered in the negative.

Lindsay v.
Stewart
M'Glashen &
Son, Limited.
Lord Low.

LORD ARDWALL.—I concur with both your Lordships. This is a compensation Act, and its purpose is to give compensation to workmen and also to dependants of workmen who may have suffered by their deaths. Now, that being the purpose of the Act, we must start with this: that it is only actual loss for which compensation is to be awarded, and not prospective or possible loss, and accordingly the Act provides that the dependants who are to be entitled to compensation are such of the persons entitled according to the law of Scotland to sue the employer for damages or *solatium* in respect of the death of the workman "as were wholly or in part dependent upon the earnings of the workman at the time of his death." Now, it appears to me that that definition excludes altogether the idea that a legal right to support from a person killed by an accident on the part of a person surviving him can by itself constitute the latter a dependant of the deceased in the sense of the Act; it concentrates the attention of any Court which has to decide a case like the present on these points—first, whether the person claiming compensation was in fact dependent upon the earnings of the workman; and, second, whether he or she was so at the time of the workman's death. Now, it has been decided in the case of the *Main Colliery Company*² in the House of Lords, and in the cases of *Turners*,³ *Baird*,⁴ and *Moyes*⁵ in the First Division of this Court, that the question raised by this definition is primarily one of fact, and, if I may humbly say so, I think that that is the true view of the matter. Of course every question of fact under a statute may become a question of law in so far as a question may arise whether certain circumstances bring a person within a certain category laid down in the statute—for instance, whether certain facts render or do not render a person a dependant within the meaning of the Act—and so far that may be said to be a question of mixed fact and law, but being so, it is primarily a matter of fact that has

¹ 3 F. 775.² [1900] A. C. 358.³ 6 F. 822.⁴ 8 F. 438.⁵ 7 F. 386.

Mar. 14, 1908. to be decided. Now, after what your Lordships have said, I do not think I need to say more, except that I desire to express my concurrence with what was said by the Lord President on the construction of this Act in the case of *Baird*,¹ and in particular I concur in his criticism of Lord Young's judgment in the case of *Sneddon v. Addie*.²

Lindsay v. Stewart
M'Glashen & Son, Limited.
Lord Ardwall.

I accordingly agree with your Lordships that we should affirm the judgment of the Sheriff-substitute.

The LORD JUSTICE-CLERK was absent.

THE COURT answered the question in the negative.

CLARK & MACDONALD, S.S.C.—CADELL, WILSON, & MORTON, W.S.—Agents.

No. 110.

ROBERT MUIR & COMPANY, LIMITED, Pursuers.—*Macmillan*.
THE UNITED COLLIERIES, LIMITED, Defenders.—*C. D. Murray*.

Mar. 17, 1908.

Muir & Co.,
Limited, v.
United
Collieries,
Limited.

2D DIVISION.

Expenses—Arrestments on Dependence—Recall—Motion—Separate Process—Personal Diligence Act, 1838 (1 and 2 Vict. cap. 114), sec. 20.
—Pursuers, who had been found by the Inner-House entitled to the expenses of an action, included in their account a sum of £6, 6s., as the cost of opposing an incidental motion for recall of arrestments on the dependence made by the defenders when the action was in the Outer-House, and refused by the Lord Ordinary without pronouncing any interlocutor. The Auditor disallowed the charge *in toto*, on the ground that, in view of section 20 of the Personal Diligence Act, 1838,* proceedings before a Lord Ordinary for recall of arrestments, whether by petition or motion, constituted a separate process, the expenses of which could not be dealt with in the principal action.

The pursuers presented a note of objections to the Auditor's report, in so far as he had disallowed the expenses of opposing the motion for recall of the arrestments. The defenders supported the determination of the Auditor.†

The Court *sustained* the objection and allowed £3, 3s. for said expenses.

HAMILTON, KINNAR, & BEATSON, W.S.—R. H. MILLER, S.S.C.—Agents.

¹ 8 F. 438.

² 6 F. 992.

* The Personal Diligence Act, 1838 (1 and 2 Vict. cap. 114), section 20, enacts:—"And be it enacted, that from and after the said thirty-first day of December, it shall be competent to the Lord Ordinary in the Court of Session, before whom any summons containing warrant of arrestment shall be enrolled as Judge therein, or before whom any action on the dependence whereof letters of arrestment have been executed has been or shall be enrolled as Judge therein, and to the Lord Ordinary on the Bills in time of vacation, on the application of the debtor or defender by petition duly intimated to the creditor or pursuer, to which answers may be ordered, to recall or to restrict such arrestment, on caution or without caution, and dispose of the question of expenses, as shall appear just; provided that his judgment shall be subject to the review of the Inner-House, by a reclaiming note duly lodged within ten days from the date thereof."

† The defenders referred to Graham Stewart's *Law of Diligence*, pp. 212, 213.

MARGARET ANN MURRAY, Claimant (Respondent).—*Wilton—Dallas*. No. 111.
JAMES GOURLAY, Respondent (Appellant).—*Orr, K.C.—J. D. Millar*.

Mar. 17, 1908.

Master and Servant—Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Schedule (1) (a).—Death of Workman—Amount of Compensation—Dependant—Sum "reasonable and proportionate to the injury"—Funeral Expenses.—In an application for compensation under the Workmen's Compensation Act, 1906, for the death of a workman, the arbitrator found that an illegitimate pupil child of the deceased, for whose support the deceased had been paying aliment under a decree of affiliation and aliment, was partially dependent on his earnings, and that the sum available for compensation under the Act was £150. No other dependant having applied for compensation the arbitrator awarded the whole sum of £150, less £5, 10s. of funeral expenses, to the illegitimate child.

Murray v. Gourlay.

Held, on an appeal, that in making the award the arbitrator had proceeded on a wrong principle, in respect that the Act does not provide for the maximum sum being awarded in every case, but only for an award of reasonable compensation within that limit; and case remitted to him to ascertain the prospective value of the contributions that would probably have been made by the deceased, if he had lived, for the support of his illegitimate child.

Opinion, per curiam (following *Bevan v. Crawshaw Brothers (Cyfartha), Limited*, [1902] 1 K. B. 25), that reasonable funeral expenses are a proper charge on the fund available for compensation.

In an arbitration under the Workmen's Compensation Act, 1906, arising out of the death of John Murray, golf club maker, Carnoustie, compensation for his death was claimed from his employer, James Gourlay, golf club maker, Carnoustie, by Margaret Ann Murray, the pupil illegitimate child of the deceased, and also by James Murray, the deceased's father. The Sheriff-substitute of Forfarshire at Arbroath (Lee), acting as arbitrator, awarded to the first applicant £144, 10s., and to the second £5, 10s. for funeral expenses; and at the request of the respondent stated a case for appeal.

1st Division.
Sheriff of
Forfarshire.

The case set forth that the Sheriff-substitute, besides finding that the deceased had lost his life by an accident arising out of and in the course of his employment, further found "in fact that the claimant Margaret Ann Murray is the illegitimate daughter of the said deceased, conform to extract decree of affiliation and aliment obtained on 17th July 1907, and that she was at the time of his death partially dependent upon his earnings . . . that the said claimant James Murray is an able-bodied labourer in receipt of regular wages, and that he was not, at the time of deceased's death, either wholly or partially dependent upon the deceased's earnings. Found further in fact that the deceased's funeral expenses, amounting to £5, 10s. or thereby, have been paid by the claimant James Murray. Found that the sum available for compensation in terms of the Workmen's Compensation Act, 1906, is £150. Found in law that the claimant James Murray, not having been dependent on the deceased, had no claim to compensation under the Act, but is entitled, out of the sum available for compensation, to repayment of the amount paid by him for funeral expenses; and that the claimant Margaret Ann Murray, having been partially dependent on the deceased, is entitled to a reasonable sum proportionate to the injury to her through the deceased's death as compensation therefor. Assessed the compensation due to the said claimant at £144, 10s."

Mar. 17, 1908.

Murray v.
Gourlay.

The question of law for the opinion of the Court was:—"Whether the sum assessed is reasonable and proportionate to the injury to the claimant Margaret Ann Murray in so far that it exceeds in amount the aggregate of the alimentary contributions in which the deceased workman would have been liable had he lived?"

The case was heard on 18th February 1908.

Argued for the appellant;—The arbitrator was in error in awarding the maximum sum here. He had failed to follow the provisions of the statute, which were that he should award a sum which was "reasonable and proportionate to the injury."* The sum awarded here was not reasonable and proportionate, for two reasons. First, the sum was the maximum which could have been awarded if the claimant had been totally dependent, while here the claimant was only partially dependent, being dependent principally on her mother, and only dependent on the deceased to the extent of a decree for aliment, under which the mother was entitled to receive certain payments from the deceased. Second, in estimating the pecuniary value of the dependency, that estimate must be made as at the time of the death, and at that time the dependency rested only on the decree for aliment, the capital value of which was £78. The arbitrator was bound to take into consideration both the extent of the dependency on the mother, and the value of the actual dependency on the deceased as at the date of his death,¹ and he had failed to do so here. It was not a reasonable and proportionate estimate of the injury to base it on a speculation as to the maximum which, under any conceivable circumstances, the deceased might have had to provide.

Argued for the respondent;—The arbitrator's award should not be interfered with, for the finding as to dependency and as to the pecuniary value of the dependency was a finding in fact on which the arbitrator was final.² Further, the arbitrator was entitled to exercise his discretion as to the sum awarded, and his discretion ought not to be interfered with so long as he kept within the maximum limits.³ In

* The Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58), First Schedule, enacts:—" (1) The amount of compensation under this Act shall be—

" (a) Where death results from the injury—

" (i.) If the workman leaves any dependants wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds. . . .

" (ii.) If the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants."

¹ *Osmond v. Campbell & Harrison, Limited*, [1905] 2 K. B. 852.

² *Baird & Co., Limited, v. Birsztan*, Feb. 2, 1906, 8 F. 438, Lord President, at p. 440.

³ *Osmond v. Campbell & Harrison, Limited*, [1905] 2 K. B. 852, *Romer, L. J.*, at p. 858; *Bevan v. Crawshay Brothers (Cyfartha), Limited*, [1902] 1 K. B. 25, *Collins, M. R.*, at p. 29.

any event, the arbitrator had rightly exercised his discretion here, for ^{Mar. 17, 1908.} he was not limited to a consideration of the sum awarded in the decree for aliment. The liability for support was a continuing liability,¹ and ^{Murray v. Gourlay.} the arbitrator was entitled to take all future contingencies into consideration in arriving at his estimate of what was a reasonable and proportionate value to put on the injury. [No argument was submitted by either side with regard to the award of the funeral expenses.]

At advising on 17th March 1908,—

LORD M'LAREN.—In this case the important facts are that the deceased John Murray was killed by an accident arising out of and in the course of his employment, and that he left an illegitimate child, Margaret Ann Murray, who was partially dependent on his earnings. The Sheriff-substitute, acting as arbitrator under the Workmen's Compensation Act, 1906, has found that the sum available for compensation is £150, and he has awarded this sum, less £5, 10s., for funeral expenses, as the compensation due to the child. I may here notice that it has been held in England,² that in such a case reasonable funeral expenses are a proper charge on the available fund, and I propose that we should follow this decision. The question then remains whether the Sheriff-substitute was right in awarding the balance of the available fund to the child as compensation.

The Act of 1906 puts illegitimate children and grandchildren into the category of dependants, and in their case, just as in the case of lawful children, the question must be, What is the measure of the parent's obligation to maintain the child?

According to the judgment of the House of Lords in *Main Colliery Company v. Davies*,³ this is a question of fact in each case to be determined neither by strictly legal considerations nor by any supposed standard of living in the class to which the workman belongs, but by taking into consideration the extent to which the applicant was in fact dependent on the injured workman, and putting a value upon the benefit which the applicant derived from being so dependent.

In the question put to us it is stated (inferentially) that the sum assessed "exceeds in amount the aggregate of the alimentary contributions in which the deceased workman would have been liable had he lived." Now, it is evident that the deceased was not a willing contributor to the support of his illegitimate child, because he allowed a decree of affiliation and aliment to go out against him, and no facts are stated which warrant the inference that the deceased would have contributed anything in excess of what he could be compelled by law to pay. If there are grounds for holding that the deceased voluntarily recognised an obligation to contribute to a larger extent than he was legally bound to do, the arbitrator would be right in taking such evidence into account. But I think that in awarding the whole available fund, less funeral expenses, the Sheriff-substitute has proceeded on a wrong principle, because the Act of Parliament does not prescribe that the maxi-

¹ Oncken's Judicial Factor v. Reimers, Feb. 27, 1892, 19 R. 519; A B v. C D's Executor, Feb. 15, 1900, 2 F. 610.

² Bevan, [1902] 1 K. B. 25.

³ 1900, A. C. 358.

JAMES M. SINCLAIR, residing at Cloichard Cottages, Pitlochry, in the parish of Moulin, Perthshire, in June 1907 raised an action in the Sheriff Court at Perth against the School Board of the parish of Moulin, in the county of Perth, and William MacGowan, school-master, residing at Pitlochry, in which he prayed the Court to interdict the defenders from refusing to enrol the pursuer as a pupil at Pitlochry Public School, and preventing him from entering, or excluding or expelling him from said school, or in any other way obstructing his attendance as a pupil at said school during school hours, and to grant interim interdict, or otherwise, and alternatively, to decern and ordain the defenders, the School Board of the parish of Moulin, to make sufficient and available provision elsewhere for the efficient education of the pursuer.*

Sinclair v.
Moulin
School Board.
2D DIVISION.
Sheriff of
Perthshire.

The pursuer was an illegitimate child. He was born in Pitlochry on 5th June 1896, and resided with his grandfather, James Sinclair, at Pitlochry, in the parish of Moulin, Perthshire. The defender William MacGowan was headmaster of Pitlochry Public School, which was vested in and under the management of the School Board of the parish of Moulin.

The pursuer was enrolled as a pupil in Pitlochry School in September 1901, and attended there until December 1906, when the School Board refused to admit him to the school on the ground that he was mentally incapable of receiving instruction in a board school, and hindered the progress of the other children. On 27th December a letter† was sent by the Clerk of the School Board to James Sinclair

* The Education (Scotland) Act, 1872 (35 and 36 Vict. cap. 62), sec. 1, enacts:—" . . . 'Parent' shall include guardian and any person who is liable to maintain or has the actual custody of any child."

The Education (Scotland) Act, 1901 (1 Edw. VII. cap. 9), enacts:—

Sec. 1. "It shall be the duty of every parent to provide efficient elementary education in reading, writing, and arithmetic for his children who are between five and fourteen years of age."

The Education of Defective Children (Scotland) Act, 1906 (6 Edw. VII. cap. 10), enacts:—

Sec. 1. "From and after the commencement of this Act it shall be lawful for a school board in Scotland, if they think fit, either alone or in combination with one or more school boards, to make special provision for the education, medical inspection, and, where required, for the conveyance to and from school, of epileptic or crippled or defective children between five and sixteen years of age, within their education district, and to defray the cost thereof out of the school fund."

Sec. 2. "The expression 'defective children' means children who, not being imbecile, and not being merely dull or backward, are, by reason of mental or physical defect, incapable of receiving proper benefit from the instruction in the ordinary schools."

† "Dear Sir,—I wrote you some time ago that your grandson, James Sinclair, was mentally incapable of receiving instruction in a board school, and that he was not to be sent to school in the meantime. Notwithstanding my letter, the boy has again been sent to school, and is a source of great trouble in the class, as he is quite incapable of learning anything and cannot sit still, but wanders about the room, thus distracting the attention of the class. The Board are not bound to provide instruction for children who are mentally weak, and a public school is not the proper place for such a child; and, by instructions of the Board, I have therefore to intimate that James Sinclair cannot be permitted to enter Pitlochry School unless you produce a certificate from a duly qualified medical man that James

Mar. 17, 1908. communicating this decision, and intimating that the pursuer would only again be admitted on production of a medical certificate that he had so far improved mentally as to be capable of receiving instruction at a board school in the usual way.

Sinclair v.
Moulin

School Board. In January 1907 the pursuer was examined, at the instance of James Sinclair, by Dr Robert Stirling, Perth, who stated in a certificate that, although backward, he was not unfit for education, but required special consideration on account of physical weakness. A copy of this certificate was sent by James Sinclair to the School Board, and on 22d January a letter was sent by the School Board in reply stating that they could not in the circumstances admit the pursuer to their school. On 25th January James Sinclair's law-agent forwarded to the Scotch Education Department Dr Stirling's certificate and the School Board's letters of 27th December and 22d January, with a formal request that the Department should compel the School Board to educate the pursuer. A correspondence followed between James Sinclair's law-agent and the Education Department, and ultimately, the Department got the pursuer examined by Dr Ash of Dunfermline, who prepared a report * upon his physical and mental condition. Thereafter the Scotch Education Department wrote saying that the pursuer "would appear to belong to the category of 'defective' children for whom special provision may be made by a school board" under the Act of 1906.

The pursuer (cond. 5) denied that he was incapable of receiving benefit from the instruction in Pitlochry Public School.

The defenders averred that the pursuer was incapable of receiving ordinary instruction in an ordinary school. They also stated that they did not think fit to make special provision for the education of the pursuer under the Act of 1906.

The pursuer pleaded, *inter alia*;—(1) The defenders being bound to admit and enrol the pursuer as a pupil in Pitlochry Public School, and having refused to do so, interdict should be granted, as craved, with expenses. (2) The pursuer being a child of school age resident in the parish of Moulin, the defenders, the School Board of the said parish, are bound, in terms of the Education (Scotland) Act, to have at all times sufficient and available provision for his efficient education.

The defenders, the School Board pleaded, *inter alia*;—(1) No title to sue. (4) The defenders having acted within their power and according to their duty as managers of the school in refusing to admit the pursuer to the school, the petition should be refused. (5) *Separatim*, the exclusion of the pursuer from the said school being in the circumstances proper and reasonable, the petition should be refused.

The Sheriff-substitute (Sym), after appointing a *curator ad litem*

Sinclair is at the time of the certificate being granted so far improved mentally as to be capable of receiving instruction at a board school in the usual way."

* " *Conclusion*.— . . . it is practically hopeless to expect any education in the literary direction, though something might be done to instruct by and through the sense of hearing and Kinæsthetic memory. In any case instruction could only be carried out in special schools. In my opinion, therefore, the boy, not being imbecile, is, by reason of mental defect, incapable of receiving proper benefit from the instruction in ordinary schools, but capable of receiving instruction in special classes."

to the pursuer, on 13th August 1907 pronounced an interlocutor Mar. 17, 1908.
 repelling the School Board's plea of "no title to sue," dismissing Sinclair v.
 the action so far as laid against the defender MacGowan, and con- Moulin
 tinuing the cause. School Board.

On 28th October 1907 he pronounced an interlocutor allowing a proof before answer.

The defenders appealed to the Sheriff (Johnston) who by interlocutor dated 6th December 1907 recalled the Sheriff-substitute's interlocutor of 28th October 1907, and dismissed the action.

The pursuer appealed.

Argued for the pursuer and appellant;—Every child capable of being educated was entitled to receive elementary education from the educational authorities, and every parent or guardian was entitled to demand education for his child.¹ The Education Acts placed parents or guardians under an obligation to send their children to school,² from which obligation there necessarily arose a correlative right on the part of the parent or guardian to demand that his child should be received into the school. This duty to send, and obligation to receive, was not confined to the case of normal children only, but extended to all children who were in any degree capable of receiving education. Thus school boards were bound to educate blind and deaf mutes³ where their parents were in poverty, and by the Education of Defective Children (Scotland) Act, 1906,⁴ the statute particularly under consideration in the present case, express power was given to school boards to make special provision for the education of "defective" children. That statute, reasonably interpreted, meant that whereas formerly the school board were bound to receive such children in their ordinary school, they had now the option of making special provision for them elsewhere, but it contained nothing to suggest that they could rid themselves altogether of their primary obligation to supply education. The suggestion that a school board could refuse to admit scholars involved a complete misapprehension of the duties of a school board, which were to safeguard the rights and interests of rate-payers, by protecting them against extravagant expenditure, and by at the same time securing efficiency in accommodation and education.⁵ *Haddow v. Glasgow School Board*⁶ had no bearing, because the parent of the child there was able to pay for the books in question. In no event, however, could the case be decided in favour of the defenders without proof upon the question of the existence of defectiveness. The plea as to title was purely technical. The only question which the Court considered in such a case was whether the pursuer had an interest. Here the pursuer's interest was undoubted.

Argued for the respondents;—The pursuer had no title to sue, children having no rights or duties in the matter of their education

¹ Barr v. Smith, Jan. 28, 1903, 5 F. (J. C.) 24, Lord Young, at p. 32.

² Education (Scotland) Act, 1872 (35 and 36 Vict. c. 62), secs. 69, 70; Education (Scotland) Act, 1883 (46 and 47 Vict. c. 56), secs. 4, 6, 9, 11; Education (Scotland) Act, 1901 (1 Edw. VII. c. 9), secs. 1, 2, 3.

³ Education of Blind and Deaf-Mute Children (Scotland) Act, 1890 (53 and 54 Vict. cap. 43), secs. 3, 5.

⁴ 6 Edw. VII. c. 10, secs. 1 and 2.

⁵ Kelso School Board v. Hunter, Dec. 18, 1874, 2 R. 228, Lord President Inglis, p. 230; Morison v. Glenshiel School Board, May 28, 1875, 2 R. 715, Lord Young, at p. 718.

⁶ June 10, 1898, 25 R. 988.

Mar. 17, 1908. either at common law or under the Education Acts. It was on parents¹ that the duty of sending their children to school was imposed, and accordingly a title to sue the school board lay in the parents only.² Even, however, had the action been competently brought, it must fail. It was based upon the fallacy that a school board were under an obligation to educate every child in their district. Every parent, it was true, was bound to educate his child, but the school board's duty was limited to providing a school efficient for the proper education of ordinary children, unless a further duty was in any special case expressly imposed by statute, *e.g.*, as in the case of blind and deaf mutes.³ The Education of Defective Children (Scotland) Act, 1906, section 1, was clearly only permissive, *vide* the words, "if they think fit." Further, the view that a school board were bound to receive all children into their school had been expressly negatived in *Haddow v. Glasgow School Board*.⁴ If in that case the non-possession of books justified exclusion, *a fortiori* must it be sufficient in the present case that the child possessed a mind incapable of receiving instruction, and habits which rendered the instruction of his class-fellows impossible. Lastly, it was a question purely for the School Board, subject to the review of the Board of Education, and the Court had no jurisdiction to interfere except upon relevant averments of *mala fides*, oppression, or the like.⁵

At advising on 17th March 1908,—

LORD JUSTICE-CLERK.—The pursuer in this case is a child, and the purpose of the case is at the instance of the child to interdict the Moulin School Board from preventing him from attending their school, and from obstructing his attendance at school, and alternatively, to ordain the School Board to make sufficient provision elsewhere for his efficient education. I have no doubt that such an action by a child is incompetent. The duty of education lies upon the parent or the person who is *in loco parentis*, and he has the right to demand education. There is no right given to the child to demand education in its own name. I do not enlarge upon this, as I concur in Lord Stormonth-Darling's opinion, which I have seen. But even if the action were competent in that form in which it is laid, I am of opinion that the Sheriff has rightly decided the case.

The facts are that the School Board have decided that the child is "mentally incapable of receiving instruction in a board school"—giving great trouble, being incapable of learning anything, and interfering by his conduct with the proper conducting of the class in which he was. They accordingly decided that until they received a certificate of improvement in his condition from a medical man he could not be allowed to attend the school. A medical man who was consulted gave a certificate that, special requirements being attended to, the child might be taught.

¹ Defined in sec. 1 of the Education (Scotland) Act, 1872 (35 and 36 Vict. cap. 62).

² *M'Fadzean v. Kilmalcolm School Board*, March 6, 1903, 5 F. 600.

³ Education of Blind and Deaf-Mute Children (Scotland) Act, 1890 (53 and 54 Vict. cap. 43), secs. 3, 5.

⁴ June 10, 1898, 25 R. 988.

⁵ *M'Fadzean v. Kilmalcolm School Board*, March 6, 1903, 5 F. 600, Lord Low, pp. 609-610; *Lord Advocate v. Stow School Board*, Feb. 19, 1876, 3 R. 469.

The Board having considered the matter held that this could not be done Mar. 17, 1908.
 with justice to the school as a whole. Accordingly, the matter was brought Sinclair v.
 before the Board of Education, which obtained a report from a skilled Moulin
 physician of their own choice. His report was quite decided as to the School Board.
 unfitness of the child to receive education in the board school. This Lord Justice-
 child is thus certified to be a "defective child" in the sense of the Clerk.
 Education Act.

These being the facts, they seem to me to be conclusive. To allow a proof whether the Board's discretion has been rightly exercised I hold to be quite out of the question. They are the proper tribunal, subject to review of the Education Department, and without some relevant allegation of *mala fides*, there is no room for further judicial inquiry.

Finally, as to the demand that they shall find another place for the child's education, it is sufficient to say that the statute lays no obligation upon the Board in the case of such a child. It confers a power on the Board, "if they see fit," to make special arrangements. It is obvious that in some circumstances such action may be reasonably feasible and in other circumstances it may be impracticable. Of this they must judge. There is nothing in this case which tends towards the conclusion that they have not exercised their judgment fairly and reasonably.

I would therefore move your Lordships to affirm the Sheriff's judgment.

LORD STORMONTH-DARLING.—This is an action at the instance of a pupil child (of the age of eleven at the date when the action was raised) against the School Board of the parish of Moulin in Perthshire to have the defenders interdicted from excluding the pursuer from the Public School of Pitlochry, and alternatively to have the School Board ordained to make sufficient and available provision elsewhere for the efficient education of the pursuer. Pupillarity being in contemplation of the law a state of absolute incapacity, it was clear that the action could not proceed as it stood; and the pursuer being illegitimate and having no legal guardian, the Sheriff-substitute adopted the expedient of appointing Mr Gordon, a solicitor in Perth, to be curator *ad litem* to the pursuer, and by a later interlocutor repelled the plea of "no title to sue." It seems to me that however unobjectionable the course adopted by the Sheriff-substitute would have been in an ordinary action, it was not the proper course to take when it was brought under his notice by both parties that the pursuer resided with his grandfather, who had the actual custody of the child, and was therefore undeniably his "parent" within the meaning of section 1 of the Education (Scotland) Act, 1872. In such a case as this I hold that the plea of "no title to sue" should have been sustained and not repelled, for the proper person to raise any question as to the duty of a school board to receive any particular child is, in my opinion, not the child himself, but the parent of the child, or the person having the actual custody of the child, on whom the duty of providing efficient elementary education in reading, writing, and arithmetic for children between five and fourteen years of age was laid by section 1 of the Education (Scotland) Act, 1901. And it is to be observed that the definition which I have quoted above from the Act of 1872 is read into the Act of 1901, because by section 7 all the Education

Mar. 17, 1908. Acts from 1872 to 1901 are to be construed as one Act. In short, there are only two legal *persons*—the school board and the parent as defined in the Act of 1872—standing towards each other with correlative rights and duties. It is said that the child himself has an interest; and I admit that he will ultimately have the highest interest of all. But for the time being he has no interest, because he has no duty, except the passive one of imbibing the instruction which he receives. Certainly he has no interest on which, even apart from his status of pupillarity, he can sue, and no rights which he can enforce.

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Darling.

I therefore think that we ought to sustain the plea of “no title to sue” which the Sheriff-substitute repelled by the interlocutor of 13th August 1907.

But since we had an interesting argument on the question whether even the grandfather, having the actual custody of the child, could insist on the child being received by the School Board into the public school, or else on their making sufficient provision elsewhere for his efficient education, it is, I think, desirable to take the case upon the footing that the action had been brought at his instance and not at the child's. Now, the whole difficulty here is personal to the boy. After doing their best for his education since he was six years of age, the School Board, through their clerk, intimated to the boy's grandfather, that he was mentally incapable of receiving instruction in a board school, that he was a source of great trouble in the class, as he was quite incapable of learning anything, and could not sit still, but wandered about the room, thus distracting the attention of the class, and for other reasons which are fully set out in their letter of 27th December 1906, they concluded by intimating that the boy could not be permitted to enter Pitlochry School unless the grandfather produced a certificate from a duly qualified medical man that the boy was so far improved mentally as to be capable of receiving instruction at a board school in the usual way. The grandfather then had him examined by Dr Stirling of Perth (a medical practitioner of good standing), who granted a rather inconclusive certificate. This certificate was intimated to and considered by the School Board, and their reply was that, as they had no school staff sufficient to have the boy specially taught, and as the teacher could not neglect the other children in the class in order to give special teaching to this boy, they must adhere to their former determination not to admit him to Pitlochry School. The matter then seems to have been brought under the notice of the Scotch Education Department, at the instance of the boy's legal adviser.

I am quite willing to accept the view taken by the Sheriff-substitute, that the pursuer and his advisers had done nothing to justify what might be called a “reference” of the child's capacity to attend school to Dr Ash of Dunfermline, but it is certain that Dr Ash was selected on the suggestion of the Department. That gentleman visited Pitlochry and examined the boy in the presence of his grandparents and his legal adviser on 3d May 1907. Three days afterwards he made a careful and detailed report, which was forwarded to the Department by the School Board. The practical conclusion of it was that “in any case instruction could only be carried out in special schools. In my opinion, therefore, the boy, not being imbecile, is by reason of mental defect incapable of receiving proper benefit from the

instruction in ordinary schools, but capable of receiving instruction in special classes." These words are an echo of section 2 of the Education of Defective Children (Scotland) Act, 1906, which defines defective children thus:—"The expression 'defective children' means children who, not being imbecile, and not being merely dull and backward, are, by reason of mental or physical defect, incapable of receiving proper benefit from the instruction in the ordinary schools," and by section 3 of the same Act it is enacted that "this Act shall be construed as one with the Education (Scotland) Acts 1872 to 1906." To complete the narrative of this correspondence (which is all admitted and referred to), it is proper to add that it ended with a letter from the Department of 10th May 1907, saying that "the boy in question would appear to belong to the category of 'defective children' for whom special provision may be made by a School Board in terms of the Education of Defective Children (Scotland) Act, 1906." And it is important to note that the power to make this "special provision" is all qualified by the words "if they think fit."

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Accordingly the question comes to be—Has the grandfather, as the actual custodian of the boy, and therefore, for the purposes of the Education Acts from 1872 downwards in the position of his parent, any right in the circumstances to insist in either alternative of this petition? He is not bound to send him to a public school; his duty is discharged if he has him efficiently educated in reading, writing, and arithmetic in any school of his selection. If the boy is, "by reason of mental defect, incapable of receiving proper benefit from the instruction in ordinary schools," as Dr Ash's report and the letter of the Department say he is, it would undoubtedly be unfortunate for the poor boy that he should be debarred from receiving the little instruction of which he is capable. But, on the other hand, why should the whole order and discipline of the school and the efficient education of the other children in the school, for which the School Board are responsible, be upset by the presence of this hapless lad? It is no question of mere dullness and backwardness. For the exclusion of a case of that kind from its provisions the statute of 1906 makes careful provision, no doubt for the reason that there would be a certain danger in allowing such a case to come within the category of mental defect. But, literally, the only averment in the condescendence of which the proof allowed by the Sheriff-substitute (though rather unwillingly, as I gather) could take note is the averment in cond. 5, "the pursuer denies that he is incapable of receiving benefit from the instruction in Pitlochry Public School." Is that a kind of averment which a Court of law can be asked to send to proof? It is always within the competency and duty of a Court of law to inquire whether a public body, to which has been committed a certain duty of inquiring into facts, have acted reasonably and within the powers entrusted to them, or capriciously and in disregard of those powers—(see observations of Lord President Inglis in *Lord Advocate v. Stow School Board*¹). But here it is not suggested that any such disregard of statutory powers has occurred, either on the part of the School Board or the Education Department. And, if these two public bodies have acted within their powers, can it be said that they are not, each

¹ 3 R., at p. 473.

Mar. 17, 1908. in its own sphere, the proper judges of this boy's fitness for receiving benefit from the ordinary instruction in a public school, and next, whether the School Board can be called upon, in justice to the other interests involved, to make special provision for the efficient education of this particular boy!

Sinclair v. School Board. Moulin. LdStormonth-Darling. If this latter demand is to be open to any parent, or person *in loco parentis*, I confess I do not see why the Legislature was careful, after referring to a school board in Scotland, to insert the words "if they think fit."

It therefore seems to me that the Sheriff has decided the case upon perfectly right grounds (except only, as I have explained, that he ought to have sustained the plea of "no title to sue"). He has found no expenses due to or by either party in the Sheriff Court, and, as this was an action against a public body on the construction of a recent statute, I think this may pass. But I also think that the pursuer and his advisers, having got a sound judgment against them from the Sheriff, were not entitled to carry the case further, except on penalty of bearing the expenses of the appeal, and I am therefore in favour of finding the School Board entitled to the expenses of this appeal.

LORD ARDWALL.—I concur in the opinion which has just been delivered by Lord Stormonth-Darling. I am of opinion that the Sheriff-substitute erred in repelling the plea of no title to sue. Under the Education Acts the two parties concerned in attending to the education of a child are on the one hand the parent, and on the other hand the School Board, the parent being bound to see to it that the child goes to school, and the School Board, under sec. 26 of the Education Act of 1872, being bound to provide efficient schools. "Parent" is defined by sec. 1 of the said Act to include "guardian, and any person who is liable to maintain or has the actual custody of any child." In the present case, the parent in the sense of the Act is the pupil's grandfather, in whose custody he is and with whom he resides, and he was the proper person to raise an action against the School Board regarding the education of the pursuer if such action were justifiable. A pupil child does not appear to me to have under the Education Acts or at common law any title to sue an action of this kind, and it would be exposing school boards to a risk of vexatious litigation were they liable to have actions raised against them nominally at the instance of pupil children, but of course at the instigation of older people who might be possibly moved thereto by motives not of the best description.

In the next place, and supposing that the action had been at the instance of the pursuer's grandfather, I am of opinion that the Sheriff-substitute made a mistake in allowing a proof, I suppose with the object of enabling himself to determine the question whether the defenders were justified in excluding the pursuer from their school owing to his mental condition, and it seems to have been in the contemplation of the Sheriff-substitute that after evidence of the kind usually given in cases involving inquiries of this kind, which as everyone knows is generally lengthy and conflicting, he should then decide whether the pursuer was entitled to be educated at the Pitlochry Public School or elsewhere. Now, it appears to me that under the Education Acts school boards are the proper judges of questions of this kind, and that their actings ought not to be interfered with unless, as the

Sheriff puts it, their decision is capricious or unconscionable or founded on an erroneous view of the law—and I might add, if their conduct has been oppressive. But there is no suggestion in the whole proceedings in this matter that the School Board have acted otherwise than regularly and fairly, and not only have they after careful investigation determined this question in the way they have done, but the matter has been investigated by the Scotch Education Department with the assistance of an able expert in such matters, and I think it is out of the question to propose that there should now be a proof, and that the Sheriff-substitute should upon that proof review the resolution that has been come to by the School Board, and has been approved of by the Board of Education.

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By section 26 of the Education (Scotland) Act, 1872, it is provided that all public schools shall be under the management of the school board of the parish or burgh in which they are situated. The exercise of their discretion in regard to the management of the school, including, of course, the question of the exclusion or admission of any pupil, forms part of the functions of the school board as managers of the school, and resolutions arrived at by them with regard to such matters ought not, in my opinion, to be interfered with except on very weighty grounds, and none such exist here.

As I agree with what has been said by the Lord Justice-Clerk, by Lord Stormonth-Darling, and by the Sheriff in his note, it is unnecessary for me to add more.

LORD LOW was absent.

THE COURT pronounced the following interlocutor:—"Sustain the appeal: Recall the said interlocutor appealed against, as also the interlocutor of the Sheriff-substitute, dated 13th August last, except in so far as it dismisses the action as laid against the defender MacGowan, which is affirmed: Recall also the interlocutor of the Sheriff-substitute dated 28th October last: Sustain the first plea in law for the defenders, the School Board of the parish of Moulin: Dismiss the action against them, and decern."

JOHN C. STURROCK, Solicitor—CARMICHAEL & MILLER, W.S.—Agents.

HAY & COMPANY AND HAY & COMPANY, LIMITED, Pursuers
 (Respondents).—*D.-F. Campbell—Jameson.*
 ROBERT D. TORBET, Defender (Appellant).—*Hunter, K.C.—*
J. Macdonald.

No. 113.
 Dec. 17, 1907.
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 Torbet.

Payment—Appropriation—Account-current.—Where a debtor has paid money on account to his creditor, if the debtor has not appropriated particular payments to particular debts, the appropriation is governed by the intention of the creditor, express, implied, or presumed.

A firm of cattle auctioneers rendered an account to a customer setting forth, in a column in order of date, cattle, &c., sold to the customer, and cash advances made to him, and in another column, below the first, in order of date, the payments made by the customer to the auctioneers. The columns were each added up, and the balance was struck by deducting the amount of the second column from the amount of the first.

Dec. 17, 1907. *Held* that the account was not an account-current to which the rule as to the appropriation of payments applied.
 Hay & Co. v. Torbet. *Devayne v. Noble* (*Clayton's case*), 1 Mer. 530, and *Cory Brothers & Co. v. Owners of the "Mecca,"* L. R., [1897] A. C. 286, considered.

2D DIVISION.
 Sheriff of Perthshire. On 7th May 1904 Robert D. Torbet, postmaster and merchant, Balbeggie, granted an obligation in favour of Hay & Company, auctioneers, Perth, by which he guaranteed "full and final payment of all purchases made, or that may be made, and of all sums advanced, or that may be advanced, by you to Alexander Cromb, dairyman, St Martins, Balbeggie, with interest at the rates as may from time to time be charged by you, declaring that the said sums shall not exceed the total of Seventy-five pounds sterling (£75). And, further, providing and declaring that this guarantee shall be a continuing obligation until recalled in writing."

On 1st August 1904 the business of Hay & Company was transferred to Hay & Company, Limited, who took over, as at that date, the whole assets and liabilities of Hay & Company.

No intimation of the transference was sent to Torbet.

On 26th January 1905 Hay & Company, Limited, rendered an account in the following terms to Cromb, viz. :—

"Account, Mr CROMB, Woodside Cottage, Balbeggie,
 and

Messrs HAY & Co., LIMITED, Perth.

1904.

Feb.	19.	To	1 cow,	.	.	.	.	£13	12	6
"	26.	"	1 do.,	.	.	.	.	15	7	6
Mch.	4.	"	1 do.,	.	.	.	.	18	0	0
Apl.	29.	"	1 do.,	.	.	.	.	10	10	0
May	13.	"	1 do.,	.	.	.	.	8	15	0
"	"	"	Insurance,	.	.	.	.	0	1	6
July	15.	"	1 cow,	.	.	.	.	12	15	0
"	"	"	Insurance,	.	.	.	.	0	1	6
"	29.	"	1 cow,	.	.	.	.	8	0	0
"	"	"	Insurance,	.	.	.	.	0	1	6
Aug.	10.	"	Southtown hay,	.	.	.	.	11	14	6
Sep.	3.	"	Windeye sale,	.	.	.	.	2	11	4
Oct.	14.	"	2 cows,	.	.	.	.	28	12	6
"	"	"	Insurance,	.	.	.	.	0	1	6
"	29.	"	Southtown stocking sale,	.	.	.	.	11	5	0
Nov.	12.	"	Southtown sale,	.	.	.	.	2	4	6

1904.

								£143 13 10		
Mar.	14.	By	cash,	.	.	.	£4	0	0	
Apl.	11.	"	do.,	.	.	.	4	0	0	
May	10.	"	do.,	.	.	.	4	0	0	
June	20.	"	do.,	.	.	.	3	0	0	
July	15.	"	do.,	.	.	.	5	0	0	
Aug.	16.	"	do.,	.	.	.	4	0	0	
Oct.	10.	"	1 cattle,	.	.	.	8	7	0	
"	24.	"	1 do.,	.	.	.	7	2	6	
Jany.	2.	"	2 do.,	.	.	.	21	5	0	
								60 14 6		

Carry forward, . £82 19 4

	Brought forward,	£82 19 4	Dec. 17, 1907.
To interest,		4 10 0	
		<hr/>	
		£87 9 4	Hay & Co. v.
Insurance on cow, 14 Oct.,		0 1 6	Torbet.
		<hr/>	
		£87 10 10"	
		<hr/>	

On 26th July 1905 Torbet wrote to Hay & Company, withdrawing his guarantee as from that date. Hay & Company, Limited, replied, on 29th July, intimating that Cromb was in their debt to more than the full amount of the guarantee, and requesting payment of the amount guaranteed, £75.

Torbet having declined to make any payment, Hay & Company and Hay & Company, Limited, raised the present action against him in the Sheriff Court at Perth for decree for payment of £67, 4s. 6d., being the amount due by Cromb to Hay & Company as at 1st August 1904, after deducting payments by Cromb down to that date. In the action the pursuers admitted that Torbet's liability under the guarantee was terminated *ipso facto* by the change of company on 1st August 1904, and that he was not liable for debts incurred by Cromb after that date.

In defence Torbet pleaded, *inter alia*;—The said guarantee has been extinguished by payments made by the said Alexander Cromb to the pursuers subsequent to the date of the change in pursuers' firm, which payments must be appropriated to the guaranteed debt.

A proof was allowed and led. The import of the evidence sufficiently appears from the opinions of the Court.

On 2d July 1907 the Sheriff-substitute (Sym) granted decree for the sum sued for.

On appeal the Sheriff (Johnston), on 15th October, adhered.

The defender appealed, and argued;—Where there was an account-current between the parties the rule was that, in the absence of express appropriation, items on the credit side of the account were to be set against items on the debit side in the order of date.¹ This rule was not confined to bankers' accounts or to pure cash accounts; all that was necessary was that there should be a continuous account with a debit and a credit side.² The account here was of that nature. It was stated continuously, and no distinction was made between Cromb's indebtedness to the old firm and his indebtedness to the new Limited Company. Where a guarantee was revoked in consequence of a change in the creditor's firm, and an account was thereafter rendered to the common debtor, setting forth dealings both before and after the change of firm, indefinite payments made subsequent to the change of firm fell to be set against the balance due at the change.³ The presumption here was that payments made by Cromb after the change of firm were to be applied in extinction of Cromb's

¹ Devayne v. Noble (Clayton's case), 1816, 1 Mer. 530.

² Lang v. Brown, Dec. 2, 1859, 22 D. 113; Scott's Trustees v. Alexander's Trustees, Jan. 10, 1884, 11 R. 407; M'Kinlay v. Wilson, Nov. 18, 1885, 13 R. 210.

³ Bodenham v. Purchase, 1818, 2 Barn. & Ald. 39; Pemberton v. Oakes, 1827, 4 Russ. 154; Hooper v. Keay, 1875, L. R., 1 Q. B. D. 178; Lang v. Brown, 22 D. 113; Gloag and Irvine, Rights in Security, p. 933.

Dec. 17, 1907. indebtedness to the old firm, and the evidence did not rebut that presumption.

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Argued for the pursuers;—The case of the "*Mecca*"¹ had altered the rule, or at least the expression of the rule, laid down in *Clayton's* case.² Previously the rule had been expressed to be that where neither of the parties made an appropriation of particular payments to particular debts the law made the appropriation; the rule was now expressed to be that where the debtor did not appropriate particular payments to particular debts, the application of the payments was governed not by any rigid rule of law but by the intention of the creditor, expressed, implied, or presumed, and that he might exercise that right up to the last moment by action or otherwise. But, however expressed, the rule did not apply here, for it applied only to cases of account-current, that was to say, to bankers' accounts or to accounts drawn up on the model of bankers' accounts, i.e., in which item was set against item in parallel columns.³ Here the account was drawn up on the principle of setting summation against summation. Further, the rule was not an absolute rule, it was merely a presumption that, in the case of accounts-current credit items fell to be set against debit items in the order of date.⁴ Here there was abundant evidence that the pursuers intended to appropriate the payments made since the date of the incorporation of the Limited Company to debts incurred since that date. It did not make any difference that the question arose with the debtor's cautioner and not with the debtor himself.⁵

At advising on 17th December 1907,—

LORD JUSTICE-CLERK.—The defender Torbet having along with another become cautioner for Alexander Cromb for all purchases made and all sums that might be advanced to him by a firm of Hay & Company, the question in the case is whether he is liable to pay to Hay & Company, Limited, as in right of all assets of Hay & Company, the balance which Cromb has failed to pay. The caution was for an amount not to exceed £75. The present claim is for a balance of £67, 4s. 6d.

The defence is that Cromb made payments to Hay & Company, Limited, which if appropriated to the first items in the account with Hay & Company would extinguish the obligation. The contention is that the rule as to appropriation of payments on accounts-current applies to the kind of account with which the Court has to deal, viz., that where there has been no special appropriation of payments these must be held to apply to and to go to extinguish the first item of debt. That there is in cases to which the rule is appropriate such a legal presumption is not doubtful, and indeed is not disputed. But the pursuers maintain that the case is not one in which the presumption applies, and further, that if it did apply, it is a presumption which can be redargued, and that it is redargued by the facts disclosed in the documentary and oral evidence.

¹ L. R., [1897] A. C. 286.

² 1 Mer. 530.

³ *Scott's Trustees v. Alexander's Trustees*, 11 R. 407; *Dougall v. Lornie*, 1899, 1 F. 1187; *Batchelor's Trustees v. Honeyman*, July 18, 1892, 19 R. 903; *Pemberton v. Oakes*, 4 Russ., at p. 168; *Lowson v. Ingham*, 1823, 2 B. & C. 65.

⁴ *In re Hallett's Estate*, L. R., 13 Ch. Div. 696, at p. 728.

⁵ *Eyre v. Everett*, 1826, 2 Russ. 381; *Creighton v. Rankin*, 1840, 7 Cl. & Fin. 325.

If it were necessary to decide the question whether there was in this case Dec. 17, 1907. an account-current between the parties, in the true sense of that expression, Hay & Co. v. I should hold that there was not any such account-current. It is true that Torbet. while an account between a bank and a customer to whom advances are Lord Justice- being made is the most direct illustration of an account-current to which the Clerk. presumptions as to appropriation of payments applies, yet it is quite certain that accounts of a similar character, although not occurring in business of a strictly banking type, may be held to be in the same position. The case of *M'Kinley v. Wilson*¹ may be taken as an illustration of an account-current which was an account of transactions not purely of a banking character, including as it did purchases and sales. Nevertheless, on the facts which brought out the intention of parties, it was held that the account which was made out as an "account-current" was truly of that character, and the presumptions as to appropriation of payments applied. But in cases where the accounts truly disclose trade transactions the presumption does not apply. Where in course of a series of transactions of trade payments are made to account, these go against the general indebtedness, the debtor not being entitled to claim that they presumably go to clear off the first items, and the creditor not being entitled to shut the debtor out from his defence against the liability for any particular item by maintaining that the debtor in making payment has cleared off that particular item and cannot go back upon it.

Now, in my opinion, the whole character of the accounts in this case is against the idea of the application of the doctrines which apply to accounts-current. It may be true that the pursuers did not absolutely confine their dealings with Cromb to transactions of purchase and sale, and sometimes helped him over a temporary difficulty by financial aid. But that would not, as I think, necessarily convert what was in its general character a tradesman's account into an account-current. Therefore, as I said before, if it were necessary to decide the matter strictly, I should be inclined to hold that the defence set up on the theory of an account-current must fail.

But I am clearly of opinion that if there were any ground for holding that this was an account to which the doctrine of particular appropriation might apply, the presumption arising upon it has been completely redargued. Hay & Company, Limited, when they took over the business and assets of Hay & Company, made their position quite clear, to the effect that in business with them Cromb was to make payments for that which they sold to him. This is made distinct by their insisting upon a payment to account on a purchase of hay before Cromb was allowed to take delivery, and by their repeated insistence that he should pay sums to account of purchases made from them. In no more marked way could Hay & Company, Limited, shew their intention to appropriate to debts incurred to them payments to them for purchases made after they took over the business. I agree with the Sheriffs in holding that their right to do so has not been lost to them by anything that has been disclosed in the documentary or parole evidence.

I am therefore in favour of affirming the judgment in the Court below.

¹ 13 R. 210.

Dec. 17, 1907. The case will require to go back to the Sheriff that the question of interest may be settled, and in that view I would propose that the expenses in this Court should be awarded to the successful party, and that power should be given to the Sheriff to decern for them.

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Torbet.

LORD STORMONT-DARLING.—The stringency of the rule in *Devaynes'* case¹ has been a good deal modified by the course of recent decisions, particularly by the case of *Cory Brothers & Company*.² In particular, it is now quite recognised that the rule (never a rigid rule of law, but always yielding to evidence of the intention of the parties) does not apply at all where there is no account-current between them of the nature of that between banker and customer, nor where it appears that the creditor intended not to make any appropriation, but to reserve the right.

The only difficulty I have had in this case is that it arises not between the parties to the account, but between one of them (the creditor) and a cautioner for the debtor, and that there was a change in the *persona* of the creditor during the currency of the account by the conversion of the private firm into a limited company—a change which (everybody is now agreed) brought the liability of the cautioner to an end as from the date of the conversion on 1st August 1904, but which neither Limited Company nor cautioner understood at the time as having that effect. I say that, because if the cautioner had realised his position he would not have written the letter of 26th July 1905, in which he declared that in any event he would take no responsibility beyond that date, although in truth his responsibility had ceased a year before, and the Company on the other hand, if they had recognised the truth, would have intimated the change to the complainer at once, and would certainly not have replied to his letter repudiating further responsibility by writing the letters of 29th July and 4th August, in which they claimed payment of the full limit of his liability (£75), which clearly implied that they believed his liability to have continued after the formation of the Limited Company. Neither party, I believe, thought at the time that the conversion of Hay & Company into Hay & Company, Limited, made the least difference in the matter. The cautioner simply remained quiescent, while Hay & Company, Limited, went on dealing with the debtor till he became bankrupt in August 1905. They now sue the cautioner for the amount of the purchases remaining unpaid by the debtor down to the formation of the Limited Company, less the payments made to account by him before that date, the amount sued for being £67, 4s. 6d., with interest. But the defender claims to have the benefit of all the payments to the credit of the account in their order, whether before or after that date, on the assumed principle of *Devaynes'* case.¹

But, notwithstanding the misconception, common to both parties, which I have pointed out, and which is not shewn to have prejudiced the cautioner's position, I have come to agree in what I understand to be the view of all your Lordships, viz., that the account between the auctioneers and Cromb is not an account-current to which the rule in *Devaynes'* case¹ can apply, and

¹ 1 Mer. 530.

² L. R., [1897] A. C. 286, Lord Macnaghten, at p. 293.

that, even if it were, the Limited Company did evince an intention so to Dec. 17, 1907.
appropriate the subsequent payments into the account as to make Cromb, as *Hay & Co. v.*
far as possible, pay his way. *Torbet.*

LORD LOW concurred.

LORD ARDWALL.—The principal facts in this case are not in dispute. On 7th May 1904 the defender granted to Hay & Company, a firm of auctioneers, the guarantee by which he guaranteed the debts that might be due to Hay & Company by a dairyman called Alexander Cromb to the amount of £75. After certain dealings had taken place between Hay & Company and Alexander Cromb the business of Hay & Company was transferred, with its rights and obligations, to Hay & Company, Limited, who were duly incorporated under the Companies Acts on 1st August 1904, and on that date took over the assets and liabilities of Hay & Company. At that date the sum of £67, 4s. 6d. was due to Hay & Company by Alexander Cromb, and this action is brought for recovery of that sum, with periodical and other interest.

The parties are agreed that the defender is not liable for any advances made or goods supplied by Hay & Company, Limited, to Alexander Cromb after the incorporation of the Limited Company, but the defender further maintains that the guaranteed debt has been extinguished by payments made by Alexander Cromb to Hay & Company, Limited, after 1st August 1904, and the only question which was discussed on the appeal was whether the defender was entitled to have such payments imputed to the extinction of the debt of £67, 4s. 6d. I am of opinion that he was not so entitled, and that accordingly the judgment of the Sheriff ought to be affirmed.

This case is of some interest as being, so far as the citation of authorities at the debate was concerned, the first case in which the question of appropriation of payments to account of particular debts has been raised in this Court since the authoritative judgment of the House of Lords in the English case of *Cory Brothers & Co. v. Owners of the "Mecca."*¹

Two points were raised at the debate—first, whether the account which was the only account rendered by Hay & Company, Limited, to the principal debtor, was so stated as to infer a presumption against the pursuers that the payments to account claimed by the defender had been appropriated by the pursuers to the items due by Mr Cromb to them in order of date, or, in other words, whether the account was a proper account-current between the parties similar to that between a banker and his customer? and second, whether on and after 1st August 1904 the payments made by Mr Cromb to Hay & Company, Limited, were appropriated by them from time to time to particular transactions?

The general law regarding the appropriation of payments was laid down with great clearness by Lord Macnaghten in the case I have mentioned, page 293. He says,—“When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time

¹ L. R., [1897] A. C. 286.

Dec. 17, 1907. when he makes the payment, the right of application devolves on the creditor. . . . The creditor has the right of election up to the very last moment, and he is not bound to declare his election in express terms. Hay & Co. v. Torbet. He may declare it by bringing an action, or any other way that makes his meaning and intention plain. Lord Ardwall. Where the election is with the creditor it is always his intention, express or implied or presumed, and not any rigid rule of law, that governs the application of the money." The noble and learned Lord states this as the law of England, but in this matter the law of England and the law of Scotland are identical, and have been so since the leading case known as *Clayton's case*¹ (better known in Scotland as *Devaynes' case*) was decided.

According to the above statement of the law, and it being admitted that no appropriation was made at the times of payment by the debtor, the question in the present case comes to be whether by rendering to the principal debtor the account, the pursuers, Hay & Company, Limited, appropriated the payments in question to the first items in their account against Mr Cromb. I am of opinion that they did not.

In considering this question it is obvious that a great deal must depend on the form of the account, because if the account is so stated as to entitle the debtor to assume that there has been appropriation by the creditor of certain payments to certain items of debt the result will be that the creditor will be barred from going back upon that appropriation. Now, the account No. 18 of process is not stated as a proper account-current at all. It first contains a record of all the goods sold or advances made to Mr Cromb by the pursuers, and next, below that, a record of all the payments made by Mr Cromb to the pursuers. Each of these columns is added up, the one deducted from the other, and a balance struck. Now it appears to me that this is very far from being an account-current. It was argued for the defender that an account stated in this way was in no view essentially different from an account stated with the debit and credit entries running side by side with each other, and that the fact of its not being so stated in the present case might simply be due to there not being room on the same sheet of paper so to state it. I do not think that this argument can be accepted seriously. If the debit and credit entries had been placed side by side, that might have raised a presumption of more or less force to the effect that the entries were to be set against each other in order of date—in short, that the account was an account-current. In the present case there are two summations, and the fact that the one is deducted from the other in order to shew the balance due certainly cannot turn what is merely a summation of items of debit separately from the items of credit into an account-current. Assuming that the pursuers desired to render a statement to Alexander Cromb shewing the amount of his indebtedness to them, but without inducing him to believe that they were stating their account as an account-current, it is difficult to see in what other form they could have stated their account. I therefore have no doubt whatever that the account contains in itself nothing that the debtor was entitled to rely on as an appropriation of particular payments to particular items of debt, and nothing to

¹ 1 Mer. 530.

shew that the creditor appropriated or intended to appropriate payments in Dec. 17, 1907. that way.

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Lord Ardwall.

The two leading cases regarding the appropriation of payments in order of date to extinction of debit entries in order of date, namely, *Devaynes'* case¹ and the case of *Bodenham v. Purchase*,² were both cases of bankers' accounts, and indeed bankers' accounts are the typical examples of accounts-current. In *Devaynes'* case¹ Sir William Grant, who was the Master of the Rolls, says that where an account-current is kept between parties as a banking account "there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably it is the sum first paid in which is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first payment on the credit side. The appropriation is made by the very act of setting the two items against each other."

This rule has been adopted both in England and in Scotland, but as pointed out by the noble and learned Lords who decided the case of *The "Mecca,"*³ the rule in *Devaynes'* case¹ had come to be considered a rule probably of much more force and stringency than had ever been intended by the Master of the Rolls when he laid it down, although several cases *prima facie* falling within the doctrine in *Devaynes'* case¹ have since the decision in that case been decided otherwise owing to their peculiar circumstances. The case of *The "Mecca,"*³ was a case in which the account was stated very much in the same way as the one in the present case, and there it was held that there was no account-current between the parties and no other circumstances making it appear that the creditor intended to make any appropriation.

Among the Scotch cases which were cited at the debate the case of *Lang*⁴ may be taken as typical of the ordinary current account. In that case it was an account between agent and client, but the agent had from time to time been accustomed to make advances to or on behalf of the client, and, on the other hand, the client from time to time made payments to the agent by cash or by bill or note, and the account-current was kept in practically the same way as a banker's account, although the relation of the parties was that of agent and client. It was accordingly there held that the account was an account-current to which the principle of *Devaynes'* case¹ was applicable.

The case of *Dougall v. Lornie*⁵ was a typical case of a different kind of account. That was a case of a plumber's account divided into sections according to work done from time to time, and the account sued for was the fifth of a series of accounts rendered in a similar way. For the work charged in these accounts various payments to account had been made, and it was there held that indefinite payments to account of a tradesman's account were not to be ascribed to the items or sectional accounts in order of date so as to preclude the debtor from subsequently challenging any item in the account. Lord Adam there pointed out that "the rule in *Devaynes'*

¹ 1 Mer. 530.

² 2 B. & Ald. 89.

³ L. R., [1897] A. C. 286.

⁴ 22 D. 113.

⁵ 1 F. 1187.

Dec. 17, 1907. case¹ applies to cash accounts-current, and has no application whatever to a tradesman's account. Payments to account of a tradesman's account go not against individual items in order of date, but against summation."

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Lord Ardwall. There may, however, be accounts-current consisting of entries other than proper cash entries. The case of *Mackinlay v. Wilson*² was a case of this kind. That was a case where two horse-dealers had frequent dealings with each other, and in the account sued for by Mackinlay, which was titled "account-current," horses and harness and cash were entered on the debtor side of the account, and horses, cash, and other things were entered on the other, the dates on both sides being consecutive. There prescription was pleaded, and it was against that plea that the pursuer pleaded that the account was an account-current and that prescription was excluded. Before deciding the question of prescription a proof was led, and on that proof the Court was satisfied that it was the intention of parties that the transactions should be set against each other from time to time as they occurred, and that the account, therefore, was rightly stated as an account-current, the one side of the account being set against the other, and that accordingly the plea of prescription should be repelled—See opinion of Lord Adam, page 217.

The case of *Batchelor*³ forms a useful contrast to *Mackinlay's* case,² for there it was held that a merchant's account with cross entries was not a proper account-current. There was no proof in that case, and it was decided simply upon the account as it stood, Lord Trayner saying,—“This is simply a merchant's account.”

From an examination of the various cases which were quoted at the debate it is evident that the important alteration in the statement of the law that was introduced by the decision in the case of *The “Mecca”*⁴ is this, that while in several of the former cases the law was stated to the effect that, failing appropriation by the debtor or the creditor, the law appropriated payments to items of debit in order of date, in the case of *The “Mecca”*⁴ the law was stated to the effect that failing appropriation of the money by the debtor, the appropriation of the money is governed by the intention of the creditor, expressed, implied, or presumed, and that such intention may be presumed from the form and statement of the account rendered by the creditor to the debtor. Applying this law to the present case, my opinion is that it cannot be presumed from the account that the creditor intended to appropriate payments to account as such after 1st August 1904, to the items of debt in order of date, and that by making the claim and raising this action for £67, 4s. 6d. they have shewn that they do not so appropriate them.

But the pursuers maintain, further, that if any presumption arises from the statement of the account, that is displaced by the fact that at the times of the payments which the defender seeks to impute in order of date to the debt incurred by Cromb before 1st August 1904, they were appropriated by the parties to particular items, and, to begin with, that the very first payment after 1st August, namely, £4 on 16th August, was paid for hay

¹ 1 Mer. 530.

² 13 R. 210.

³ 19 R. 903.

⁴ L. R., [1897] A. C. 286.

bought at Southtown sale, and in response to a letter dated 11th August Dec. 17, 1907. 1904. This is established by the proof. The course of dealing with the new firm accordingly commences with a payment appropriated to a specific item. Again, it is proved that certain cows were paid for by instalments of £1 per week, and then again it appears that Hay & Company, Limited, were frequently finding fault with Mr Cromb for not paying for particular purchases which he made from them, and for not sending in stock to be sold by them so as to pay for such purchases. In short, without going into further details, I am of opinion that it appears from the whole of the proof that when those who had the management of Hay & Company, Limited, who of course had a responsibility to the company, commenced dealing with Mr Cromb on and after the incorporation of the company, they dealt with each transaction between them and Cromb separately as it arose, and demanded and received payments to account of the particular transaction. This course of dealing is quite inconsistent with treating these transactions as parts and portions of an account-current. But further, it proves the appropriation of particular payments to particular transactions, and therefore excludes the idea that the payments on August 16th and onwards were payments which the defender is entitled to have imputed towards the debt which had been incurred previous to that date.

On both the grounds above dealt with I am of opinion that the judgment of the Sheriff should be affirmed, and the case remitted back in order that the question of interest may be dealt with.

THE COURT affirmed the interlocutor appealed against.

CARMICHAEL & MILLER, W.S.—MENZIES, BRUCE-LOW, & THOMSON, W.S.—Agents.

ERSKINE BEVERIDGE (James Adamson Beveridge's Trustee), First Party.—*Blackburn, K.C.—Lippe.* No. 114.

CHARLES HERBERT BEVERIDGE AND OTHERS (James Beveridge's Executors), Second Parties.—*Blackburn, K.C.—Lippe.* Mar. 17, 1908.

THE REVEREND JOHN CLEGHORN BELL AND OTHERS (Robert Methven Heron's Trustees), Third Parties.—*Sol.-Gen. Ure—Constable.* Beveridge's Trustee v. Beveridge.

MRS ELIZABETH MARY BEVERIDGE, Fourth Party.—*Macmillan.*

Trust—Administration—Investment of Funds—Liability of Trustees—Local Authorities Loans Stock—Purchase at Premium—Local Authorities Loans (Scotland) Act, 1891 (54 and 55 Vict. cap. 34), sec. 44 (2)—Liferent and Fee.—The Local Authorities Loans (Scotland) Act, 1891, by sec. 44 (1), authorises the investment of trust funds in stock issued under that Act, but by sec. 44 (2) provides "that when two or more persons are successively interested in money left subject to a trust, no investment thereof shall be made in stock at a price exceeding the redemption value of the stock."

Testamentary trustees, who held funds for behoof of different persons as liferenter and fiar respectively, in 1897 invested part of these funds in a redeemable stock issued under the Local Authorities Loans (Scotland) Act, 1891, at the price of £102 per cent, being £2 per cent more than the redemption value. They at the same time entered into an arrangement with the liferenter whereby he undertook to repay to the trust this £2 per cent of excess cost. On the death of the liferenter this £2 per cent of excess cost had been paid back to the trustees, but at that time the stock stood in the market at 10 per cent below its redemption value.

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Held that as the stock had been purchased at a price beyond its redemption value, contrary to sec. 44 (2) of the Local Authorities Loans Act, 1891, the investment was *ultra vires* of the trustees, and that the arrangement whereby the excess cost was to be repaid to the trust by the liferenter did not make the investment lawful.

Held, further, that as the investment was *ultra vires* the trustees were personally liable to restore to the trust the difference between the redemption value of the stock and the amount which it might yield on being realised.

2D DIVISION.

JAMES ADAMSON BEVERIDGE of Brucefield, Dunfermline, died on 16th November 1887, leaving a trust-disposition and settlement, dated 20th April 1883, with two relative codicils dated respectively 13th September 1883 and 10th October 1884. By his trust-disposition and settlement the testator conveyed his whole estate, heritable and moveable, to trustees for the purposes therein mentioned, and, *inter alia*, directed them to convey the residue of his means and estate to his sister, Mrs Elizabeth Mary Beveridge, wife of Dr Alexander Watt Beveridge. By the second codicil the testator provided:—"I hereby leave to" Robert Methven Heron, Mrs Mary Heron, and Miss Jessie Campbell Heron, "and the survivors and survivor of them, the liferent of the sum of £20,000 . . . and I hereby direct my trustees . . . to set aside and invest, in their names for behoof of the said Robert Methven Heron, Mrs Mary Heron, and Jessie Campbell Heron, and survivors and survivor of them, for liferent use only, the said sum of £20,000, on the securities authorised by the Acts of Parliament relating to the investment of trust funds . . . and on the death of the survivor, the said capital sum of £20,000 will revert to and form part of the residue of my means and estate."

Upon the truster's death his trustees invested the sum of £20,000, as directed by the second codicil. Mrs Mary Heron, one of the three liferenters of that sum, predeceased the testator, and the liferent was shared equally by the survivors, Robert Methven Heron and Jessie Campbell Heron, until the latter's death on 2d September 1896, when the sole right to the liferent vested in Robert Methven Heron.

In 1897 it became necessary to find a new investment for £9650, part of the sum of £20,000 above mentioned. On 20th April 1897 the trustees resolved to purchase £9460 of 3 per cent redeemable stock issued by the Corporation of Dunfermline at the price of £9649, 4s. (being at the rate of £102 per cent) subject to certain arrangements with Mr Robert Methven Heron the liferenter which were embodied in a letter of guarantee granted by him. This stock was issued by the Corporation of Dunfermline under and in terms of the Local Authorities Loans (Scotland) Act, 1891.* The dividends thereon were secured upon rates or taxes levied by the Corporation

* The Local Authorities Loans (Scotland) Act, 1891 (54 and 55 Vict. cap. 34), enacts:—Section 44 (1)—"Trustees or other persons for the time being authorised to invest money in the mortgages, debentures, or debenture stock of any railway or other company, shall, unless the contrary is provided by the instrument authorising the investment, have the same power of investing money in stock issued under the provisions of this Act (other than stock for the time being represented by a stock certificate to bearer) as they have of investing it in the mortgages, debentures, or debenture stock aforesaid. (2) Provided that when two or more persons are successively interested in money left subject to a trust, no investment thereof shall be made in stock at a price exceeding the redemption value of the stock unless the instrument creating the trust shall otherwise expressly provide."

under authority of Act of Parliament, and the stock itself was redeem- Mar. 17, 1908.
able at par on 15th May 1947, or, in the option of the Corporation, at the term of Whitsunday 1917, or any term of Whitsunday or Martinmas thereafter, on three months' notice to the holder. The whole stock fell to be redeemed on or before Whitsunday 1947.

The letter of guarantee granted by the liferenter was dated 21st April 1897, and provided as follows:—"I, . . . sole surviving liferenter of the fund of £20,000 directed by the late Mr Beveridge, the truster, to be held in trust for the liferent use of me and the late . . . approve of your proposal to invest the sum of £9649, 4s., part of the capital of the said fund, in the purchase, at the price of £102 per cent (that being the minimum price of issue), of £9460 of the redeemable three per cent stock about to be issued by the Corporation of Dunfermline; and I further agree to accept interest on the said sum of £9460 at the rate of two and three-quarters per cent per annum—the difference between such interest and the interest payable by the Corporation to be set aside by you as a sinking fund to meet the premium of £189, 4s., being the difference between the amount payable for the stock and the par value at which the same is redeemable, or such proportion thereof as may be lost when the said stock falls to be realised, or has been redeemed by the Corporation, such sinking fund, in the event of the said stock not being realised at a loss, to be payable to me or my heirs: And, in the event of the said sinking fund not being sufficient to meet any loss that may be made on the realisation or redemption of the stock, I hereby agree and declare that the deficiency shall form a charge against my estate."

The trustees requested the law-agents of Mrs Beveridge, the fiar, to ascertain whether she would consent to the proposed investment, and referred them to section 44 (2) of the Local Authorities Loans (Scotland) Act, 1891. In reply the fiar's law-agents wrote that Mrs Beveridge did not see her way to consent.

The £9460 of Dunfermline Corporation stock was purchased by the trustees at Whitsunday 1897 at 102 per cent, the whole price being paid out of the trust funds.

The trustees at the date of the purchase, and at the date of the resolution to purchase, were Messrs Erskine Beveridge, James Beveridge, and Robert Methven Heron, the liferenter, all of whom concurred in the purchase. James Beveridge died on 14th February 1903, and Robert Methven Heron, the liferenter, died on 23d June 1906.

The dividends received on the Dunfermline Corporation Stock (less the deduction provided for by the letter of guarantee), were regularly remitted to Mr Heron by the factor and law-agent of the trustees, accompanied by a statement shewing the details thereof. These remittances continued to be made up to the term of Whitsunday 1906, being the last half-yearly term before Mr Heron's death. From each half-yearly remittance of the said dividends $\frac{1}{4}$ per cent was deducted and retained by the factor and law-agent, this deduction being shewn in the statement as "sum set aside as sinking fund to meet premium paid on purchase of this stock in terms of letter of guarantee." At the date of Mr Heron's death the sinking fund accumulated from such deductions amounted to £213, 18s. 11d., including bank deposit interest. This sum was more than sufficient to meet the premium of 2 per cent originally paid on the stock, which amounted to £189, 4s.

Since the date when the investment in Dunfermline Corporation

Mar. 17, 1908. Stock was made, it had fallen in value in common with other Corporation stocks. At Mr Heron's death the market price was 89½, and it subsequently fell to 88½. The total depreciation at the latter date, on the price originally paid, was thus £1123, 7s. 6d., or, deducting the amount of the original premium, £934, 3s. 6d. In consequence of the death of Robert Methven Heron, the liferenter, the capital of the sum of £20,000, liferented by him, fell to be paid over to Mrs Beveridge, as residuary legatee of the testator. She intimated that she held Mr Erskine Beveridge, as sole surviving trustee, and the representatives of the deceased trustees, liable for the whole of the depreciation on the Dunfermline Corporation Stock. The surviving trustee, and the representatives of the deceased trustees, were willing to pay to the residuary legatee the premium of 2 per cent originally paid on the stock, amounting to £189, 4s., but they refused to pay the rest of the amount by which the stock had depreciated. A question in consequence arose as to whether, in the circumstances, the trustees incurred personal liability for the whole depreciation on the stock through making the investment. For the determination of this question a special case was presented for the opinion and judgment of the Court.

The parties to the special case were—(1) the surviving trustee; (2) and (3) the representatives of James Beveridge and Robert Methven Heron, the deceased trustees; (4) Mrs Elizabeth Mary Beveridge, the residuary legatee.

The first, second, and third parties maintained that, in respect the premium on the purchase price of the stock issued by the Corporation of Dunfermline was paid by the liferenter, the stock was purchased by them at a price not exceeding the redemption value thereof; that the investment was accordingly one which the trustees were entitled to make, and did not fall within the prohibition imposed by the Local Authorities Loans (Scotland) Act, 1891, sec. 44 (2); that in any case, on a sound construction of the proviso in that subsection, it simply prohibited the payment of a higher price than the redemption value for such stocks, and created no liability except for the excess of the price paid above redemption value, provision for the repayment of which excess had in this case been provided for, and that there was therefore no liability on the trustees to make good the depreciation in value which the stock had suffered. In any event, these parties maintained that the investment was one which it was within their powers to make under the second codicil or in virtue of the Trusts (Scotland) Amendment Acts of 1884 and 1898, and particularly of section 3 (6) of the Act of 1884 and section 3 (b) of the Act of 1898.

The fourth party maintained that the first, second, and third parties were jointly and severally liable to make good to the trust-estate the whole depreciation on the Dunfermline Corporation Stock purchased by the trustees with the trust funds as above set forth; that the only authority which the trustees possessed for investing in that stock was derived from section 44 of the Local Authorities Loans (Scotland) Act, 1891; that the trust funds were, at the time of the investment in question, funds in which two persons were successively interested, and the stock was purchased at a price exceeding the redemption value of the stock, without any authority to that effect in the testamentary writings under which the trustees acted; that the investment in said stock was accordingly one which, in view of subsec. (2) of sec. 44 of the Local Authorities Loans (Scotland) Act, 1891, it was *ultra*

vires of the trustees to make, and that the first, second, and third parties were bound to restore to the trust-estate the whole amount of the depreciation thereon. Mar. 17, 1908.
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The first question of law was:—“(1) Are the first, second, and third parties jointly and severally liable to make good to the fourth party the difference between the redemption value of the said Dunfermline Corporation stock and the amount which it yields on realisation?”

The case was heard before the Second Division on 30th January and 7th February 1908.

The arguments sufficiently appear from the contentions of the parties.

At advising on 17th March 1908,—

LORD LOW.—At the time when the testamentary trustees of the deceased Mr James Adamson Beveridge invested part of the trust funds in Dunfermline Corporation stock, their only authority for so doing was the power conferred upon trustees to invest trust funds in such stocks by the 44th section of the Local Authorities Loans (Scotland) Act, 1891. The power conferred by the statute is, however, subject to the following proviso:—“Provided that when two or more persons are successively interested in money left subject to a trust, no investment thereof shall be made in stock at a price exceeding the redemption value of the stock, unless the instrument creating the trust shall otherwise expressly provide.”

It is admitted that that proviso was applicable to the investment in question, because there were two or more persons—liferenters and fiars—successively interested in the money, and there was nothing in the trust-deed which authorised the trustees to go beyond the powers conferred by the statute. Now, it appears to me that the language of the proviso is unambiguous and imperative. “No investment shall be made in stock at a price exceeding the redemption value of the stock.” Nothing could be clearer than these words, and the fact is that the trustees did invest trust funds in stock of the kind referred to in the statute at a price of 102 per cent, while the redemption value was only 100 per cent. It is therefore clear that upon the face of the transaction the investment was one which the statute declares trustees shall not make, and was therefore *ultra vires*.

The trustees, however, say that although the full price was in the first instance paid out of trust funds, they made an arrangement with the liferenter whereby the excess of the price was restored to the trust-estate, with the result that ultimately, and before the expiry of the liferent, the investment had cost the trust-estate only 100 per cent, or the redemption value. They argued that the plain object of the proviso was to prevent trustees expending more money in the purchase of stock than the ultimate fiar would get back when the stock came to be redeemed, and that as the trust-estate had in fact only been diminished by the investment to the extent of the redemption value, the mischief struck at by the proviso had not arisen, and they (the trustees) could not be held to have contravened the enactment.

The argument is plausible, but I do not think that it is sound. The trustees unquestionably invested trust funds in the purchase of the stock at a price exceeding the redemption value, and they must, in my opinion,

Mar. 17, 1908. take the consequences. It seems to me that the arrangement which they made with the liferenter was for their own protection, and cannot be pleaded against the residuary legatee, seeing that not only was she no party to the arrangement, but that she expressly refused to consent to trust funds being invested in the stock at £102.

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Accordingly the trustees are, in my opinion, in the position of having made an investment of trust funds which was *ultra vires* of them, and consequently they are liable to restore to the trust-estate the loss which it has thereby sustained. The first question therefore must, in my judgment, be answered in the affirmative.

(His Lordship then dealt with another question which is not reported.)

LORD STORMONTH-DARLING.—I concur in the opinion which has just been read.

LORD ARDWALL.—I concur in the opinion delivered by Lord Low, but I confess I have found the case to be one of some difficulty. I think it is obvious that the intention of the proviso of subsection 2 of section 44 of the Local Authorities Loans (Scotland) Act, 1891, was to prevent loss falling on the ultimate beneficiary when the stock came to be redeemed at par value in cases where persons were successively interested in an investment. Indeed, so far as I can see, the statute can have no other object, because it authorises the purchase of the same stocks at par value. Now, if any stock happens to stand at more than par value, the only inference to be drawn from that would be that it is a very good security and commands a premium because of its superiority to other stocks of the same description; therefore, so far as the safety of trust investments is concerned, there is no reason whatever for the provision of the subsection in question.

But I think it must be held that in dealing with statutes a Court of law is not entitled in considering a prohibition contained in a statute to inquire what the object of the prohibition is, and should the object be the prevention of a loss of some kind, to hold that if the possibility of that loss is obviated the prohibition of the statute may be disregarded. Such a method of reasoning, if generally applied, would make wild work with the application of statutes, and, in my opinion, is not permissible.

I think that in this case we must confine ourselves to a consideration of the plain question whether the investment made by the trustees in Dunfermline Corporation Stock was an investment which, as trustees, they were entitled to make at the time and at the price they did. To this there can be only one answer, to the effect that it was not. The result is that the trustees' actings must be held to have been *ultra vires*, and that they are liable for all loss resulting therefrom, and are not entitled in response to the fourth party's request for payment of £20,000 to tender as part thereof the investment in question, but that they are bound to replace in the trust the price originally paid for the said stock.

I therefore concur in holding that the first question should be answered in the affirmative.

(His Lordship then dealt with the other question.)

LORD JUSTICE-CLERK.—I concur.

Mar. 17, 1908.

THE COURT pronounced this interlocutor:—"Answer the first question in the case in the affirmative, . . . and decern."

Beveridge's
Trustee v.
Beveridge.

ERSKINE DODS & RHIND, S.S.C.—WATT & WILLIAMSON, S.S.C.—
MACKENZIE, INNES, & LOGAN, W.S.—Agents.

ROBERT SOMERVILLE AND OTHERS, Pursuers (Respondents).—
Clyde, K.C.—Macmillan.

No. 115.

THE COMMISSIONERS FOR THE HARBOUR AND DOCKS OF LEITH,
Defenders (Reclaimers).—*Dickson, K.C.—J. H. Millar.*

Mar. 17, 1908.

Somerville v.
Leith Docks
Commissioners.

Harbour—Rights and Obligations of Harbour Commissioners—Dock—Access—Use of Lock—Special charge for use of lock—Ultra Vires—Harbours, Docks, and Piers Clauses Act, 1847 (10 Vict. cap. 27), secs. 2, 3, 33, 51, 52, and 83—Leith Harbour and Docks Act, 1892 (55 and 56 Vict. cap. clxxvii.), secs. 4, 58, 59 and 60, and Schedule (B).—Held that in virtue of sec. 33 of the Harbour, Docks, and Piers Clauses Act, 1847, incorporated with the Leith Harbour and Docks Acts, 1875 and 1892, and of sec. 58 of the Leith Harbour and Docks Act, 1892, a shipowner was entitled to have access to and egress from any of the docks included in Leith Harbour for any of his vessels free of any charge other than the rates payable under sec. 58 and Schedule (B) of the special Act of 1892 at all times when such access and egress could be given with safety, either by means of the locks giving access to such docks or otherwise, and when accommodation was available, but subject to the right of the harbour-master to give directions for all or any of the purposes set out in the Harbours, Docks, and Piers Clauses Act, 1847, and also subject to the right of the Leith Docks Commissioners to make bye-laws as allowed by that Act or either of their special Acts of 1875 and 1892; and that sec. 60 of the Leith Harbour Act of 1892 entitling the Commissioners to make "reasonable charges for work done, services rendered, facilities afforded, and use of plant," &c., applied only to special facilities (the use of cranes, &c.), asked for and received after the vessel had got access to the harbour and docks.

ON 8th September 1905 the Commissioners for the Harbour and Docks of Leith, incorporated by the Leith Harbour and Docks Act, 1875 (38 and 39 Vict. cap. clx.), sec. 6 (in this report referred to as "the Commissioners"), by minute of that date, passed a resolution in the following terms:—" (1) Locking in and out of vessels * should be allowed in the Albert and Imperial Docks; (2) locking should be limited to two hours after high-water; (3) no locking should be allowed when the water on the Imperial Dock sill is less than 21 ft. 6 in.; (4) no vessel should be locked unless arrangements have been timeously made with the dock-master, according to regulations to be issued by the superintendent; (5) the dock-master should have power to decline to lock in or out any vessel without giving reasons; (6) a charge of £2 for each locking should be made against each vessel arranging to be locked in or out, £1 to be returned in the event of a ship arranging to be locked in or out and not taking advantage of the arrangement." This resolution was subsequently modified by minute of the Commissioners, dated 13th July 1906, by which the charge for locking vessels in and out of the Imperial and Albert

2D DIVISION.
Lord Dundas.

* It appeared that "locking" in or out of a vessel meant letting a vessel in or out of a dock, entered through a lock, by working the lock at times when the lock-gates were closed owing to the state of the tide.

Mar. 17, 1908. Docks was reduced to £1 per vessel. Neither of these resolutions was embodied in a bye-law.

Somerville v.
Leith Docks
Commissioners.

In November 1906 Robert Somerville, shipowner, Dalkeith, and others, the owners of a fleet of steamships trading regularly between Leith and other ports, brought an action against the Commissioners in which they concluded, *inter alia*, for declarator "that the pursuers, upon payment of the rates made payable by section 58 of . . . the Leith Harbour and Docks Act, 1892, and by Schedule (B) to the said Act, are entitled to have access to and egress from the harbour and docks of Leith given to all ships, vessels, barks, boats, or lighters belonging to them or any of them, free of any rate or charge other than the rates made payable by section 58 and Schedule (B) of the said Act, and that at all times when access to and egress from the said harbour and docks can be given with safety either by means of the locks in the said harbour or otherwise, and when accommodation is available"; and for declarator "that the defenders have no legal right or title to . . . exact from the pursuers or any of them or their managers or agents any dues or charges other than the rates made payable as aforesaid for any ships, vessels, barks, boats, or lighters belonging to the pursuers or any of them obtaining access to or egress from the said harbour and docks by means of the locks through which the said docks or any of them are approached."*

* The Harbours, Docks, and Piers Clauses Act, 1847 (10 Vict. cap. 27), incorporated, as regards the sections quoted *infra*, with the Leith Harbour and Docks Act, 1875, and with the Leith Harbour and Docks Act, 1892, by these Acts respectively enacts:—

Sec. 2. "The expression 'the special Act' used in this Act shall be construed to mean any Act which shall be hereafter passed authorising the construction or improving of a harbour, dock, or pier, and with which this Act shall be incorporated; . . . the expression 'the harbour, dock, or pier' shall mean the harbour, dock, or pier, and the works connected therewith, by the special Act authorised to be constructed."

Sec. 3. "The word 'rate' shall mean any rate or duty or other payment in the nature thereof payable under the special Act."

Sec. 33. "Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers."

Sec. 51. "The undertakers may appoint such harbour-masters as they think necessary (including in such expression dock-masters and pier-masters, as hereinbefore defined), and from time to time, as often as they think fit, may remove any such harbour-master."

Sec. 52. "The harbour-master may give directions for all or any of the following purposes; (that is to say),

For regulating the time at which and the manner in which any vessel shall enter into, go out of, or lie in or at the harbour, dock, or pier, and within the prescribed limits, if any, and its position, mooring, or unmooring, placing and removing, whilst therein."

Sec. 83. "The undertakers may from time to time make such bye-laws as they shall think fit for all or any of the following purposes; (that is to say), *inter alia*,

For regulating the use of the harbour, dock, or pier;

For regulating the exercise of the several powers vested in the harbour-master;

For regulating the admission of vessels into or near the harbour, dock,

The facts, as appearing from the averments of parties, so far as material, are sufficiently narrated in the opinion of the Lord Ordinary (Dundas). Mar. 17, 1908.
Somerville v.
Leith Docks
Commissioners.

The pursuers pleaded, *inter alia*;—(1) The charge condescended on (*i.e.*, the charge imposed by the resolutions quoted *supra*) being illegal and *ultra vires* of the defenders, the pursuers are entitled to decree in terms of the conclusions of the summons for declarator. (4) The defenders being bound on a sound construction of the statute regulating the harbour and docks of Leith to afford the pursuers' vessels access to and egress from the said harbour and docks on payment of the statutory rates, the pursuers are entitled to decree as concluded for.

The defenders pleaded, *inter alia*;—(3) The charge for locking in and out being legal in respect that it was made for facilities afforded or services rendered by the defenders in terms of section 60 of the Leith Harbour and Docks Act, 1892, the defenders should be

or pier, and their removal out of and from the same, and for the good order and government of such vessels whilst within the harbour or dock, or at or near the pier."

The Leith Harbour and Docks Act, 1875 (38 and 39 Vict. cap. clx.), enacts:—

Sec. 4. " . . . The expression 'Harbour and Docks' means and includes the Port and Harbour of Leith, and the harbours, docks, quays, piers, and whole other works and property included in the undertaking defined and vested in the Commissioners by this Act, and all future additions thereto and extensions thereof."

This definition is incorporated by reference with the Leith Harbour and Docks Act, 1892, by sec. 4 of that Act.

The Leith Harbour and Docks Act, 1892 (55 and 56 Vict. cap. clxxvii.), enacts:—

Sec. 58. "From and after the commencement of this Act . . . it shall be lawful for the Commissioners, and they are hereby authorised, from and after that date to demand, levy, collect, and receive . . . from the owners of every ship, vessel, bark, boat, or lighter coming into or going out of the harbour and docks or precincts of the port aforesaid, or the agents or managers of such owners, the rates on vessels specified in Schedule (B) to this Act; . . . from every person, company, or body whomsoever who shall use any dry or graving dock now existing or hereafter to be constructed at the harbour and docks as now existing and to be extended as aforesaid, the several rates specified in Schedule (D) to this Act; and from every person, company, or body whomsoever using any cranes, weighing-machines, rails, or sheds now existing or hereafter to be constructed or provided at the harbour and docks, the several rates applicable thereto respectively specified in Schedule (E) to this Act . . ."

Sec. 59. "The Commissioners may from time to time vary the rates by this Act authorised to be levied, or any of them, by reducing or raising the same in such way and manner and to such extent as they deem expedient or necessary, and may reduce or increase the rates on vessels from any place or places specified in Branch I. of Schedule (B) to this Act, without altering the rates on vessels from any other place or places specified in the same group therewith in the said branch of such schedule: Provided always, that no rates shall be increased to more than one-fourth above the amount which would have been leviable in conformity with the Schedules of Rates annexed to the Act of 1875, and that such rates shall at all times be charged equally to all persons in respect of vessels of the same class or description arriving from or sailing for the same port or ports, and in respect of the same class or description of goods, and for and in respect

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assolized. (4) In respect that the pursuers are not entitled to access to and egress from the docks in question free of the charge levied by the defenders when it is impossible *vi naturæ* for the said docks to be open, the declarator sought for should be refused. (5) In respect that the defenders are entitled and authorised to regulate the access to and egress from the docks in question, either by means of regulations or through their harbour-master, and that the pursuers are bound to conform to the defenders' regulations or orders and to the directions of the harbour-master, decree of absolvitor should be pronounced.

On 21st June 1907 the Lord Ordinary, after hearing counsel in the Procedure-roll, pronounced this interlocutor:—"Finds, declares, and decerns in terms of the first declaratory conclusion of the summons, viz., that the pursuers, upon payment of the rates made payable by section 58 of an Act of Parliament entitled the Leith Harbour and Docks Act, 1892 (55 and 56 Vict. cap. clxxvii.), and by Schedule (B) to the said Act, are entitled to have access to and egress from the harbour and docks of Leith given to all ships, vessels, barks, or lighters belonging to them or any of them, free of any rate or charge other than the rates made payable by section 58 and Schedule (B) of the said Act, and that at all times when access to and egress from the said harbour and docks can be given with safety, either by means of the locks in the said harbour or otherwise, and when accommodation is available."*

of anything whatsoever for which such rates are exigible, and that, before any increase on the rates shall take effect, at least twenty-one days' previous notice thereof shall be given in at least one newspaper published in Edinburgh or Leith."

Sec. 60. "The Commissioners shall be entitled to make all reasonable charges for work done, services rendered, facilities afforded, and use of plant, machinery, or appliances provided by them for the dispatch of business at the harbour and docks or the convenience of shipmasters, merchants, and others concerned with the traffic thereat, in so far as such charges are not expressly provided for by this Act."

* "OPINION.—The pursuers are owners of a fleet of steamships trading regularly between Leith and ports in England and on the Continent. The defenders are the Commissioners for the Harbour and Docks of Leith incorporated by the Leith Harbour and Docks Act, 1875 (38 and 39 Vict. c. clx.). The main (if not the only) question is whether or not the pursuers, upon payment of the rates made payable by section 58 of the Leith Harbour and Docks Act, 1892 (55 and 56 Vict. c. clxxvii.), and Schedule (B) to said Act, are entitled to have access to and egress from the harbour and docks of Leith given to their ships and other craft, free of any other rate or charge, 'and that at all times when access to and egress from the said harbour and docks can be given with safety either by means of the locks in the said harbour or otherwise, and when accommodation is available.' This question is one of importance to the parties, but I have not found it to be attended with serious doubt or difficulty. It relates, as explained in the condescendence, really to the three docks known as the Albert, the Edinburgh, and the Imperial respectively, which are, like most modern docks, approached through locks. These three docks are the largest in Leith Harbour, and are suitable for, and used by, the pursuers' vessels. It may be convenient at the outset to explain the general nature and character of the various docks at Leith, all of which are shewn on the small hand-map with which I was furnished at the discussion. The old docks (East and West) were opened about 1806. They were constructed under the autho-

The defenders reclaimed. The case was heard before the Second Division on 31st January and 5th and 6th February 1908. Mar. 17, 1908.

The arguments of parties sufficiently appear from the opinion of the Lord Ordinary.¹ Somerville v
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At advising on 17th March 1908,—

LORD STORMONTH-DARLING.—The harbour and docks of Leith are under the administration of a body of statutory commissioners, whose powers and duties are regulated by two local Acts (of 1875 and 1892), with which is incorporated a public Act—the Harbours, Docks, and Piers Clauses Act of 1847. By the latter Act, section 33, it is provided that “upon payment of the rates made payable by this and the special Act, and subject to the other

ity of an old Act, and were, as the map indicates, approached by a lock; but I am informed that, as matter of fact, this lock has not been used for a long period—more than forty years. The Victoria Dock was constructed about 1852, without the authority of any special Act of Parliament. It has a gate, but no lock. The Albert Dock was opened in 1869, without the authority of any special Act. It is approached by a lock, and is now connected by waterway with the Imperial and also with the Edinburgh Docks. The Edinburgh Dock was opened in 1881, and was among the works authorised by the said Act of 1875. It lies to the east of, and is approached from, the Albert Dock, through an open passage spanned by a swing bridge. The Imperial Dock was authorised by the said Act of 1892, and was opened in 1902. Its entrance lock is mentioned in section 22 (2) and (3) of the Act.

“The question now in dispute was sharply raised when the defenders passed, on 8th September 1905, a resolution—varied later by a resolution dated 13th July 1906—by which the defenders, for the first time, imposed a pecuniary charge for the locking in or out of vessels going to or from the three docks with which this case is concerned.

“The substantive case stated for the pursuers is based upon the following statutory enactments. By section 33 of the Harbours, Docks, and Piers Clauses Act, 1847 (10 Vict. cap. 27), it is provided that ‘upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers.’ By section 2 of the same Act ‘the expression “the harbour, dock, or pier” shall mean the harbour, dock, or pier, and the works connected therewith, by the special Act authorised to be constructed’; and section 3 provides that ‘the word “rate” shall mean any rate or duty or other payment in the nature thereof payable under the special Act.’ Section 4 of the special Act of 1875 (repeated by section 4 of the special Act of 1892) enacts that ‘the expression “harbour and docks” means and includes the port and harbour of Leith, and the harbours, docks, quays, piers, and whole other works and property included in the undertaking defined and vested in the Commissioners by this Act, and all future additions thereto and extensions thereof.’ Section 58 of the said Act of 1892 authorises the Commissioners to levy and collect, *inter alia*, ‘from the owners of every ship, vessel, bark, boat, or lighter coming into or going out of the harbour and docks or precincts of the port aforesaid, or the agents

¹ *Authorities referred to*:—Harbours, Docks, and Piers Clauses Act, 1847, secs. 2, 3, 30, 33, 34-48, 51, 52, and 83-91; Leith Harbour and Docks Act, 1875, secs. 3, 4, 7, 41, 52, 60, 71, 75, and 76; Leith Harbour and Docks Act, 1892, secs. 3, 4, 22 (2) and (3), 58, 59, 60, and Schedules B and E.

Mar. 17, 1908. provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers." The rates here referred to, so far as applicable to rates on vessels, are those specified in section 58 of the special Act of 1892, and Schedule B appended thereto. It is proper to add that by section 59 of the same special Act the Commissioners have power from time to time to vary the rates thereby authorised to be levied by reducing or raising the same to such an extent as they may deem expedient or necessary, under a certain restriction as to the amount of such increase, and with a proviso that such rates shall at all times be charged equally to all persons in respect of vessels of the same class or description, and also that before any increase on the rates shall take effect, at least twenty-one days' previous notice thereof shall

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or managers of such owners, the rates on vessels specified in Schedule (B) to this Act. . . .

"Upon a construction of these sections, the pursuers argue that their vessels are entitled, upon payment of the rates prescribed by section 58 and Schedule (B) of the special Act of 1892, to free access to and egress from the whole harbour, docks, and piers of Leith, including those parts of the same which are accessible only by locks, at all times when such access or egress can be accomplished with safety, and when accommodation is available. As to these last conditions, they concede that the discretion must lie with the defenders' harbour-master, so long as he exercises it fairly and *in bona fide*. I should here explain that the parties agreed in stating that, for two or three hours before high water at each tide, the gates of the locks lie open, and that for some hours thereafter (as to the number of these the parties were not in agreement) the operation of locking a vessel in or out can be carried on with perfect safety; but the defenders say that, if the pursuers' contention is given effect to, they 'will be obliged to keep a large staff of experienced men on duty day and night for the purpose of working the lock gates, and will thus be involved in heavy additional expense.' The matter is thus one of expenditure, pure and simple. I am of opinion that the pursuers' argument is well founded. I think that the statutory provisions to which I have referred give shipowners and others an absolute right, upon payment of the rates prescribed, to demand access to or egress from all parts of the harbour or docks, to or from which such access or egress can be afforded with safety, and due regard to accommodation. A contrary hypothesis might, I think, result in anomalies. In the case, for example, of a harbour to which access can only be obtained by the opening of gates, it would seem that vessels could not demand right to enter the harbour at all, except on payment of some extra charge over and above the rate. But the defenders argued, in the first place, that the pursuers' construction of the Acts would violate the obligation which is admittedly incumbent upon harbour commissioners to treat all classes of shipping upon equal terms. They explained, and it was not disputed, that many vessels—even of the larger classes—coming to Leith do not in fact go into docks at all, but take up their berths in the harbour outside the docks; that others are in use to resort to the Victoria Dock, or to the Old Docks; that others, again, are content to obtain entrance to or exit from the three docks in question at the times above referred to, when the lock gates are lying open; and that some of the vessels which frequent the port of Leith are, owing to their great length, unable to enter these locks at all. The defenders put their case so high as to say that they would not be legally entitled, looking to their duty of equal treatment, to afford to the pursuers' ships the privilege of entry to and exit from the docks in question at times when it was necessary for that purpose to work the lock gates, without some special charge being made over and above the prescribed

be given in at least one newspaper published in Edinburgh or Leith. It is Mar. 17, 1908. further proper to add that by section 60 of the same special Act power is given to the Commissioners "to make all reasonable charges for work done, services rendered, facilities afforded, and use of plant, machinery, or appliances provided by them for the dispatch of business at the harbour and docks, or the convenience of shipmasters, merchants, and others concerned with the traffic thereat, in so far as such charges are not expressly provided for by this Act."

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The pursuers are owners of a fleet of steamships trading regularly between Leith and ports in England and on the Continent. They complain of a certain resolution passed by the Commissioners on 8th September 1905 by which, for the first time, as regards the three newest and largest docks in

'rates.' In my judgment, this argument is fallacious. It is no doubt true that at all ports there are different classes of shipping, with different habits, capacities, and requirements. But if the pursuers' view of this matter is right, as I think it is, all vessels (including those belonging to them) which desired, and were physically able, to enter these docks, would require to be equally dealt with; and it is, I think, nothing to the purpose to say that there are other ships at Leith which either cannot or do not desire to enter the docks at all times when it would be possible to do so with safety, and having regard to accommodation. Then, the defenders relied strongly upon section 76 of the Act of 1875, which is practically repeated by section 60 of the Act 1892. These sections authorise the defenders to 'make all reasonable charges for work done, services rendered, facilities afforded, and use of plant, machinery, or appliances provided by them . . . in so far as such charges are not expressly provided for by this Act.' But, if the pursuers' view as to the policy of the Acts, and the construction of the sections previously dealt with, is correct, as I think it is, getting in or out of these docks, at all times when the gates can with safety and propriety be opened, does not appear to me to be a matter of 'work done,' or 'services rendered,' or 'facilities afforded,' or 'of use of plant, machinery, or appliances provided.' It is matter of right upon payment of the 'rates.' These sections seem to me to have reference not to anything done in the exercise of that right, but to special facilities which may be asked and received after the vessel has obtained due access to the harbour and docks. This view is, in my judgment, confirmed by the total absence in the Acts (with the exception of section 22 (2) and (3) (description of works) of the Act of 1892) of any reference to locks and of any express right on the Commissioners' part to charge for locking vessels in or out. Such operations must, I think, be regarded as mere incidents in that free access to the harbour and docks which is to be had by vessels upon payment of the rates. The defenders also referred to sections 51 and 52 of the General Act of 1847. But I can find nothing there to authorise the Commissioners or their harbour-master to impose an extra charge for locking operations, as they bear to do by their 'resolutions,' quoted upon the record. The defenders have power to pass bye-laws for various purposes, and under certain conditions—section 83 of the General Act of 1847, and section 71 of the special Act of 1875—but, for obvious reasons, they shrank from saying that the desired result could be achieved in that manner; and I do not think that it could.

"Upon the whole matter, therefore, I am of opinion that the pursuers' argument is substantially right, and that they are entitled to decree of declarator in terms of their first crave of the summons. Their counsel stated that, if I should be of that view, they would not press for the further declarator sought."

Mar. 17, 1908. *Somerville v. Leith Docks Commissioners.*
 LdStormonth-Darling. Leith, a change was attempted to be made in the practice of the Commissioners with respect to the admission of vessels to and from these docks, by limiting the locking in and out of vessels to two hours after high-water, by imposing a charge of £2 (afterwards reduced to £1) against each vessel arranging to be locked in or out, and by making other less important changes. These resolutions are said to have been passed without notice in any newspaper, without being posted up as a rate in some conspicuous part of the harbour, and without having been embodied in any bye-law. On the whole matter, it is pleaded that the Commissioners being bound, on a just construction of the statutes, to afford the pursuers' vessels access to and egress from the whole harbour and docks on payment of the statutory rates, are not entitled to make these new and unauthorised charges, and that the resolutions proposing to allow them are illegal and *ultra vires*. The Lord Ordinary has sustained this view, and I think he is right. In pronouncing decree in terms of the first declaratory conclusion of the summons, his Lordship has adopted the final words of that conclusion, "and that at all times when access to and egress from the said harbour and docks can be given with safety, either by means of the said locks in the said harbour or otherwise, and when accommodation is available." That is a qualification in favour of the defenders, but they say there ought to be a further qualification in order to save the right of the harbour-master to give all lawful directions, and also the right of the defenders themselves to make bye-laws. It may be said that these rights are sufficiently secured by statute (particularly secs. 52 and 83 of the public Act of 1847). But Mr Clyde for the pursuers did not object to these rights being expressly reserved, and I think that our decree should contain some such additional words as these,—"And without prejudice to the right of the harbour-master to give directions for all or any of the purposes set out in the Harbours, Docks, and Piers Clauses Act, 1847, and also without prejudice to the right of the defenders to make bye-laws as allowed by the same Act or by either of the special Acts."

The defenders do not attempt to explain why the statutes give no express right to charge for locking vessels in or out, nor why it was not till 1905 that they themselves attempted to impose such a charge. They say a good deal about the additional expenditure which they will have to incur if the pursuers' contention is given effect to, in wear and tear of dock gates, and in keeping a large staff of experienced men to work those gates. But they say nothing to displace the pursuers' argument upon the statutes—an argument which, I think, Mr Macmillan put very tersely when he maintained that once the pursuers had paid their rates under section 58, they were enfranchised of the whole harbour. At least the only counter argument which the defenders urge upon the statutes is to refer to section 60 of the special Act of 1892, which I have already recited. Now, the Lord Ordinary's contention on section 60, with which I entirely agree, is that it deals only with charges for special facilities which may be asked for and received after the vessel has obtained due access to the harbour and docks and for which (I may add) no charges are expressly provided by the Act. One has only to look at the schedules appended to the Act of 1892 to see how many different kinds of special facilities are afforded in these docks, for all of which there

are special rates. I need only mention graving dock, cranes, rails, steelyards, and sheds for different kinds of goods. For all of these it is quite right that special rates should be provided, because only special ships require to make use of them. In like manner, according to the progress of mechanical invention, new kinds of appliances may come into use, for which it may be reasonable that the Commissioners should make a special charge, as, for instance, if they make a new installation of electric lighting in a particular part of the docks, and allow its use for the convenience of merchants concerned with the traffic thereat. That is the kind of charge which section 60 contemplates, and not the use of a lock, which is truly part of the dock accommodation, and is intended for "all persons" who may frequent the docks on payment of the scheduled rates.

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Darling.

If the Lord Ordinary is right as to the first declaratory conclusion, it was not contended that the rest of the interlocutor could be successfully challenged, and I am therefore for adhering (with the addition which I have suggested), with expenses.

LORD ARDWALL—I agree with the opinion which has been delivered by Lord Stormonth-Darling. There is certainly an appearance of equity in the defenders' resolution of 8th September 1905, because undoubtedly the entrance or egress of vessels to and from the docks by means of the locks after the lock gates have been closed for the time imposes work upon the defenders' servants beyond that which is necessary when the locks are open for three hours before each high tide, when of course vessels pass in and out without causing any more trouble than is involved in the regular opening of the dock gates previous to high tide once every twelve hours or thereby. But this fact does not necessarily entitle the defenders to make an extra charge in respect of the passage of vessels in or out of the docks by means of the locks after the level of the water in the outer harbour has fallen below the level of the water in the docks. They must shew that the pursuers are obtaining some privilege over and above the rights conferred on them by statute in return for payment of harbour dues, or otherwise they must shew that there is a special provision in the Harbour Acts entitling them to make the extra charge of £1 per vessel.

In considering this case it must be observed that the locks and gates are part of the harbour works specially authorised to be made in virtue of the powers contained in the Acts empowering their construction just as much as are the docks themselves, and the water lying between the two gates of the locks is as much part of the harbour as the water in the outer harbour or the water in the docks. This being so, I think it follows that all vessels are entitled to the use of the locks and the water therein on payment of the statutory harbour dues entitling them to the use of the harbour in terms of section 33 of the Harbours Act of 1847.

The defenders obtained powers to make these docks and locks presumably with the view to making the harbour of Leith more available for commerce and more attractive to shipping, and, *inter alia*, to shipping consisting of steamers sailing as regular liners at stated periods to and from Continental ports, and I think it is contrary to the policy of the Harbour Acts as well as to sound considerations of public policy that the advantage afforded to

Mar. 17, 1908. steamers of a certain size of being able to get in and out of the docks at any suitable state of the tide should form the subject of a special impost. I am of opinion that it must be held that such extra labour as may be necessary for working the dock gates is labour necessary to render available the ordinary harbour waterways, and therefore should not form the basis of a claim for an extra charge on vessels taking advantage of the convenience afforded by the locks.

Somerville v.
Leith Docks
Commissioners.

Lord Ardwall.

Defenders' counsel, however, founded strongly upon section 76 of the Leith Harbour and Docks Act, 1875, and section 60 of the subsequent Act of 1892, which are in similar terms, and which authorise certain charges to be made. In my opinion these sections do not apply to a charge such as the present, but to charges for work done, services rendered, and facilities afforded, and the use of plant, after a vessel has got to her berth in the harbour, and do not apply to the use of the harbour itself or any of the waterways forming part thereof. I accordingly think that the interlocutor of the Lord Ordinary is well founded, but I agree with the opinion that both the conclusion of the summons and the portion of the interlocutor are too wide when they declare that the pursuers are entitled to have access and egress "at all times when access to and egress from the said harbour and docks can be given with safety, either by means of locks in the said harbour or otherwise."

Nothing is said in this case as to the engineering questions involved in the use of the locks for the passage of vessels when the level of the water in the outer harbour has fallen to a certain number of feet below the level of the water in the respective docks, or whether the locks may be safely used at all states of the tide, provided there is water sufficient in the outer harbour for the passage of vessels, and so on. These matters are not before us, and in fact it was not until the debate had proceeded a considerable length that the Court were given to understand that there was really any question at issue except the right of the defenders to make the extra charge of £1 for the right of passage through the locks when they were not open at any rate. I accordingly concur with Lord Stormonth-Darling that there should be a qualification inserted in the Lord Ordinary's interlocutor in case of possible difficulties in the working of the locks at all times of the day and night.

LORD JUSTICE-CLERK.—I concur in the judgment of Lord Stormonth-Darling.

LORD LOW was absent at the hearing.

THE COURT pronounced this interlocutor:—"Refuse the reclaiming note: Adhere to the . . . interlocutor reclaimed against, with the following addition thereto, viz., 'but without prejudice to the right of the harbour-master to give directions for all or any of the purposes set out in the Harbours, Docks, and Piers Clauses Act, 1847, and also without prejudice to the right of the defenders to make bye-laws as allowed by the same Act or by either of the special Acts'; and with the foregoing variations affirm the said interlocutor reclaimed against, and decern."

BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—VICTOR A. NOËL PATON, W.S.—Agents.

No. 116.
Mar. 17, 1908.

REV. WILLIAM WATSON, Pursuer and Real Raiser.—*Chree*.
ROBERT ALLAN AND OTHERS, Claimants (Reclaimers).—*Dickson, K.C.*
—*Macmillan*.

THE VERY REV. JOHN M'MURTRIE, D.D., AND OTHERS (Foreign Missions Committee of the Church of Scotland), Claimants (Respondents). *Executors v. Allan's*
Clyde, K.C.—*Hon. W. Watson*.

REV. ALEXANDER MILLER, D.D., AND OTHERS (Foreign Missions Committee of the United Free Church of Scotland), Claimants (Respondents).—*Clyde, K.C.*—*Cowan*.

Charitable and Educational Bequests and Trusts—Constitution—Uncertainty—"Foreign Missions"—Executor.—A Scottish testator, by his holograph general settlement, provided,—“The residue of my property I give and bequeath for the benefit of foreign missions in India, China, Africa, and South America, or any other in the foreign field suitable. I appoint the Rev. W. Watson, Kiltarn, as my executor, at a remuneration of £20 sterling.”

Held that the bequest was a bequest for charitable purposes, and was not void from uncertainty, the bequest being to a definite class, coupled with the appointment of a person (the executor) having power to select the objects falling within the class on whom the benefit of the bequest was to be conferred.

Dundas v. Dundas, Jan. 27, 1837, 15 S. 427, *followed*.

THE pursuer and real raiser in this action of multiplepointing was the executor-nominate of Donald Allan, M.D., Evanton, Ross-shire, who died on 24th August 1906, leaving a holograph will in the following terms:—“I, Donald Allan, M.D., Evanton, in the county of Ross and Cromarty, make the following disposition of my property, moveable and heritable:—I hereby give, devise, and bequeath [certain legacies]. The residue of my property I give and bequeath for the benefit of foreign missions in India, China, Africa, and South America, or any other in the foreign field suitable. I appoint the Rev. W. Watson, Kiltarn, as my executor, at a remuneration of Twenty pounds stg.”

1st Division.
Lord Mac-
kenzie.

The fund *in medio* was the residue of Dr Allan's estate.

The claimants were (1) Robert Allan and others, the whole next of kin of the testator and the whole parties interested in his intestate succession, both heritable and moveable; (2) the Very Rev. John M'Murtrie, D.D., and others, being the Foreign Missions Committee of the General Assembly of the Church of Scotland, and (3) the Rev. Alexander Miller, D.D., and others, being the Foreign Missions Committee of the United Free Church of Scotland.

No claim was lodged by the executor.

The claimants Robert Allan and others claimed the whole fund *in medio*, and pleaded;—(1) The bequest of the residue of the deceased's estate contained in his said holograph will being void from uncertainty, the said residue has fallen into intestacy. (2) The claimants, being the parties entitled to succeed to the deceased's estate *ab intestato*, are entitled to be ranked and preferred on the fund *in medio* in terms of their claim. (3) The Foreign Missions of the Church of Scotland and the United Free Church of Scotland being, neither of them, sufficiently identified as the missions to which the deceased intended to bequeath the residue of his estate, the claims stated on behalf of these missions should be repelled.

The claimants the Foreign Missions Committee of the Church of Scotland averred that they were the foreign missions designated by

Mar. 17, 1908. the testator, and stated the grounds upon which their contention was based.*

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Allan.

They claimed (1) to be ranked and preferred to the whole of the residue absolutely, or otherwise, to the whole of the residue, subject to such directions with regard to distribution among the claimants' foreign missions as may be directed by the pursuer and real raiser. (2) Alternatively, to be ranked and preferred along with the claimants the Foreign Missions Committee of the United Free Church of Scotland to the whole of the residue in equal portions absolutely, or otherwise, to the whole of the residue in equal portions, subject to such directions with regard to the distribution of the said equal portions among the claimants' foreign missions and those of the United Free Church of Scotland as may be directed by the pursuer and real raiser.

They pleaded;—(1) The claimants' missions being those designated by the testator as his residuary legatees, are entitled to be ranked and preferred absolutely in terms of the first alternative of the first claim, or otherwise, to be ranked and preferred in terms of the second alternative of their first claim, subject to such directions as the pursuer and real raiser may give with regard to the appropriation thereof among the particular missions of the claimants' Church. (2) Alternatively, the foreign missions of these claimants' Church, and those of the claimants the Foreign Missions Committee of the United Free Church of Scotland, being those designated by the testator as his residuary legatees, are entitled to be ranked and preferred to the whole residue in equal portions absolutely, or otherwise, to the whole of the residue in equal portions, subject to such directions with regard to the distribution of the said equal portions among the claimants' foreign missions and those of the United Free Church of Scotland, as may be directed by the pursuer and real raiser.

The claimants the Foreign Missions Committee of the United Free Church of Scotland averred that they were the foreign missions designated by the testator, and stated the grounds upon which their contention was based.*

The claim and the pleas for these claimants were in the same terms as those stated for the Foreign Missions Committee of the Church of Scotland.

On 21st November 1907 the Lord Ordinary (Mackenzie) allowed a proof before answer.†

* The nature of these averments is stated in the opinion of the Lord Ordinary.

† "OPINION.—This is a multiplepinding with reference to the residue of the estate of the late Dr Allan, Evanton, Ross-shire, who died on 24th August 1906.

" . . . The next of kin maintain that this bequest of residue is void from uncertainty, and that they are accordingly entitled to succeed as heirs *ab intestato*.

"Claims have been lodged by the office-bearers of the Foreign Missions Committee of the General Assembly of the Church of Scotland, and also by the joint secretaries of, and as such representing, the Foreign Missions Committee of the United Free Church of Scotland, and the joint general treasurers of the United Free Church of Scotland, who, as such, are joint treasurers of the Foreign Missions Committee. These two sets of claimants originally claimed that each was entitled to the whole of the residue, but these claims are not insisted in, and they now make common cause against

The claimants Robert Allan and others reclaimed.

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The case was argued before the First Division on 21st January 1908.

Argued for the reclaimers;—The Lord Ordinary's judgment could not be supported on the ground stated by him. This was not a case of a bequest to a definite person insufficiently designated. The terms of the bequest were so vague that no proof was competent to shew whom the testator meant to benefit. Nor could the respondents take advantage of the rule stated in *Crichton v. Grierson*,¹ approved in *Blair v. Duncan*,² and applied in *Dundas v. Dundas*,³ the rule, namely, that a bequest was valid if made in favour of a definite class, with power to a person named to select the objects within that class. Both of these essentials were lacking, for there was neither a definite class nor a person with power to select.⁴ The disjunctive clause "or any other" would include missions of any kind existing or not existing at the testator's death. This was not a charitable bequest,

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the next of kin. Their claims are alternative—(First) each claims to be ranked and preferred along with the other to the whole of the residue in equal portions absolutely; or otherwise, they claim to be ranked and preferred to the whole of the residue in equal portions, subject to such directions with regard to the distribution of the said equal portions among the foreign missions as may be directed by the pursuer and real raiser, the executor. No claim is lodged by the executor.

"The first alternative is based upon the argument that, on a sound construction of the settlement, the bequest of residue was not for the benefit of the purposes of foreign missions, but was for the benefit of certain definite foreign mission schemes; that is to say, the Churches put their claim upon the ground that this is a bequest to definite legatees insufficiently designed, and that, under the authorities, they are entitled to prove who the testator intended to benefit—*Scottish Missionary Society*, 20 D. 634; *Wilson's Executors*, 8 Macph. 233. It is averred that the testator was born in the parish of Kiltearn, and practised medicine in Bonar Bridge for about twenty years; that he then, about 1886 or 1887, left Bonar Bridge and settled at Evanton, where he lived until his death, and practised to a limited extent. He was thus a domiciled Scotsman, and had been a member of the Church of Scotland all his life. In the claim for the Foreign Missions Committee of the Church of Scotland it is averred—'At the date of his death the testator was in full communion with the Church of Scotland, having for the last six years prior to his death attended his brother-in-law's church in the parish of Kiltearn. During that period he gave general contributions to the parish church at Kiltearn, and through that church, to the schemes of the Church of Scotland, including the foreign mission scheme of that Church. Prior to December 1900 the testator had been a member of the old Free Church of Scotland, but, upon the union of that church with the United Presbyterian Church, he attended and became a member of the Church of Scotland, and continued to be so until his death.'

"The Foreign Missions Committee of the United Free Church aver:—'He regularly contributed to the foreign missions of the Free Church of Scotland, at Bonar Bridge, and thereafter in Kiltearn, the parish in which Evanton is situated, up to the date of the union of the Free Church and United Presbyterian Church in 1900. After that date, as there was no United Free Church in his district, the testator, in December 1900, became a member of the Church of Scotland at Kiltearn, of which his brother-in-law, the pursuer, was and is minister. The foreign missions formerly carried

¹ July 25, 1823, 3 W. & S. 329, per L. C. Lyndhurst, at p. 338.

² Dec. 17, 1901, 4 F. (H. L.) 1.

³ Jan. 27, 1837, 15 S. 427.

⁴ *Robbie's Judicial Factor v. Macrae*, Feb. 4, 1893, 20 R. 358.

Mar. 17, 1908. and was not entitled to the favourable consideration accorded to bequests of that nature.¹ The wide definition of "charitable bequests" which was given effect to in *Pemsel*,² was dissented from by Lord Halsbury and Lord Bramwell, and in any event did not cover this bequest.

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Argued for the respondents the Foreign Missions Committees of the Church of Scotland and of the United Free Church of Scotland;—There was a definite legatee to whom the bequest had been left. The only difficulty arose from the insufficiency of the designations, and the exact identity of the legatee was a proper matter to be remitted to proof.³ In any event, the bequest fell to be sustained as being a bequest to a definite class combined with a power of selection in a person named by the testator. "Foreign missions" had a definite meaning, which would give validity to the will, and the Court would accordingly assume that that was the meaning intended by the

on by the Free Church of Scotland are now, and have been since the union of that Church with the United Presbyterian Church, carried on in their entirety by the United Free Church of Scotland.' Each of these claimants avers that the foreign missions of the claimant's Church are those designated by the testator as entitled to his residue, or, alternatively, that the residue falls to be equally divided between them. It is also averred that the Church of Scotland and 'the United Free Church of Scotland are the only two Churches in Scotland who have foreign missions of an organised character. They both have extensive missions in India, China, and Africa, as well as in other places.' These averments appear to me to be sufficient to entitle the claimants to a proof.

"The alternative contention for the Churches is founded upon a proposition well settled in law, and which is thus stated by the Lord Chancellor (Lord Lyndhurst) in *Crichton v. Grierson*, 3 W. & S. 329—'According to the authorities in the law of Scotland it is quite clear that a man may, in the disposition of his property, select particular classes of individuals and objects, and then give to some particular individual a power after his death of appropriating the property or applying any part of his property to any particular individuals among that class whom that person may select'—*Blair v. Duncan*, 4 F. (H. L.) 5.

"If, however, the testator did not intend to bequeath his residue to certain foreign mission schemes—if he intended to bequeath it for the benefit of foreign mission purposes generally—I am unable to hold, in view of the decided cases, that this was a sufficient selection of particular classes of individuals and objects. Assuming that the term foreign missions occurring in a will such as this is necessarily confined to religious missions and excludes all others, e.g., medical missions, the case seems to me to fall directly under the case of *Macintyre v. Grimond's Trustees*, 6 F. 285, 7 F. (H. L.) 90, for the reasons given by Lord Moncreiff in the Court of Session, which were expressly approved by the Lord Chancellor in the House of Lords. I am of opinion that Dr Allan's bequest, if it is so interpreted, is not sufficiently specific to be supported. A bequest for religious purposes is not, in Scotland, construed as meaning a bequest for charitable purposes.

"Even if it could be held that the testator had selected particular classes

¹ *Murdoch's Trustees v. Weir*, 1907, S. C. 185, aff. *supra* (H. L.), p. 3; *Grimond or Macintyre v. Grimond's Trustees*, Jan. 15, 1904, 6 F. 285, rev. March 6, 1905, 7 F. (H. L.) 90.

² *Income-Tax Commissioners v. Pemsel*, [1891] A. C. 531.

³ *Scottish Missionary Society v. Home Mission Committee*, Feb. 19, 1858, 20 D. 634; *Wilson's Executors v. Scottish Society for the Conversion of Israel*, Dec. 2, 1869, 8 Macph. 233; *Miller's Trustees v. Kirkcaldy and Others*, Oct. 27, 1905, 13 S. L. T. 73 and 454.

testator.¹ The clause "or any other," extended the field, but did not render the class of objects more vague. There was an appointment of an executor to whom the testator had delegated the duty of selecting the objects, and this distinguished the case from those in which no such appointment had been made and where the bequest had been held void.² This was a holograph will, not prepared by a lawyer, and in such a case the Court were willing to overlook the absence of legal form in order to ascertain and give effect to the wishes of the testator.³ Further, this was, in effect if not in name, a charitable bequest, and as such entitled to favourable consideration. Provided the general intention were clearly indicated, the Court would always give effect to such a bequest, if necessary, by preparing and approving of a scheme.⁴

At advising,—

LORD KINNEAR.—The question in this case is whether a certain bequest is void by reason of uncertainty. The will is a very simple one, and whatever doubt may arise as to the efficacy of the bequest in dispute its mere interpretation, in my opinion, does not present any serious difficulty.

The testator leaves certain legacies of no great amount to relations, and a legacy of £10 to a servant, and then he proceeds,—“The residue of my property I give and bequeath for the benefit of foreign missions in India, China, Africa, and South America, or any other in the foreign field suitable. I appoint the Rev. W. Watson, Kiltarn, as my executor, at a remuneration of £20 stg.” It appears to me that there can be no uncertainty as to the meaning of these words. I cannot think it doubtful that “foreign

of individuals and objects, he has failed to give to some particular individual power after his death of appropriating the residue. It is to be observed that there is here no trust. The bequest of residue is a direct bequest. The testator's brother-in-law is appointed as his executor. It is said that under the Executors (Scotland) Act, 1900, section 2, the term executor is equivalent to trustee. In my opinion, this does not affect the point of importance, which is that no discretionary power of selection is given to anyone under the will, nor do I think that such a power can be implied—*Low's Executors*, 11 Macph. 744. As is pointed out by Lord M'Laren in *Robbie's Judicial Factor*, 20 R. 363, the appointment of *hæres fiduciarius* with a power of selection is essential to the existence of such a bequest, because, in the absence of such a grant of power of selection, the legacy would fail from uncertainty.

“If the claimants represent the foreign missions which the testator intended to benefit, they do not need to be selected by the executor in the exercise of any discretionary power. (On the mere question of relevancy, I do not find it stated on record that he has selected them.) If the claimants require to be selected by the executor before becoming entitled to anything under the residue clause, then they are obliged to found upon a bequest which, as I have already said, is not sufficiently definite. The duty which would, according to the claimants' argument, be placed upon the executor would be the definition of a class, not the selection from a class defined.”

¹ Whicker v. Hume, 1858, 7 Clark, 124, *per* L. C. Chelmsford, at p. 154.

² *E.g.*, *Low's Executors and Others*, June 21, 1873, 11 Macph. 744.

³ Scott v. Scales, July 20, 1865, 3 Macph. 1130, *per* Lord Neaves, at p. 1139.

⁴ *Magistrates of Dundee v. Morris*, May 1, 1858, 3 Macq. 134; *Presbytery of Deer v. Bruce*, Jan. 20, 1865, 3 Macph. 402; *Income-Tax Commissioners v. Pemsel*, [1891] A. C. 531; *White v. White*, [1893] 2 Ch. 41.

Mar. 17, 1908. missions" in the mouth of a Scottish testator means an enterprise conducted by some Church or association in this country for the propagation of the Gospel in foreign parts. The bequest therefore, is, in my opinion, very clearly a bequest for the benefit of foreign missions. But then the testator does not define the particular missions which are to be benefited, nor the particular Church or association by which these missions are to be conducted. It is a bequest in favour of foreign missions in general; and so considering it, I should agree with the observation of the Lord Ordinary that it is not sufficiently specific to be supported unless the testator has given a power to a trustee acting for him to select among the class of foreign missions those to which the bequest is to go. But then immediately following the bequest to the foreign missions there is the appointment of the Rev. Mr Watson to be the testator's executor. This is a will in ordinary language, written by a layman, and in ascertaining what he means by appointing an executor I do not think that we are concerned at all with any technical difficulties arising from the distinction, if there be such in the present state of the law, between the office of a trustee and the office of an executor strictly so called. What the testator means is to appoint somebody who is to carry out the purposes of his will, and as mere matter of construction it appears to me that when he says, "I give certain legacies to certain people, and give the residue for foreign missions, and appoint Mr Watson to be my executor," he means that Mr Watson is to execute all the provisions of the will, not only by paying the legacies to the persons named, but also by carrying out what is really in point of money the largest interest in the will, and so giving effect to the provision for the benefit of foreign missions.

As matter of construction that appears to me to follow, because I cannot imagine that the testator intended to appoint an executor to carry out the provisions of his will, and to exclude from the provisions which are so to be executed any one of those which the will contains. He is to carry into execution the will and every part of it, and that imports, in my opinion, a power to the executor to do whatever is requisite in order to carry out these provisions. I put this as mere matter of construction, but I add that since the passing of the Executors Act of 1900,¹ the argument founded upon the difference between trustee and executor is no longer maintainable, because under that Act an executor has all the powers of a trustee.

The point, however, appears to me to be directly decided in the case of *Dundas v. Dundas*,² which I think is entirely in point. In that case, after leaving certain legacies, the testatrix provided as follows:—"Any money left after paying all expenses I wish may be laid out on charities. I leave and bequeath to my nephew, John Dundas, the sum of £200 sterling, with power to see this will executed." It was held that the bequest, when combined with the appointment of the defender as executor, imported a discretionary power on his part to select the charities upon which the benefit was to be conferred. Lord Fullerton (Ordinary) says—"In sound construction this must be held to import a discretionary power in the executor to make that selection of charities without which her will in regard to the

¹ 63 and 64 Vict. cap. 55.

² 15 S. 427.

immediately preceding legacy could not be carried into effect." Then he adds—"This construction, of course, brings the case within the rule established in the case of *Crichton v. Grierson*.¹" Following that decision it appears to me that the question we have to determine is whether the bequest to foreign missions, with an appointment of executor, which implies the power to carry out all the directions of the will, does or does not fall within the rule which the Lord Ordinary cites in *Crichton v. Grierson*,¹ where the Lord Chancellor (Lord Lyndhurst) says—as quoted in *Blair v. Duncan*²—"According to the authorities in the law of Scotland it is quite clear that a man may in the disposition of his property select particular classes of individuals and objects, and then give to some particular individual a power after his death of appropriating the property or applying any part of his property to any particular individuals among that class whom that person may select." The Lord Ordinary observes that, giving effect to that rule, the bequest in question is not sufficiently specific to be supported, and adds—"A bequest for religious purposes is not in Scotland construed as meaning a bequest for charitable purposes." There can be no doubt that these two words have different significations, but they are not mutually exclusive. A bequest for religious purposes may very well be a bequest for charitable purposes, and if there were any question as to the meaning of the words it appears to me that that is not a question which requires to be considered in this case. It is not necessary that we should define either the one or the other of these expressions exactly. If it were necessary, I myself think that since the decision of the House of Lords in the case of *Pemsel*,³ I should not be able to admit that the meaning of the word "charity" has been in this country so narrowed by popular usage as the learned Judges who decided the case of *Baird's Trustees v. The Lord Advocate*⁴ held that it was. But then, as I have said, I do not think that is a question we need to determine. It may very well be that a bequest for religious purposes in general could not be sustained as sufficiently specific even although a bequest for charitable purposes could be made effectual. But it does not follow that a will for a special purpose is the less capable of being sustained because that special purpose falls within the general description of religious purposes. The rule for the application of the doctrine laid down in *Crichton v. Grierson*¹ appears to me to be found in a comparison of the recent decisions of the House of Lords—the cases of *Blair v. Duncan*,⁵ *Macintyre v. Grimond's Trustees*,⁶ and *Murdoch v. Weir*.⁷ In the first of these cases the rule is stated with great precision by Lord Robertson, who says—"What has been established as regards the intervention of a trustee is thus stated by Lord Lyndhurst in *Crichton v. Grierson*,¹ and the passage touches the very core of the present case." His Lordship then goes on to cite the passage quoted by the Lord Ordinary, and adds—"This is the rule which is to be applied in the present case, and the question is, Has this testatrix done what Lord Lyndhurst describes—

¹ 3 W. & S. 329.

² 4 F. (H. L.) 1, per Lord Robertson, at p. 5.

³ Income-Tax Commissioners v. Pemsel, [1891] A. C. 531.

⁴ 15 R. 682.

⁵ 4 F. (H. L.) 1.

⁶ 6 F. 285, 7 F. (H. L.) 90.

⁷ *Supra*, (H. L.) 3.

Mar. 17, 1908. has she selected a particular class or particular classes of objects among which her trustee is to select?" Applying that test to the will before them
 Allan's Executor v. Allan. in which a bequest had been made for charitable or public purposes, Lord Robertson was of opinion, and the House was of the same opinion, that in making this bequest "this testatrix has done nothing like selecting a particular class or particular classes of objects. She excludes individuals, and then leaves the trustee at large, with the whole world to choose from. There is nothing affecting any community on the globe which is outside the ambit of his choice." Therefore, in the application of the rule to that case, the bequest was held to be too wide, because there was nothing approaching the particularisation of the class to be benefited.

A similar decision was given in the later case of *Macintyre v. Grimond's Trustees*.¹ The question concerned a bequest for religious purposes, which was also held to be too wide as embracing a great variety of possible objects without particularisation of the class. On the other hand, in the last case of all, in *Murdoch's Trustees v. Weir and Others*,² the House of Lords came to a different decision, and the bequest was sustained, the Lord Chancellor putting the rule in this way,—he says with respect to the criticisms which are applied to charitable bequests,—“All that can be required is that the description of the class to be benefited shall be sufficiently certain to enable men of common sense to carry out the expressed wishes of the testator.” That is, therefore, the rule which is held to be established by *Orichton v. Grierson*³ and the subsequent cases, and the question to be put in each particular case is whether the description of the class to be benefited is sufficiently exact to enable an executor of common sense to carry out the expressed wishes of the testator. I cannot entertain any doubt that an executor of reasonable common sense and reasonable knowledge of such affairs as the will deals with will have no difficulty in determining whether any particular purpose is or is not a purpose falling within the class to be benefited by the bequest to foreign missions.

It is said that in order to have the benefit of the general rule the bequest must be what has been described as a charitable bequest. I do not think that is the true deduction from the leading decision of *Orichton v. Grierson*,³ because the Lord Chancellor in examining the whole series of the decisions cites a great number of cases which have no relation to charity at all. But if there be any particular favour which the law requires Courts to shew in construing charitable bequests, then I am of opinion that this particular bequest now in question falls within that class. I think that is the necessary conclusion from the judgment of Lord Watson in the case of *Pemsel*,⁴ where his Lordship, after narrating the considerable number of legislative provisions, goes on to say, “that Scotch trusts which are *ejusdem generis* with trusts falling within the statute of Elizabeth (in England) are charitable in this sense that they are all governed by the same rules which are applicable to charitable trusts in England.” That a trust for the benefit of foreign missions falls within the description of “pious and godly uses,” which, Lord Watson says, is equivalent to charitable uses, seems to me beyond all reasonable doubt.

¹ 6 F. 285, 7 F. (H. L.) 90.

³ 3 W. & S. 329.

² *Supra* (H. L.) 3.

⁴ [1891] A. C. 531, at p. 561.

But I think that has been directly decided by this Court in the case of *Mar. 17, 1908. Wilson's Executors v. The Scottish Society for the Conversion of Israel*.¹ The precise question to be determined in that case was different from that with which we are now concerned, because the testator had certainly designated the particular association to be benefited by the bequest, and did not merely bequeath, as I think this testator does, to a class of associations among which his trustee is to select. But the point for which I cite the decision is that in considering how far effect should be given to the evidence adduced for the purpose of identifying the particular society as that which the testatrix intended to benefit, the Lord President treated the case as a charitable bequest, and upon that ground only finds it possible to give weight to evidence which, if he were dealing with another class of bequests, he would not have thought sufficient. His Lordship says,—“Having arrived at the conclusion that the testatrix, in making a charitable bequest of this kind, intended to give her money to some society for promoting the conversion of the Jews, and that there are several societies more or less nearly answering to the description in the will, it is the duty of the Court to decide which of them she meant, even although they are not all claiming in this process, and although we can only arrive at a decision by reasonable conjecture as to her probable meaning”; and on that principle, which, in the next sentence of his opinion, he says is not entirely satisfactory to his mind as a lawyer, he nevertheless founds his judgment. It is to be observed that notwithstanding the somewhat restricted meaning which he found it necessary to put upon the word “charity” in construing the Income-Tax Act, the Lord President has no hesitation in describing the bequest for the conversion of the Jews as a “charitable bequest,” and on that ground he thinks it proper to follow the course of the decisions requiring bequests for charities to be favourably interpreted by the Courts.

I think we ought to follow the same rule in this case, and that we must therefore find that the residuary bequest of the testator, when it is combined with the appointment of the real raiser as executor, imports a discretionary power on his part to select the missions on which the benefit of the bequest is to be conferred. He is of course to exercise his discretion as a trust committed to him, and not merely according to his own favour for one or other association for prosecuting foreign missions. It is a discretion which, as I read the will, the testator intended to confer upon him, and which he is therefore empowered to exercise. Taking this view, I think it follows that the Lord Ordinary's interlocutor ought to be recalled. The Lord Ordinary has allowed parties a proof of their averments. Now, the averments to be proved are averments made by the Established Church of Scotland on the one hand and the United Free Church on the other as to certain circumstances in the history of this testator which are supposed to indicate a favour on his part either for the Established Church or for the United Free Church. If the question were whether this testator intended to benefit one or other of these Churches to the exclusion of the other, or to the exclusion of other missionary associations, I am not persuaded that the facts specified would aid the Court very much in forming a judgment upon that question. They

Mar. 17, 1908. would come to nothing more than evidence which might suggest to the mind of a Judge a conjecture in favour of one or other of the Churches. But since
 Allan's Executor v. Allan. I hold that the testator did not intend to favour either Church to the exclusion of the other, but foreign missions generally, it is obvious that the proof
 Lord Kinnear. allowed could not assist the Court in coming to a conclusion.

I do not think it would be proper at this stage to repel the claims of these two Churches. While each has stated its own case they have combined to state a case as against the next of kin in support of the validity of the bequest, however it is to be administered, and I think it would be premature to pronounce any judgment which would put them out of Court at any further stage which must be reached before final judgment can be given.

I suggest that it would be proper to recall the Lord Ordinary's interlocutor, and to remit to him to allow the real raiser, if so advised, to lodge a claim in order that the trusts of the will may be executed, and thereafter to proceed as shall be just. The parties are in Court, and I think they ought to be allowed to remain in the process until we see what course the real raiser may be advised to take.

LORD PRESIDENT.—I agree entirely with the opinion which Lord Kinnear has just delivered, and I only propose to add a very few words. It is impossible, in my opinion, to read the will and to suppose, as the Lord Ordinary has done, that this is a case of a certain scheme or schemes insufficiently designed, and that the claimants are entitled to prove whom the testator intended to benefit. My reason is that the phrase "or any other in the foreign field suitable" clearly points, I think, to a power of selection somewhere. Accordingly I cannot agree with the propriety of allowing a proof to substantiate the averments to which Lord Kinnear has alluded, because I do not think it would forward the case one iota. The general question is whether the bequest shall stand. Now, as to the general rule, of course there is no doubt. It is the rule laid down by the Lord Chancellor in *Crichton v. Grierson*.¹

But then it was argued that this bequest fails in two particulars. It was said that there was not a selection of a particular class of objects—not a sufficient specification. I think there is, because I agree with what Lord Kinnear says, that foreign missions in the mind of a Scottish testator has a perfectly well understood meaning. It does not seem to me to help the matter to introduce the discussion which was handled by the House of Lords in *Blair v. Duncan*² and *Macintyre v. Grimond*,³ because there is here no question as to the interpretation of "religious." Of course it has now been decided that a bequest for "religious purposes" is too wide to be given effect to. That does not mean that you may not have a perfectly well defined purpose which might be properly characterised as a religious purpose. And accordingly it seems to me that a bequest to foreign missions is sufficiently defined, and that it is not hurt by saying that it is a religious purpose. Then comes the second alleged defect, that there is here no power of selection. But there is the appointment of an executor. It is quite true that it is not said that that executor is to do the

¹ 3 W. & S. 329.

² 4 F. (H. L.) 1.

³ 7 F. (H. L.) 90.

choosing, but then there comes in the other canon, namely, that the Court Mar. 17, 1908. will always help the execution of a charitable bequest. There again I agree with Lord Kinnear that a bequest of which it is possible to say that it is a religious bequest may also be a charitable bequest. I have no doubt that this is a charitable bequest, and if that is so, then the Court will be helpful, so far as machinery is concerned, to have the purpose carried out. In other words, we have a direct application of the old authority of the *Magistrates of Dundee v. Morris*,¹ the case of a Dundee charity, and, I think, the very recent case of *Murdoch v. Weir*.² Accordingly I concur with what your Lordship has proposed. But in case there is any doubt about it, I should like to explain that the pursuer and real raiser should be allowed to lodge a claim, and it follows that if he does lodge a claim in accordance with the judgment pronounced, his claim will be sustained. It is not because there is any doubt about that that Lord Kinnear proposes at this stage not to repel the claims of the two Churches. It is only because one cannot force Mr Watson to make a claim, and it would not be right to have the multiplepounding disappear altogether. Should Mr Watson not do so, it would then be for the Churches to make some other proposition, such as to move for the appointment of a judicial factor. There is no doubt that the effect of this judgment is that if Mr Watson puts in a claim his claim will be sustained.

LORD M'LAREN.—I agree in the judgment proposed. Apart from the power of selection, I should not have been disposed to sustain the bequest to foreign missions as sufficiently precise to satisfy the rule which has been laid down in many cases, that there must be not only a specification of a definite class representing the objects of the trust, but also a power of selection amongst the various bodies professing to carry out the object which the testator had in view. I should have great hesitation in expressing an opinion which differs from that of Lord President Inglis, but so far as his Lordship, in the case relating to the *Society for the Conversion of Israel*,³ professes to apply the principles of interpretation applicable to charitable trusts to a society whose object was solely the conversion of people from one form of religion to another, I should wish at all events to reserve my opinion, first, because his Lordship says that these considerations were not altogether satisfactory to his own mind; and, secondly, because it does not appear to me that the case in question was one in which the principle of the special construction of charitable trusts would arise. It was a case of the identification of a particular society which was described in general terms, and was not a case of the determination amongst a class of objects indicated in general terms of the particular object to which the fund was to be appropriated.

While I should not be of opinion that a bequest for purely religious purposes was entitled to the benefit of the benignant construction accorded to charitable trusts, it may very well be that the objects indicated are partly charitable and partly religious, or partly secular objects other than charity. I suppose it is generally known that the foreign missions of the Scottish Churches have education as one of their principal motives, and in Africa

¹ 1858, 3 Macq. 134.² *Supra* (H. L.), p. 3.³ 8 Macph. 233.

Mar. 17, 1908. especially they have been very successful, whether for good or harm, in educating the Kaffir races to the ordinary standard of education which prevails amongst the European population. It may very well be that so far as the educational purpose is concerned a bequest of this kind might receive Lord M'Laren. favourable interpretation, and I should certainly not hesitate to say, where the primary object was charity or education, such as a school or college, that the institution would be entitled to the benefit of the "charitable" rule of construction although it was required that there should be religious services conducted, or even a chaplain appointed. Each case must, of course, depend upon its special circumstances, and the character of the body or class of bodies indicated by the testator. In the present case I think there is no difficulty whatever, because missions in the sense in which the testator has obviously used the word are a sufficient limitation of a definite class; and then, of course, there is the appointment of an executor which is equivalent to the power of selection. I therefore agree that if a claim is put in by the executor it must be sustained.

LORD PEARSON was absent.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor, and remit to the Lord Ordinary to allow the real raiser, if so advised, to lodge a condescendence and claim in order to the execution of the provisions of the will, and thereafter to proceed as accords."

HARRY H. MACBEAN, W.S.—ALEX. ROSS, S.S.C.—ALAN L. MENZIES, W.S.—
COWAN & DALMAHOY, W.S.—Agents.

No. 117. CRICHTON & STEVENSON, Pursuers (Respondents).—*M'Lennan, K.C.*
—*Murray.*

Mar. 19, 1908. ROBERT LOVE, Defender (Appellant).—*M'Clure, K.C.*—*M. P. Fraser.*

Crichton & Stevenson v. Love.
Sale—Moveables—Conditions—Implied Condition as to Fitness—Reliance on Seller's Skill and Judgment—Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71)—Application of Sec. 14 (1) to non-manufactured goods.—The Sale of Goods Act, 1893, sec. 14, enacts, ". . . there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:—(1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not) . . ."

Jeffrey, a salesman for Crichton & Stevenson, coalmasters, having asked Honeyman, a shipbroker, for an order, Honeyman told him that he had a ship coming in for which he would require bunker coal, and that he had been using Auchlochan unscreened coal. Jeffrey told him that his firm could supply Slamannan coal from Strathaven Colliery, unscreened, which he thought would suit if Auchlochan suited. Honeyman expressed his willingness to give an order, but said that the order must be given through Love, a coal merchant with whom he dealt. Honeyman communicated this conversation to Love, and at a subsequent meeting between Love and Jeffrey the latter received an order for Strathaven coal, and was told the name of the ship for which it was intended, both parties knowing that the order had reference to the coal which Honeyman had agreed to take. The coal when delivered proved quite unfit for the purpose of bunkering the ship, and was rejected.

In an action by Crichton & Stevenson against Love, for the price of the coal, *held* (1) that the conversation between Jeffrey and Honeyman was in the mind of both parties when the order was given, and formed part of the transaction, (2) that considering the transaction thus, the buyer had made known to the seller the particular purpose for which the coal was required, and had relied on the seller's skill and judgment in the matter, (3) that the warranty as to fitness thereby implied had not been fulfilled, and that the buyer was not liable for the price of the coal.

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Gillespie Brothers & Company v. Cheney, Eggar, & Company, [1896] 2 Q. B. 59, *approved*.

CRICHTON & STEVENSON, coalmasters, Glasgow, raised an action in the Sheriff Court at Glasgow against Robert Love, coal and ore merchant, Glasgow, concluding for payment of £52, 13s. 5d., being the price of 140 tons of Strathaven steam coal, put on board the s.s. "Dalbeattie" in Glasgow Harbour by the pursuers in implement of an order received from the defender.

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The defender averred that the "Dalbeattie" belonged to a company in Norway for which Messrs Honeyman & Company, Glasgow, were agents. That in March 1906, on the pursuers applying to Messrs Honeyman for an order "Mr Honeyman explained to the pursuers that he was in the habit of purchasing Auchlochan bunkers for the 'Dalbeattie,' as they had found from experience that this class of bunker coal was very satisfactory, and on the pursuers guaranteeing that their Strathaven unscreened coal was as good a bunker coal quite suitable for the 'Dalbeattie,' and would give as good results as the Auchlochan bunkers which the 'Dalbeattie' had been using, Mr Honeyman agreed to purchase the bunker coals for the 'Dalbeattie,' at the same time, however, explaining to the pursuers that he, Mr Honeyman, purchased all his bunker coals through the defender, and that they would require to arrange to put the order through the defender." That the defender was advised of the arrangement, and the pursuers agreed to pay him a commission. "In the transaction the pursuers were perfectly well aware that the defender was merely Messrs Honeyman & Company's agent."

The defender further stated:—(Stat. 6) "The s.s. 'Dalbeattie' sailed from Glasgow on 30th March 1906, bound for Brest, the coal supplied by the pursuers being used for the bunkers, the purpose for which they were bought, and which was well known to the pursuers. On proceeding on the voyage it was discovered that this coal would not keep up steam, that it was dirty, and the captain, for the safety of the vessel and all concerned, had to come to an anchor at the Tail of the Bank."

The defender pleaded;—(2) The defender being agent for a disclosed principal, is not liable to the pursuers in the sum sued for, and decree of absolvitor should be granted, with costs. (3) The pursuers, having sold a coal for bunkering steamers, and being aware of the purpose for which the coal was supplied, were bound to supply an article suitable and reasonably fit for the purpose, and having failed to do so, decree of absolvitor should be granted, with costs. (4) *Separatim*, the order having been given on the assurance that the coal would be as suitable as Auchlochan coal was for the "Dalbeattie," and the coal supplied being entirely unsuitable and useless, absolvitor should be granted, with costs.*

* The Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), enacts:—Sec.

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The facts out of which the controversy arose, as ascertained after a proof, were as follows:—

In March 1906 Robert Jeffrey, a coal salesman in the employment of the pursuers, approached Messrs Honeyman & Company, ship-brokers, Glasgow, in order to obtain an order for coal, and had an interview with Mr Honeyman, a member of the firm. After a conversation, the import of which is stated in Jeffrey's evidence,* Honeyman told Jeffrey that he did not usually deal direct, but that he gave his coal orders through Robert Love, the defender, and that he would be willing to give him an order, but that it must be done through Love. Honeyman communicated this conversation to Love, and an interview then took place between Jeffrey and Love, at which Love gave an order for 150 tons of Strathaven unscreened steam coal. At the interview Jeffrey was informed by Love that the coal was intended for bunkering the "Dalbeattie," and reference was made to the conversation between Jeffrey and Honeyman.†

In fulfilment of this order 140 tons of Strathaven unscreened steam coal were delivered on board the "Dalbeattie" in Glasgow harbour about the end of March 1906. On trial the coal supplied proved to be of a very inferior quality, and quite unfit for the purpose of raising steam, and it was accordingly put on shore, and its rejection intimated to the pursuers.

On 30th March 1907 the Sheriff-substitute (Fyfe), after a proof, repelled the defender's pleas, and gave decree against the defender as craved.‡

14. "Subject to the provisions of this Act and of any statute in that behalf there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:—(1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose. . . ."

* In his evidence Jeffrey said:—"In March 1906 I met Mr Honeyman in the corridor which leads to the office. His office is next door to ours. He mentioned he had a boat coming in, and he could give us an order now he thought. He asked the name and price of the coal. I told him it was Slamannan coal. I mentioned it was Strathaven Colliery. I said it was unscreened steam coal. The price I quoted was 7s. 6d. f.o.b. Glasgow. He told me it was for bunkers. (Q.) Was there anything said about the coal he had been buying previously? (A.) He said he had been using some Auchlochan. He did not say anything about the name of the vessel. He did not say where he had used Auchlochan coal. I said I thought if Auchlochan suited him that ours would suit him."

† In his evidence Jeffrey said:—"When I met defender in the Exchange he told me the boat the coal was wanted for. He informed me that it was for Honeyman & Company the coal was for. . . . Defender told me that it was Mr Honeyman's order I was getting, that that was the order that Mr Honeyman spoke to me about."

‡ "NOTE.— . . . The defender's case therefore resolves itself into the general plea that the coal delivered not having been reasonably fit for the purpose for which it was supplied, defender was entitled to reject it.

The defender appealed to the Court of Session.

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The case was argued before the First Division on 24th and 25th January 1908.

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Argued for the appellant (on his third plea, the other pleas being abandoned);—The buyer having made known to the sellers in this case the particular purpose for which the coal was required, and having relied on their skill and judgment to supply him with the requisite quality of coal, there was an implied warranty as to the fitness of the coal, under section 14 (1) of the Sale of Goods Act, 1893.¹ The Sheriff-substitute had erred in limiting the application of this section to manufactured goods: on the contrary it extended to every class of goods, and included such products as coal.² [Counsel for the respondents intimated that he did not propose to maintain the view as to the scope of the section taken by the Sheriff-substitute.] It was not necessary for the buyer to shew that he had expressly

“There is no doubt about the facts (1) that what was sold was ‘Strathaven unscreened coal’; (2) that its intended use was, within the knowledge of seller and buyer, for bunkering a steamer; (3) that Strathaven unscreened coal was put on board the ‘Dalbeattie.’ The case is not that one thing was bought, and a different thing was put aboard ship, but rather that the thing bought was, when used on board the ship, unfit for its only purpose of raising steam.

“In this case, as in all such cases, section 14 of the Sale of Goods Act is pressed upon my attention. I often think in looking at section 14 (1) that the most significant phrase in it is the parenthetical phrase ‘whether he be the manufacturer or not.’ In framing this subsection (1) of clause 14, what seems to me to have been before the mind of the draughtsman, and probably the only thing before his mind, was the sale of manufactures. I don’t think that he had in contemplation at all the sale of a product such as coal, and I cannot but think that, if it does apply to products, this entire clause 14 assumes different aspects when applied to manufacturers and to products. If a seller sells such a thing as—say a locomotive engine—the ordinary buyer must obviously rely on the seller’s skill and judgment, and so it is quite reasonable that under clause 14 the responsibility of the articles sold turning out fit for the purpose for which a locomotive is required shall rest with the seller. But when we come to such a product as unscreened coal—that is practically coal as it is dug out of the earth—I don’t think this applies. No skill or judgment of the seller is, or can be, exercised to fit the subject of sale for a market. If it is not in itself fit for its purpose, nothing the seller can do can make it fit.

“The same considerations apply to clause 14 (2). I much doubt whether this subsection either was intended to cover a product such as coal. I think it also contemplated only manufactures. I do not think that coal brought up from the bowels of the earth falls within the term ‘goods,’ as used in this subsection, and so I do not think that, in the statutory sense, any question here arises upon merchantable quality, or buyer’s examination.

“It is not suggested that there was any express warranty given that the coal pursuers sold would attain such and such a result, and if I am right that the statutory implied warranty is not applicable to a product known to the intending buyer, such as coal from a named coalfield, then we get clear of the technicalities of the statute, and are thrown back upon the common law obligations of seller and buyer.

“So regarded, the single question seems to me to be—did pursuers do

¹ 56 and 57 Vict. cap. 71.

² Wallis v. Russell, L. R. Ir., [1902] 2 K. B. 585; Gillespie Brothers & Co. v. Cheney, Eggar, & Co., [1896] 2 Q. B. 59.

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contracted with reference to the purpose for which the coal was required: it was sufficient that in point of fact this purpose was known to the seller.¹ It was not enough for the respondents to say that the appellant got what he asked for, namely, "Strathaven steam coal." This was not a case of the sale of a specified article by a trade name, and in general when goods were bought under a descriptive name, and the purpose for which the goods were required was known to the seller, the mere delivery of goods answering to that description was not enough, unless they were fit for the purpose.² In proving that the respondents knew the purposes for which the coal was intended, and that the order was given in reliance on the skill and judgment of the respondents, the appellant was entitled to refer to the previous interview between Honeyman and Jeffrey, for it was with express reference to what had passed at that interview that the order had been given. The unfitness of the coal supplied for bunkering purposes could not be disputed. *Gillespie Brothers & Company*³ was directly in point.

Argued for the respondents;—A buyer was only entitled to the benefit of section 14 (1) when he could prove that he had made known the purpose of the purchase in such a way as to shew that he relied on the seller's skill and judgment. In the present case the evidence fell far short of this. The most that could be said was that the appellant had informed the respondents' agent that the coal was intended for bunkering the "Dalbeattie." There was nothing to shew that he did this in such a way as to shew that he relied on the respondents to select for him the appropriate quality of coal. On the contrary, he expressly ordered a particular kind of coal—Strathaven steam coal—and he got what he asked for. It was irrelevant to consider the prior communings between Jeffrey and Honeyman. It was more than doubtful whether Honeyman had said anything to shew reliance on Jeffrey's skill and judgment, and in any event it was not Honeyman who gave the order, but Love. The cases relied on by the respondents were distinguishable. In *Wallis*⁴ the question was whether the selection had been left to the seller. In *Gillespie Brothers*³ there was express reliance on the seller's skill and judgment. In *Jacobs*² the only question which was decided was that it was part of the contract that the goods should be up to a certain standard. The Sheriff-substitute had accordingly arrived at a right conclusion.

At advising,—

LORD PRESIDENT.—This is an appeal from the Sheriff Court at Glasgow, in which a firm of Crichton & Stevenson, who are coalmasters, sue Robert

for defender what they contracted to do for him—that is to say, deliver to him what he had bought from them. Now, defender, it is clear from the proof, knew what 'Strathaven unscreened coal' meant, for he had bought it before. What he contracted that pursuers should do for him was—that they should dig out of the bowels of the earth a certain quantity of the coal lying in Strathaven pit, and on his account put that on board the s.s. 'Dalbeattie.' This pursuers did, and that as it seems to me ends the whole matter, as in a question between pursuers and defender."

¹ *Douglas & Co. v. Milne*, Nov. 21, 1895, 23 R. 163; *Jones v. Just*, 1868, L. R., 3 Q. B. 197, and cases cited.

² *Jacobs v. Scott & Co.*, May 4, 1899, 2 F. (H. L.) 70.

³ [1896] 2 Q. B. 59.

⁴ [1902] Ir., 2 K. B. 585.

Love, a coal merchant, for the price of a cargo of coals supplied by them to him. It is admitted that the coals were supplied; but the defence is that the coals were not suitable for the purpose for which they were supplied. Mar. 19, 1908.
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Two defences were originally proponed in the Sheriff Court, neither of which was given effect to in the Sheriff Court, and neither of which was insisted in before your Lordships' bar; and, therefore, I merely mention them in order to get rid of them. It is said, first, that the principal defender, Love, was not really the person who bought the coals, but that he was an agent for a disclosed principal. The Sheriff was against that contention, and the learned counsel, very rightly, did not attempt to interfere with that finding. The other defence was that there had been a special guarantee given of these coals, and that also was not insisted in before your Lordships' bar. The whole matter, therefore, came to turn upon the Sale of Goods Act, 1893, to section 14 of which I shall presently more particularly advert.

But I should first mention that the findings upon which the learned Sheriff-substitute gave decree for the pursuers were these: That in March 1906 the defender ordered from the pursuers about 150 tons of Strathaven unscreened coal at a certain price; that the pursuers delivered the coals; that the defender has not paid the price—all of which facts are not controverted—and then that the defender has failed to establish his pleas. Two pleas I have already dealt with. The third plea, that rested on the section of the Sale of Goods Act, the learned Sheriff-substitute held was not established, for this reason, that he held that the Sale of Goods Act, section 14 (1), did not apply to such things as coals. He does not think that the Act has in contemplation the sale of a product such as coal, and, accordingly, he holds that the Act does not apply. And, then, taking the matter as one at common law, he finds that there was no warranty given of the coal being fit for any particular purpose.

The learned counsel for the respondents did not see their way to support the learned Sheriff-substitute's judgment upon the grounds on which he had put it, and I do not wonder, because I do not think that the grounds can be supported, and certainly it is absolutely in the teeth of an authority which, although not binding, must certainly be treated with respect. The case of *Gillespie Brothers & Company v. Cheney, Eggar, & Company*,¹ which is a decision of the late Lord Chief-Justice of England (Lord Russell of Killowen), could not have been quoted to the Sheriff-substitute or, I think, he would have dealt otherwise with the matter. The facts in that case were that the plaintiffs were commission-merchants and the defendants coal-agents. The plaintiffs received from their correspondents in Barbadoes a letter in these terms:—"We have now decided to order a cargo of coal, and will ask you kindly to look after same. . . . We will take whatever kind of coal you think it best to send us, after satisfying yourselves of its suitability for the purposes we require, viz., the bunkering of steamships and ships of war, and, of course, it must stand well upon the British and Foreign Admiralty lists." This letter was taken by the plaintiffs to

¹ [1896] 2 Q. B. 59.

Mar. 19, 1908. the defendants, and shewn to and left with them. And following upon
 Crichton & that the following contract was entered into:—"Memorandum of Agree-
 Stevenson v. ment.—That Messrs Gillespie Brothers & Company agree to buy and Messrs
 Love. _____ Cheney, Eggar, & Forrester agree to sell a cargo of coal deliverable at Bar-
 badoes, per ship 'Enrichetta M.' now at Swansea, on the following con-
 ditions, viz., that the quantity is to be about 500 tons; that the coal is to
 be of the description known as Cyfartha Merthyr or Hills, Plymouth; that
 the price, including cost, freight, and insurance, is to be 18s. 6d. per ton.
 . . . " Well, on the arrival of the coal at Barbadoes it was found, as
 alleged by the plaintiffs, to be wholly unsuitable for the bunkering of
 steamships and ships of war, and accordingly the action was raised. Now,
 that, I need scarcely say, is of course a decision absolutely in point, so far
 as it raises the question of the statute applying to articles of this sort, and
 the judgment is a very valuable one upon the construction of the statute
 altogether.

The section of the Sale of Goods Act, 1893, upon which the whole matter
 depends is section 14, which says:—"Subject to the provisions of this Act.
 . . . there is no implied warranty or condition as to the quality or
 fitness for any particular purpose of goods supplied under a contract of sale
 except as follows:—(1) Where the buyer expressly or by implication makes
 known to the seller the particular purpose for which the goods are required,
 so as to shew that the buyer relies on the seller's skill or judgment, and
 the goods are of a description which it is in the course of the seller's busi-
 ness to supply (whether he be the manufacturer or not), there is an implied
 condition that the goods shall be reasonably fit for such purpose, provided
 that in the case of a contract for the sale of a specified article under its
 patent or other trade name there is no implied condition as to its fitness for
 any particular purpose. . . ." Now, the first portion of that section
 was clearly applicable in the case of *Gillespie Brothers & Company*.¹ There
 was no question that the buyer there had made known to the seller the
 particular purposes for which the coals were required. They were required
 for bunkering, and they were to be of such bunkering as was suitable
 for steamers and ships of war. There is no question also that he had
 done it in such a way as to shew that he relied on the seller's skill or
 judgment, because in the letter he said,—“After satisfying yourself as to
 the suitability for the purpose we require.” But it was contended in that
 case that there might be a defence under the proviso as to the sale of an
 article by its “patent or other trade name.” I remind your Lordships that
 in the contract which was made the coal was to be of the description of
 Cyfartha Merthyr or Hills, Plymouth, and there was no question that that
 coal had been supplied. The Lord Chief-Justice deals with that in this
 way: after reading the proviso he says (p. 64),—“That, obviously, is
 intended to meet the case not of the supply of what I may call for this
 purpose raw commodities or materials, but for the supply of manufactured
 articles—steam-ploughs or any form of invention which has a known name,
 and is bought and sold under its known name, patented or otherwise. I
 am clearly of opinion that the proviso does not apply to this case.” Now,

¹ [1896] 2 Q. B. 59.

I humbly agree with that ; and, although I have had to bring it in at this Mar. 19, 1908. moment, the application of it will be apparent in a little.

I now go in detail to the facts which raise the controversy in this case—
[His Lordship narrated the facts and quoted the portions of Jeffrey's evidence, *ut supra*].

Crichton &
Stevenson v.
Love.

Ld. President.

Now, the order that he gave him was undoubtedly an order for a cargo of Strathaven coal. Well, the Strathaven coal was supplied. It was put in the boat, but the performance going down the river was so bad that they anchored off Greenock Pier, and eventually the coal was put out upon the quay at Ardrossan and rejected. But before it was finally rejected they had another trial of it. They had tried it in the boat, but they also had a trial of it in a tug. I am not going into this matter closely on the evidence. I wish simply to state the result at which I have arrived, because it is a result at which I have arrived without the slightest doubt. This is not the difficult part of the case. I am clearly of opinion, as a jury matter; that this coal was *de facto* unfit. It behaved very badly in the vessel going down, and I think it got a perfectly fair trial in the tug, and was proved to be unsuitable coal for bunker coal. I do not say that with boilers of a particular construction, with forced draught, it might not be possible to get this coal to burn, and the analysis probably shews that it has the constituents of heat in it. But that is not the question. The question is an ordinary jury question, and if I was in the trade I should hold without the slightest hesitation that this particular cargo of coal was a bad cargo, and was not good enough to raise steam.

Well, now, I come to the application of the statute to these facts. I hold in fact that these goods were not reasonably fit for the purpose for which they were supplied. As the Sheriff-substitute says in his note,—“There is no doubt about the facts (1) that what was sold was ‘Strathaven unscreened coal’; (2) that its intended use was, within the knowledge of seller and buyer, for bunkering a steamer; (3) that Strathaven unscreened coal was put on board the ‘Dalbeattie.’” I think those findings are quite correct. There was no question, therefore, that, in the words of the statute, the buyer had made known to the seller “the particular purpose for which the goods were required.” But the real difficulty and, I confess, delicacy of the case—because I have not found the matter unattended with difficulty—the real difficulty comes with the application of the next words. It is not enough to shew that the buyer “makes known to the seller the particular purpose for which the goods are required,” but it must be “so as to shew that the buyer relies on the seller’s skill and judgment.” Now, that is where the difficulty of the case comes in, because it is certainly true that Love ordered Strathaven coal and he got Strathaven coal, and the point is—in ordering that, although he knew it was for bunker work, did he rely upon the seller’s skill or judgment?

We had a very excellent argument from Mr Murray in which he treated the matter as one of clear logic. He said that the chain was broken. He said no doubt it might be that in what I may call the touting interview Jeffrey clearly conveyed to Honeyman that if he would order Strathaven bunker coal it would be a good enough coal for steaming purposes; but, he said, Honeyman, having taking his chance of that, then goes to Love and

Mar. 19, 1908. says to Love "Order me a cargo of Strathaven coal," and that consequently when Love came to Jeffrey to make the bargain which was made, Love Crichton & did not really rely on Jeffrey at all, that really what Love did was simply Stevenson v. Love. to order a specific article, not concerning himself with whether that specific Ld. President. article was fit or was not, because all that had already been settled by Mr Honeyman—that Mr Honeyman made up his own mind and must take his chance. As I say that is a very powerful argument and a very logical one. But, upon mature consideration, I do not think it is sound. I think, when you are to inquire if the buyer relies on the seller's skill and judgment, you must take the transaction as a whole; and I think, therefore, that you can really in this matter wrap up Love and Honeyman in one.

I have purposely gone upon Jeffrey's evidence and not upon Love's, because, of course, the pursuer cannot complain of his own evidence being taken. I have already read that passage in which Jeffrey said he knew that it was Honeyman's order he was getting. Now, it seems to me that inasmuch as he knew that Love at that moment was passing on, so to speak, Honeyman's order, not as an agent—I am not raising any question as to that, it was really to serve Honeyman that Love was giving it—and that he also knew that it was bunker coal, it seems to me to import his own conversations with Honeyman; and that consequently the real justice of the matter is to hold that in the whole transaction Love and Honeyman together were relying upon the seller's skill or judgment, namely, that the coal should be fit for the purpose for which he was supplying it.

Accordingly, upon these grounds I am of opinion that, the defence of unsuitability being made out, there was under the terms of the Sale of Goods Act an implied warranty in this case, and that, accordingly, the defence is a good one against paying the price of the article supplied.

LORD KINNEAR.—I concur with your Lordship, for the reasons given.

LORD MACKENZIE.—I am of the same opinion. It appears to me that the difficulty in this case arises from the form in which the transaction was carried out. I think it is necessary to go beyond the form in order to reach what was the substance of the transaction. It is no doubt true that Love bought this coal because Honeyman had made up his mind, that Love did not trouble himself about the order, and that the contract was not influenced by the previous supplies to Love of coal of the same description. But when one says that Love had bought the coal because Honeyman had made up his mind, that, I think, makes it necessary, in order to get at the substance, to ask this question—Why was it that Honeyman had made up his mind to take this particular coal? No doubt the subject that was being dealt with was a specific subject, but then it is equally true that Honeyman had no previous opportunity of examining the coal that he was buying; and, according to the admission of the pursuers' salesman, Jeffrey, Honeyman told him that he knew nothing about their coal—that is to say, Strathaven coal. It is further matter of admission—and in regard to this matter I prefer to take the evidence from the witnesses of the pursuers—it is matter of admission that Jeffrey knew the particular purpose for which the coals were required; and also that Jeffrey told Honeyman that in his opinion they were as good for that purpose as the Auchlochan coal which they had been previously using.

I am of opinion that it is established, as a matter of fact, that Honeyman Mar. 19, 1908. relied on Jeffrey's skill and judgment; and, therefore, if it was a question Crichton & Stevenson v. Love. between Honeyman and Jeffrey, I should have no doubt that section 14 (1) Love. of the Sale of Goods Act applied. The difficulty is in taking the next step. I think that the bridge, if I may use the expression, is supplied by Jeffrey's Lord Mac- evidence that he knew perfectly well that the order he was getting was not, kenzie. in any proper sense, Love's order, but was Honeyman's order. Accordingly there is sufficient in the case to enable one to hold that Jeffrey knew that Love was just standing in Honeyman's shoes, and that, therefore, subsection 1 of section 14 is pleadable against Jeffrey as in a question with Love, just as it would have been in a question with Honeyman.

On the question whether the coal was suitable or unsuitable for the purpose for which it was supplied I am entirely of the same opinion as your Lordship.

LORD M'LAREN and LORD PEARSON were absent.

THE COURT pronounced this interlocutor:—"Sustain the appeal, recall the interlocutor of the Sheriff-substitute dated 30th March 1907: Find in fact (1) that in March 1906 the defender ordered from the pursuers about 150 tons Strathaven unscreened coal at 7s. 6d. per ton, delivered f.o.b. at Queen's Dock, Glasgow, for the purpose of being used as bunker coal in s.s. 'Dal-beattie'; (2) that the defender made known to the pursuers the purpose for which said coal was required, viz., for use as bunker coal on an ordinary steamer, and that he relied on the pursuers' skill and judgment in this matter; (3) that the pursuers delivered 140 tons 9 cwt. of coal purporting to be in fulfilment of said order; (4) that the coal so delivered was not reasonably fit for the purpose above mentioned: Find in law that the defender is not liable to pay for said coal: Therefore assoilzie the defender from the conclusions of the action, and decern."

MACPHERSON & MACKAY, S.S.C.—R. H. MILLER & Co., S.S.C.—Agents.

SUMMER SESSION.

MRS ISABELLA DICKSON OR ZUGG, Pursuer (Respondent).—
Blackburn, K.C.—J. B. Young.
J. & J. CUNNINGHAM, LIMITED, Defenders (Appellants).—
Morison, K.C.—Dunbar.

No. 118.

May 14, 1908.

Zugg v. J. & J. Cunningham, Limited.

Master and Servant—Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 4 (1)—Subcontracting—Work "undertaken" by the Principal.—The Workmen's Compensation Act, 1906, sec. 4 (1), under the rubric *Subcontracting*, enacts, that where any person (the principal), in the course of or for the purposes of his trade or business, contracts with any other person (the contractor) for the execution by or under the contractor of the whole "or any part of the work undertaken by the principal, the principal shall be liable to pay" compensation to any workman employed in the execution of the work as if he had immediately employed him.

A firm of chemical manufacturers contracted with a certain person to tar the outside of tanks used in their business to protect them from the weather,

May 14, 1908. and a workman in the employment of the contractor was killed by an accident while engaged on the works.

Zugg v. J. & J. Cunningham, Limited.

In a claim for compensation by the workman's widow, *held* that the work of tarring the tanks was not part of the work "undertaken" by the chemical manufacturers, within the meaning of section 4 (1) of the Workmen's Compensation Act, 1906, and that they were not liable to pay compensation.

1ST DIVISION.
Sheriff of the
Lothians and
Peebles.

IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Edinburgh, at the instance of Mrs Isabella Dickson or Zugg, widow of the deceased Alfred Dennis Zugg, labourer, against J. & J. Cunningham, Leith, the Sheriff-substitute (Guy) awarded compensation, and on the crave of the defenders stated a case for appeal.

The following facts were stated to be admitted or proved :—“(1) The appellants are manufacturers of sulphuric acid, chemical manures, and feeding stuffs, at their works in Salamander Street, Leith, of which they are the owners as well as the occupiers; (2) part of said works consists of large chambers which are used in the manufacture of sulphuric acid, enclosed and protected by corrugated iron and wood; (3) it is necessary to have the corrugated iron and wood tarred over about once in every two years for the purpose of preserving them from the weather, and keeping the chambers within wind and water-tight, the tarring of one half being done one year and of the other half the following year; (4) the chambers are about 20 feet in height and about 40 feet from the ground level, and the said work of tarring is done by workmen who use a hanging scaffold; (5) the appellants have never had this work done by any of their servants, but have always contracted for it to be done at so much a square yard; (6) in the month of July 1907 the appellants contracted with James Aimers who had had a similar contract with the appellants during the years 1902, 1903, and 1905, to do a portion of this tarring work, he being paid one penny per square yard—Aimers supplying the tackle and scaffolding and the appellants supplying the tar; (7) Aimers employed a man George Laing to assist him in the work, and authorised Laing to employ Alfred Dennis Zugg, who was accordingly employed and paid wages at the rate of 7d. per hour; (8) on 14th August 1907 a rope accidentally slipped from the hanging scaffold on which the said George Laing and Alfred Dennis Zugg were working, with the result that Zugg fell to the ground, and was so injured that he died in Leith Hospital on the same day.”

It was also admitted or proved that the respondent was the widow of the said Alfred Dennis Zugg, and was wholly dependent upon his earnings at the time of his death, and was the only person so dependent; that if compensation was payable the amount thereof was £245, 14s.

On these facts the Sheriff-substitute held in law that within the meaning of said Act (1) the appellants were principals in relation to said work; (2) that the said work was undertaken by the appellants in the course of and for the purpose of their trade or business; and (3) that Zugg was a workman within the meaning of said Act, and that the said accident arose out of and in the course of his employment as such; and (4) that the respondent was entitled to compensation from the appellants under the said Act in the said sum of £245, 14s., and he ordered the appellants to consign said sum with the Sheriff-clerk, and found the appellants liable in expenses.

The questions of law for the opinion of the Court were :—“(1)

Whether the work contracted for was work undertaken by the appellants as principals in the course of or for the purposes of their trade or business all within the meaning of the Workmen's Compensation Act, 1906? and (2) whether the appellants are liable to the respondent in compensation under the said Act?" * May 14, 1908.
Zugg v. J. & J. Cunningham, Limited.

The case was argued before the First Division on 14th May 1908.

Argued for the appellants;—The work in the course of which the accident occurred was not work "undertaken by the principal" within the meaning of section 4 of the Act.

The Court intimated that they did not desire to hear further argument for the appellants, and called upon counsel for the respondent.

Argued for the respondent;—Section 4 of the Workmen's Compensation Act, 1906, had a wider application than the corresponding section in the Act of 1897, inasmuch as it did not contain the proviso excluding the liability of the principal in the case of work which was merely ancillary or incidental to the work carried on by the principal. The cases under the Act of 1897 in which compensation had been refused had been decided on the ground that the work was merely ancillary and incidental.¹ The present case resembled rather those decisions where it had been held that the subcontract formed part of the undertaking.² The appellants' business could not be carried on unless the sulphuric acid chambers were properly tarred, and the work of tarring was, on a fair construction of the section, part of the work undertaken by the appellants.

LORD PRESIDENT.—This stated case sets forth that the appellants, chemical manufacturers, have in their works certain structures enclosed and protected by corrugated iron and wood. These structures require protection against weather just as other parts require slates or paint. The business of the appellants is not that of painters or slaters, but that of manufacturers of sulphuric acid, chemical manures, and feeding stuffs. Therefore, when from time to time these structures require re-tarring the appellants have to employ for that purpose one whose business it is to do such work. Indeed, the Sheriff-substitute finds in fact that "the appellants have never had this work done by any of their own servants, but have always contracted for it to be done at so much a square yard." Accordingly, in July 1907 the appellants did contract with Aimers to do a portion of this work at a penny

* The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 4, *subcontracting* (1), enacts:—"Where any person (in this section referred to as the principal), in course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him."

¹ Dempster v. Hunter & Son, Feb. 26, 1902, 4 F. 580; Stewart v. Dublin and Glasgow Steam Packet Co., Nov. 4, 1902, 5 F. 57; Dundee and Arbroath Joint Railway Co. v. Carlin, May 31, 1901, 3 F. 843.

² Burns v. North British Railway Co., Feb. 20, 1900, 2 F. 629; McGovern v. Cooper & Co., Nov. 30, 1901, 4 F. 249; Bee v. Ovens & Sons, Jan. 25, 1900, 2 F. 439; Stalker v. Wallace, July 10, 1900, 2 F. 1162.

May 14, 1908. per square yard, he being supplied with tar. Aimers employed another man to assist him in the work, and authorised him to employ Zugg, Zugg v. J. & J. Cunningham, who was accordingly employed upon the job. Unfortunately, whilst Zugg was so employed he fell from the scaffold on which he was working, Limited.

Ld. President. and was killed. Zugg's widow brought this claim for compensation against the chemical manufacturers. There is no question that Zugg was not the servant of the appellants, and accordingly the claim is brought under the 4th section of the Act. Section 4 (1) of the Workmen's Compensation Act, 1906, provides:—[His Lordship quoted sec. 4 (1)].

Now, the Sheriff-substitute, after finding the facts as above narrated, holds in law "that the said work was undertaken by the appellants in the course of and for the purposes of their trade or business." I am of opinion that the Sheriff-substitute has misunderstood the section. The whole point turns on whether this was work "undertaken" by the appellants. It is not out of the way to consider what is the place of the section, that is to say, what is its position in the scheme of the Act, and for this purpose it is perfectly proper to look at the rubric. You may look at the rubric of the section in examining the position of the section in the Act, though you cannot do so in order to put an interpretation upon the actual words of the section. Now, the rubric is "subcontracting." The Act had dealt with the ordinary relations between employer and employed; it goes on to provide for cases where a middleman or subcontractor is introduced. It seems to me that what is in the section is clear enough. Where a person has undertaken as principal to perform a piece of work, and then enters into a contract with another for the performance of the whole or part of the work he will be liable to the workman employed by that other contractor, but always provided he has undertaken to perform the work. Now, undertaking as a principal must mean undertaking on the order of someone else, *i.e.*, a customer. In other words, to get the state of affairs contemplated by the section there must be an undertaking by A to perform the work for B, and a subcontract between A and C (whose immediate servant the workman is), to perform the work undertaken. Now, when we come to look at the facts here we find that there was no undertaking by the appellants, and no subcontract. The appellants ordered the work for themselves, and it was Aimers, and Aimers alone, who "undertook" to perform the work. Accordingly, there is no room for the application of the section. The absurd length to which the opposite doctrine would lead may easily be seen. I suggested the illustration of a doctor who for the purposes of his practice required that an electric power installation should be fitted up in his consulting room, and who employed a firm of electrical engineers to fit the installation. The idea that he should be liable for injuries received by a servant of the firm so engaged shews the absurdity of such a view of the section. Such a construction would be entirely foreign to the central idea that prompted the Workmen's Compensation Acts, namely, that injuries to workmen should be looked upon as part of the expenses of the work which their employers carried on. I have no difficulty in holding that the Sheriff-substitute was wrong, and that there is no claim against the appellants. I accordingly think that both questions should be answered in the negative.

LORD M'LAREN.—I am of the same opinion. If Zugg had been directly employed I take it he would have had no claim against Messrs Cunningham, because "workman" is so defined in the Act of Parliament as to exclude people who are merely casual labourers. The applicant's claim accordingly is founded on the fact that there was an intermediary, to wit, Aimers. To establish the claimant's argument it is necessary in the first place to put a construction on the word "undertaken." I think that word may receive some shade of colour or meaning from the word "undertaking," which is used in other clauses of the statute. To illustrate what I mean, take the case of a railway company which arranges to build its own engines or to lay out its own sidings. In such a case the company would be held to have undertaken the work, though it was under no contractual obligation to do so. Similarly where a builder by profession has undertaken to erect or repair a building, it may be for his own occupation, if he delegates the whole or a part of the work to another he would be liable to pay compensation in the event of an accident happening to one of the subcontractor's workmen.

In the present circumstances I am unable to see that the work of tarring the building in question was work undertaken by the appellants, whose business is not the erection or repair of structures but the manufacture of chemicals. I am therefore of opinion that the fourth section of the Act is inapplicable, and that the determination of the Sheriff should be reversed.

LORD KINNEAR.—I agree with your Lordships.

LORD PEARSON was absent.

THE COURT answered both questions in the case in the negative, recalled the interlocutor of the Sheriff-substitute as arbiter, and remitted to him to proceed accordingly.

R. S. RUTHERFORD, Solicitor—E. ROLLAND M'NAB, S.S.C.—Agents.

THE SOUTHHOOK FIRE-CLAY COMPANY, LIMITED, Pursuers
(Appellants).—*R. S. Horne.*

WILLIAM LAUGHLAND, Defender (Respondent).

No. 119.

May 14, 1908.

Master and Servant—Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58), Schedule I., sec. 16—Review of Weekly Payments—Payments under unrecorded Verbal Agreement—Date from which Payments may be Ended, Diminished, or Increased.—Employers who were paying compensation to a workman under an unrecorded verbal agreement, presented an application on 21st December 1907, under the Workmen's Compensation Act, 1906, Schedule I., sec. 16, to have the payments reviewed, and the compensation ended as at 1st November 1907, on the ground that incapacity had then ceased.

Southhook
Fire-Clay Co.,
Limited, v.
Laughland.

The Sheriff, as arbitrator, found it proved that the workman's incapacity ceased on 1st November 1907, and on 29th January 1908 pronounced an interlocutor ending the payments from the date of the interlocutor.

In an appeal upon a stated case held that as there was no recorded agreement the compensation fell to be ended as from the date when incapacity ceased, and not from the date of the application for review or of the date of the arbitrator's decision.

Steel v. Oakbank Oil Company, Dec. 16, 1902, 5 F. 244, and *Pumpherson Oil Company, Limited, v. Cavaney*, June 23, 1903, 5 F. 963, distinguished and commented on.

May 14, 1908. ON 21st December 1907 the Southhook Fire-Clay Company, Limited, Crosshouse, presented a petition under the Workmen's Compensation Act, 1906, in the Sheriff Court at Kilmarnock for the review of weekly payments made under an unrecorded agreement to William Laughland, miner, craving that the same should be ended as from 1st November 1907.

Southhook
Fire-Clay Co.,
Limited, v.
Laughland.

1st Division.
Sheriff of
Ayrshire.

No appearance was made for the defender.

On 29th January 1908 the Sheriff-substitute (D. J. Mackenzie), after a proof, issued an interlocutor finding the pursuers entitled to have the weekly payments ended, and reviewing and ending the same accordingly as from the date of the interlocutor.

At the request of the pursuers the Sheriff-substitute stated a case.

The case stated :—"The arbitration petition craved a review of the weekly payments to the defender and an order that the same might be ended as at 1st November 1907, and was presented in this Court on 21st December 1907. . . . At the diet of proof the defender did not appear, and evidence was led by the pursuers, as a result of which I found the following facts proved, namely :—That the defender on 2d July 1907 sustained personal injury by accident while in the employment of the pursuers; that liability in compensation for said injury was admitted by the pursuers, and that compensation calculated on a basis of an average weekly wage of £1, 7s. 8d. was paid by the pursuers to the defender down to 1st November 1907; that no memorandum of said agreement was recorded; that on 1st November 1907 the defender having recovered from the effects of his injury, resumed work, and has since been engaged in the pursuers' employment, and has been earning full wages; that the defender refuses to discharge the pursuers from his claim for compensation; that the wages at present received by the defender are greater in average weekly amount than those received by him before the accident, being £1, 9s. 4d. as contrasted with £1, 7s. 8d."

The questions of law were :—"1. Was the arbitrator right in holding that he could terminate the compensation only as from the date of his interlocutor? 2. Ought he to have terminated the compensation as at the date of the presentation of the application for review? Or, 3. Ought he to have terminated the compensation as at 1st November 1907?"

The case was argued before the First Division on 14th May 1908.

Argued for the appellants ;—Compensation should have been ended as from 1st November, when the workman's incapacity ceased. The Sheriff in finding that it was only ended as from the date of his interlocutor, had considered himself bound by the decisions in *Steel v. Oakbank Oil Co.*¹ and *Pumpherson Oil Co., Limited, v. Cavaney*.² These cases were distinguishable. They dealt with agreements of which a memorandum had been recorded, and the legal consequences of which were very different from those where an agreement was only inferred from payments *de facto* made under the Act. But if it should be considered that this case was ruled by these decisions, the question should be remitted for reconsideration by a Court of seven Judges in view of the dissenting opinions in *Steel*¹ and *Cavaney*,² and of the fact that in England the question had been decided differently.³

¹ Dec. 16, 1902, 5 F. 244.

² June 23, 1903, 5 F. 963.

³ *Morton & Co., Limited, v. Woodward*, [1902] 2 K. B. 276.

There was no difference under the new Act with regard to this question, because sec. 16 of the First Schedule of the Act of 1906 re-enacted sec. 12 of the First Schedule of the Act of 1897.

May 14, 1908.
Southbrook
Fire-Clay Co.,
Limited, v.
Laughland.

There was no appearance for the respondent.

LORD PRESIDENT.—This stated case touches the fringe of a question on which there seems to be a considerable amount of difference of judicial opinion. But I do not think it imposes upon us the necessity of taking either of the two courses which otherwise would have been alone open to us. That is to say, either to have sent the case to a Court of seven Judges or to the whole Court for consideration of the differing judicial opinions which have been expressed in the case of *Steel v. The Oakbank Oil Company*¹ in the other Division, in the case of *Cavaney v. The Pumpherston Oil Company*² in this Division, and in the case of *Morton*³ in the English Court of Appeal—or to have treated the matter as decided as it has been by a majority in both Divisions, leaving to the unsuccessful party the remedy of going to the House of Lords. I do not think we are driven to choose between these two alternatives, because I think this case presents in one particular so important a difference that it takes it out of the class of cases which I have just mentioned. The point is, where a person has been paid compensation under the Workmen's Compensation Act for a certain period, and then there has been an application to the arbitrator—in this case the Sheriff-substitute—under the 16th section of the First Schedule of the Act for review of the payment—whether the arbitrator in making the review should make the date of the new condition of circumstances—that is to say, the affirmance that payment should stop altogether—(a) the time at which he holds in fact that the real change in circumstances occurred; or (b) the time at which the person asking review presented the petition; or (c) the date of the judgment or interlocutor giving effect to the Sheriff-substitute's views. Where the payments that had been made were made under something which is equivalent to a judgment—that is to say, in respect of a recorded memorandum—is one state of affairs. But where there was no compulsory warrant for the payment is another state of affairs. I do not propose to go into the arguments that were used in these cases; and, in particular, I reserve my own personal opinion as to whether I agree with the Judges of the majority here or with the Judges of the minority here who agreed with the Judges of the English Court. But I say this, that it is perfectly evident that the whole of the reasoning of the majority here, who decided that the date must be the third of the dates I have specified, depended upon the fact that there was an operative judgment ordaining a certain sum to be paid weekly to the workman, and that until that judgment was got rid of, it must continue to have effect. When we come to the facts of this case it is otherwise. Here no memorandum of agreement was ever recorded. All that happened was that there was a *de facto* payment from 2d July 1907 down to 1st November 1907; that on 1st November 1907 the employers ceased payment; and then, as the workman would not admit that he had no claim for compensation, the employers presented a petition to the Sheriff to bring the payments to an end. On

¹ 5 F. 244.

² 5 F. 963.

³ L. R., [1902] 2 K. B. 276.

May 14, 1908. that petition the Sheriff-substitute has found as matter of fact that on 1st November 1907 the workman was completely recovered, and that he had recovered was evidenced by the fact that at that moment he was in full employment with a wage actually higher than he had earned before. In other words, the Sheriff-substitute has found that *de facto* the ceasing of payment was perfectly right. Then, in addition, we are face to face with the fact that there is no decree in existence, nor any decree which can ever be called into existence, which would affirm that the employers were under obligation to pay anything after 1st November 1907. Accordingly it seems to me here that the arbitrator was not right. I think that he, perhaps not unnaturally, thought that he was bound by these cases, but I think he ought, in the circumstances, to have terminated the compensation as at 1st November 1907, and that we should so determine. I am quite clearly of opinion that it is not necessary for the decision of this case to decide the difference of judicial opinion in the cases I have cited.

Southhook
Fire-Clay Co.,
Limited, v.
Laughland.
Ld. President.

LORD M'LAREN.—If I had to consider the result at which I would personally arrive in regard to this question in its various forms I should say that my opinion, as expressed in the case of *Cavaney*,¹ is unaltered. But then I was in a minority in that case, and I must accept the decision of the Court unless and until that decision is overruled by a competent authority. Therefore I am very glad to be able to concur in the judgment proposed, regarding it, if I may say so, as a bridge by which I may more quickly arrive at my destination than I should in the former case. I agree with your Lordship that it is impossible to read the opinions of the Judges constituting the majority without seeing that in their opinions it was a very important element—certainly in the case of *Cavaney*¹—that there was a recorded agreement, or an award in an arbitration, which set up an obligation indefinite as regards duration in time. Such obligation would naturally continue until it was brought to an end by some means as effectual as the agreement or award, and their Lordships came to the conclusion that the agreement would subsist until the decision of the case. I should have thought myself that, following the analogy of ordinary legal proceedings, reductions, or any other mode of terminating an agreement, the effect of the decision would draw back at least to the date of the initial writ of the case. But then in this case we have no award, we have no recorded agreement, and the most that can be said is that there is an inferential agreement to continue to pay, because as a matter of fact the employer has paid compensation substantially on the basis of the statute during the period of incapacity. But then it seems to me to follow that, as there is nothing to set aside, you can only infer an agreement to pay during incapacity and no longer. Therefore when the Sheriff-substitute has found the date when incapacity ceased, that seems to me to be the date when payment would necessarily terminate. I agree that the question should be so answered.

LORD KINNEAR.—I think that this case is clearly distinguishable on the ground your Lordship has stated from the cases of *Steel v. The Oakbank Oil Company*² and of *Cavaney v. The Pumpherton Oil Company*.¹ Upon

its own merits, I concur with what your Lordship has said, and that we May 14, 1908. must answer the question as proposed.

LORD PEARSON was absent.

Southhook
Fire-Clay Co.,
Limited, v.
Laughland.

THE COURT answered the first and second questions in the case in the negative, and the third question in the affirmative.

SIMPSON & MARWICK, W.S., Agents.

THE PARISH COUNCIL OF THE PARISH OF STRICHEN, Petitioners
(Appellants).—*Chree*.

No. 120.

THE REV. RICHARD GOODWILLIE, Respondent (Appellant).—*Chree*. May 20, 1908.
JOHN SLEIGH AND OTHERS, Compearers (Respondents).—*Hunter, K.C.*
—*Macmillan*.

Strichen
Parish Council
v. Goodwillie.

Sheriff—Jurisdiction—Appeal—Competency—Burial Grounds (Scotland) Act, 1855 (18 and 19 Vict. cap. 68), secs. 9, 10, 32.—In a petition under the Burial Grounds Act, 1855, for the designation of a burial ground, the decision of the Sheriff-substitute cannot competently be appealed to the Sheriff.

ON 23d October 1907 the Parish Council of the parish of Strichen presented a petition in the Sheriff Court at Aberdeen, under section 9 of the Burial Grounds (Scotland) Act, 1855, craving to have a certain piece of land designated for the purpose of a burial ground.*

1st DIVISION.
Sheriff of
Aberdeen,
Kincardine,
and Banff.

The petition was opposed by the Rev. Richard Goodwillie, minister of the parish of Strichen.

ON 15th November 1907 the Sheriff-substitute (Young) granted the prayer of the petition.

Mr Goodwillie appealed to the Sheriff.

ON 22d February 1908 the Sheriff (Crawford) dismissed the appeal as incompetent.†

* The Burial Grounds (Scotland) Act, 1855 (18 and 19 Vict. cap. 68), enacts:—

Sec. 9. " . . . If a majority . . . of the parochial board shall resolve that a burial ground shall be provided under this Act for the parish, such new burial ground shall be provided in the same manner as if an old burial ground had been closed by Order in Council.

Sec. 10. " Whenever any burial ground shall have been closed by Order in Council " the parochial board " may apply by summary petition to the Sheriff to have a suitable portion of land designated for the purpose of a burial ground . . . provided always that due intimation shall have been given of not less than ten days to the owner of such lands, that he may be heard for his interest before such designation is actually made, subject always to an appeal to any of the Lords Ordinary of the Court of Session, whose decision shall be final, such appeal always being presented within fourteen days of the date of the Sheriff's judgment."

Sec. 32. " No interlocutor or deliverance of a Sheriff under this Act, excepting as herein provided, shall be in any way subject to review, or to be set aside by reason of any defect of form therein, or in the procedure on which it followed."

† " NOTE.—This is an appeal against a decree of the Sheriff-substitute, pronounced in a petition by the Parish Council of Strichen, presented under section 9 of the Burial Grounds (Scotland) Act, 1855. I am of opinion that the appeal is not competent, and that I have no jurisdiction to entertain it. By the statute a certain jurisdiction is conferred, and a corresponding

May 20, 1908. Mr Goodwillie appealed to the Court of Session.

The case was heard on 20th May 1908.

Strichen
Parish Council
v. Goodwillie.

duty laid upon the Sheriff. It was conceded, and could not successfully have been disputed, that the word 'Sheriff,' as used in the statute, includes Sheriff-substitute, as it always does, unless the contrary is expressed, and that the petition was competently presented to the Sheriff-substitute and dealt with by him. Now, clause 32 of the Act is in these terms:—'No interlocutor or deliverance of a Sheriff under this Act, excepting as herein provided, shall be in any way subject to review, or to be set aside by reason of any defect of form therein, or in the procedure on which it followed.' The words of that section, according to their plain meaning, appear to me to exclude an appeal from the Sheriff-substitute to the Sheriff. The words 'excepting as herein provided' make that all the more evident. The exception refers to an appeal which is allowed in certain cases under section 10 to a Lord Ordinary of the Court of Session. That appeal must be presented within fourteen days of the date of the Sheriff's judgment. That would not leave time for an appeal from the Sheriff-substitute to the Sheriff, and I do not think it possible to interpret the words 'Sheriff's judgment' as meaning a judgment on appeal from the Sheriff-substitute.

"The statutes are now numerous in which a new jurisdiction and duty are conferred and laid upon the Sheriff for the purposes of the statute different from his jurisdiction as Judge Ordinary. The procedure prescribed in these statutes varies very much in detail, and each must be interpreted by its own terms. Where there is room for holding that 'Sheriff' means the Sheriff Court with its ordinary procedure, then the appeal from the Sheriff-substitute to the Sheriff will remain, and any different intention must be clearly and unmistakably expressed. Such a case was *The Magistrates of Portobello v. The Magistrates of Edinburgh*, 9th November 1882, 10 R. 130, in which the language of the Rivers Pollution Prevention Act made it clear that the ordinary procedure of the Sheriff Court was to be followed, and the subject-matter of the petition to the Sheriff was similar to that of an ordinary Sheriff Court action. There is, however, a series of statutes which differ from each other in detail, some of them, though not all, imposing upon the Sheriff a duty which is rather ministerial than judicial, but agreeing in this, that the purpose of the statute is to be worked out under a procedure marked by more speedy finality and greater dispatch than an ordinary litigation would afford. One feature common to such Acts is that they provide for a single decision in the Sheriff Court, which in some cases is final, while in others there is a single limited appeal. In some statutes, especially of late years, that object is attained by limiting the jurisdiction to the Sheriff-principal. But a single decision may be contemplated without such limitation. An early case of that kind was *Balderston v. Richardson*, 20th February 1841, 3 D. 597, arising under the Bankrupt Act. Lord Gillies observed, 'The Sheriff in the statute means either the Substitute or the Principal, but not both,' and that observation is equally applicable to the present case. The case of *Fulton v. Dunlop*, 31st May 1862, 24 D. 1027, arising under the same statute as the present, is very nearly a direct precedent. It was there stated by the Sheriff-substitute, and assumed throughout, that there was no appeal from him to the Sheriff. It also appears from the report that a year or two previously another application had been made under the Act by the Parochial Board, and that the Sheriff had dismissed an appeal to him from the Sheriff-substitute as incompetent. The same point has been raised in other cases, such as *Fleming v. Dickson*, Dec. 19, 1862, 1 Macph. 188; *Leitch v. The Scottish Legal Burial Society*, Oct. 21, 1870, 9 Macph. 40; and *Bone v. The Sorn School Board*, March 16, 1886, 13 R. 768. Those cases decided that the Sheriff-principal may take up the case though the petition has been presented to the Sheriff-substitute, and he has dealt with preliminary pleas, and that even when

Argued for Mr Goodwillie *;—The Sheriff had erred in refusing to entertain the appeal from the Sheriff-substitute, such appeal being competent and not excluded by the terms of the statute.¹

Counsel for the respondents (Sleigh and others) was not called upon.*

LORD PRESIDENT.—I do not see any difficulty in this case, and I think the judgment of the Sheriff is right. It is impossible to read the provisions of the Burial Grounds (Scotland) Act, 1855, without seeing that the only appeal allowed is an appeal to the Lord Ordinary under certain limited conditions, and that there is no appeal from the Sheriff-substitute to the Sheriff. The Sheriff and the Sheriff-substitute here are not acting in their ordinary capacity, and are both equally available as a Court of first instance.

LORD M'LAREN.—I concur.

LORD KINNEAR.—I entirely agree with your Lordship. I think that the Sheriff has refused the appeal on perfectly right grounds; and that he has stated correctly the distinction between Acts of Parliament conferring an exclusive jurisdiction on the Sheriff, to be exercised either by the Sheriff-depute or the Sheriff-substitute, and those which give a new jurisdiction to the Sheriff Court to be explicated according to the ordinary course of procedure.

LORD PEARSON was absent.

THE COURT dismissed the appeal.

HENRY & SCOTT, W.S.—ALEX. MORISON & Co., W.S.—Agents.

the Sheriff has done so under the mistaken impression that an appeal to him was competent. He can intervene so long as no final decision has been pronounced. But all these cases agree in this, that only one decision in the Sheriff Court is contemplated. A recent case was decided by the First Division under section 57 of the Roads and Bridges Act, 1878, affirming a judgment by which I held that an appeal to the Sheriff was incompetent. The clause of finality was in similar terms to those of section 32 above quoted, and I cannot distinguish between the two cases. The case which was mentioned during the debate (and Mr Duncan, the agent of one of the parties in this case, was engaged in it) is not reported. The name was, I think, *Aberdeen District Council v. Milne*, and the year 1901.

"I have thought it desirable to refer to some of the cases in which a similar question has been mooted, and which seemed to me valuable as illustrating the present case. But as I have said, each statute must be interpreted by its own terms. In the case of *Fulton* we have what almost amounts to a direct precedent, and even without the help of that case I should have come to a clear conclusion that I have no jurisdiction to entertain this appeal."

¹ *Leitch v. Scottish Legal Burial Society*, Oct. 21, 1870, 9 Macph. 40, per Lord Cowan, at p. 42.

* Between the date on which the petition was presented and the date on which the appeal was taken to the Sheriff, the Parish Council of Strichen was re-elected. The majority of the new Parish Council was opposed to the petition, and joined with Mr Goodwillie in maintaining the appeal and moving that the petition be refused. The petition was supported and the competency of the appeal objected to by John Sleigh and others, ratepayers, who compared and were sisted as parties to the action.

No. 121.

May 23, 1908.
 Maclean v.
 Maclean's
 Executrix.

ALEXANDER MACLEAN, Pursuer (Respondent).—*MacRobert*.
 FLORA MACLEAN (Mrs Maclean's Executrix), Defender (Reclaimer).—*Chree*.

Succession—Legacy—Specific or General—Ademption.—By a general disposition and settlement a testatrix bequeathed her whole estate to her daughter F., "with the exception of £300 sterling of mine which my son A. has invested for me, and which I do hereby leave and bequeath to himself." At the date of the settlement A. had in his possession a sum of £300 belonging to his mother on which he paid interest to her. This sum he subsequently repaid to her before her death.

Held (rev. judgment of Lord Mackenzie) that the legacy to A. was a specific legacy of a sum of £300 in his hands at the date of the settlement, and that as there was no sum in his hands at the death of the testatrix the legacy must be held to have been adeemed.

2D DIVISION.
 Lord Mac-
 kenzie.

ALEXANDER MACLEAN, wine and spirit merchant, Glasgow, brought an action against Miss Flora Maclean, Ardgay, Ross-shire, executrix-nominate of the deceased Mrs Flora M'Leod or Maclean, Ardgay, as such executrix and as an individual, in which he concluded, *inter alia*, for payment of £300 as the amount of a legacy bequeathed to him by Mrs Maclean.

The defender pleaded, *inter alia*;—(5) Said legacy of £300 having been adeemed, the defender is entitled to absolvitor from the conclusion for payment thereof.

The parties renounced probation as regards all matters bearing on the defender's fifth plea in law.

The facts as appearing from the documents produced and the averments of parties were as follows:—The pursuer and defender were brother and sister. The deceased Mrs Flora M'Leod or Maclean was their mother. She died on 31st July 1901 leaving a general disposition and settlement dated 13th June 1898, by which she provided, *inter alia*:—"I, . . . do hereby appoint my daughter Flora Maclean to be my sole executrix; and I give and dispose to the said Flora Maclean my whole means and estate, heritable and moveable, with the exception of Three hundred pounds stg. of mine which my son Alick has invested for me, and which I do hereby leave and bequeath to himself. . . ."

At the date of the settlement the pursuer had in his hands a sum of £300 belonging to his mother, on which he paid interest to her. In 1901, before his mother's death, the pursuer wrote a letter dated "Friday, 1901," in which he said:—"If mother is strong enough, Flo, please tell her that I don't want to have this £300, as I am not in need of it, and don't want people to think I am in debt to you or mother, and to *oblige me* tell Mr M'Callum to alter the will and allow me to return this £300, and since you are to be trustee, Flo, I wish to be straight. I won't take one cent, and I only kept this cash safe for you and mother, and it will do fine in the bank for you. . . ."

Thereafter, on 7th March 1901, before the death of his mother, the pursuer repaid to her the sum of £300 belonging to her which he had had in his hands.

On 6th July 1907 the Lord Ordinary (Mackenzie), after hearing counsel in the Procedure-roll, pronounced this interlocutor:—"Repels the . . . 5th plea in law for the defender . . . finds that the legacy of £300 bequeathed to the pursuer under the will of the

said Mrs Flora M'Leod or Maclean, dated 13th June 1898, has not been adeemed . . . Grants leave to reclaim." *

The defender reclaimed. The case was heard before the Second Division on 16th May 1908.

Maclean v.
Maclean's
Executrix.

Argued for the defender and reclaimer;—This was a specific bequest. The subject of it had ceased to exist at the date of the testatrix's death, for at that date there was no longer any sum in the pursuer's hands. The bequest had consequently been adeemed.¹

Argued for the pursuer and respondent;—This was a general and not a specific legacy.² It was a legacy of a sum of money. The reference to the investment of it was demonstrative merely, and not taxative. In the case of a bequest of a sum of money the presumption was that a reference to the investment of it was demonstrative merely.³ If the legacy was general, then the sum bequeathed was payable out of the general estate. The cases cited for the reclaimer were distinguishable. They related to bequests of sums due under some particular document—bond, bill, deposit-receipt, or policy.

At advising on 23d May 1908,—

LORD LOW.—The first question in this case appears to me to be whether the legacy of £300 left to the pursuer by his mother was a special legacy. The Lord Ordinary has answered that question in the negative, holding that "the expression of the bequest points rather to the amount of the fund than to the designation of it as a specific *corpus*." I confess that I am unable so to read the bequest. The testatrix left to her daughter her whole means and estate "with the exception of £300 sterling of mine which my son Alick has invested for me, and which I do hereby leave and bequeath to himself." The parties have renounced probation, but it appears from the pleadings that they are agreed that at the date of the will the pursuer had in his hands £300 belonging to his mother, which he subsequently repaid to her.

The pursuer's argument was that the words "which my son Alick has

* "OPINION.— . . . The first question is whether the legacy of £300 was a special legacy. Unless it is held to be a special legacy the question of ademption does not arise. In my opinion the expression of the bequest points rather to the amount of the fund than to the designation of it as a specific *corpus*. In such a case the legacy is general, to be made good out of the general fund though the money should have been uplifted—Bell's Prin., sec. 1886. None of the cases cited by the counsel for the defender were like the present. In all of them there was either a specific subject or, in the case of money, a particular bond, bill, deposit-receipt, or insurance policy. Here the bequest is of money, which at the time happened to be in the pursuer's hands, but which he subsequently handed back. That, I think, is different from the case of a specific investment. I am accordingly of opinion that the defender's 5th plea in law should be repelled, and that there should be a finding that the legacy has not been adeemed."

¹ Pagan v. Pagan, 1838, 16 S. 383; Anderson v. Thomson, 1877, 4 R. 1101; Jack v. Lauder, 1742, Mor. Dict. 11,357; Davidson's Trustees v. Davidson, 1901, 4 F. 107; Davies v. Morgan, 1839, 1 Beavan, 405; Mantou v. Tabois, 1885, L. R., 30 Ch. D. 92.

² Bell's Prin. sec. 1886; Chalmers v. Chalmers, 1851, 14 D. 57, per L. J.-C. Hope, at p. 60, foot.

³ Chalmers v. Chalmers, 14 D. 57, per L. J.-C. Hope, at p. 60, foot.

May 23 1908. invested for me," are to be regarded as being no more than a statement of the reason which led the testatrix to fix the amount of the legacy at £300. That argument is ingenious, but I do not think that it is in accordance with the natural meaning of the language used. No doubt the fact that the pursuer had £300 of his mother's money in his hands when she made her will was the reason why she bequeathed that sum to him, but the bequest was of the very sum which he had in his hands, and no other. It cannot be assumed that if the pursuer had not had the £300 in his hands his mother would have left him a legacy of that amount, or of any amount.

Maclean v.
Maclean's
Executrix.
Lord Low.

Now, of course, a will speaks at the date of the testator's death, and the question comes to be whether at Mrs Maclean's death there was any sum of £300 answering the description in the will? Plainly there was not, and accordingly I am of opinion that the pursuer's claim to the legacy cannot be sustained.

LORD ARDWALL.—The only question argued in the debate on this reclaiming note is whether the legacy of £300 bequeathed to the pursuer under the will of Mrs Flora M'Leod or Maclean, dated 13th June 1898, has or has not been adeemed. In this case it is not the facts constituting ademption, and the legal effect of these, that are in dispute so much as the question whether this legacy was or was not susceptible of ademption, and the solution of this question depends on the further question, viz., whether or not the legacy was a general or a special legacy.

I am of opinion that the legacy was a special legacy of a specific sum of money. The parties have renounced probation, and I think it unfortunate that they have not adjusted a minute of admissions of facts which must be known to both of them, and which could not admit of dispute, the admission of which would have tended to simplify the discussion and the determination of the case. From the words of the deed itself, in so far as they designate the subject of the bequest, neither party takes much benefit. On the one hand it tells in favour of the defender's contention that the sum bequeathed is excepted altogether from the *universitas* of the testatrix's estate disposed to Miss Maclean. For the pursuer, again, it may be urged that the description, "which my son Alick has invested for me," seems to point to this, that the testatrix regarded the £300 as simply a portion of her estate which had been invested on her behalf and in her name by her son, the legatee. But the question whether a legacy is a legacy of a specific sum or not is one of fact, and on the record as it stands the facts appear to be as follows: At the date of Mrs Maclean's settlement a sum of £300 belonging to her was in the hands of her son, the pursuer. The income of this sum was then being paid by the pursuer to his mother. It is an inference in fact from the statements of parties, and the terms of the letter, dated "Friday 1901," that the pursuer had not invested this sum in his mother's name, but either invested it in his own name or made use of it in his business. But this fact is clear, that it was a sum which was in the pursuer's hands at the date of the will and which he was bound to account for and pay to his mother if requested to do so. It was thus a sum due by the pursuer to his mother, and thus constituted a debt due by him to her. Accordingly on 7th March 1901 the pursuer paid to his mother the said sum

of £300, apparently in cash or its equivalent, and not by transferring shares May 23, 1908. or other investments to her.

On these facts I am of opinion that the legacy was the bequest of the specific sum of £300 due to the testatrix by her son at the date of the execution of her will. This being so, the subject of the bequest ceased to exist by the payment of the £300 to the testatrix and the merging of it in her general estate. Then at the death of the testatrix, the subject of the bequest being no longer in existence, the legacy must be held to have suffered ademption.

*Maclean v.
Maclean's
Executrix.*

Lord Ardwall.

The question as to whether a legacy has been adeemed or not is purely one of fact. This has been settled in a variety of cases both in Scotland and England, several of which were cited to us at the debate. They are reviewed in Lord Ormisdale's judgment in the case of *Anderson v. Thomson*,¹ who, in referring to the judgment of Lord Thurlow in the cases of *Ashburner v. M'Guire*,² and *Stanley v. Potter*,³ says that it is firmly established in England "that the test of ademption is whether the specific thing bequeathed by a testator continued to exist at his death, or had been converted into something else, and this independently altogether of the *animus adimendi*, a consideration which has been discarded on the ground that it is calculated to create confusion and uncertainty," and he thereafter points out that there are Scotch cases to the same effect.

I am therefore of opinion that the Lord Ordinary's interlocutor, in so far as it finds "that the legacy of £300 bequeathed to the pursuer under the will of the said Mrs Flora M'Leod or Maclean, dated 13th June 1898, has not been adeemed," ought to be recalled, and that the Court should find that said legacy has been adeemed, and remit the cause to the Lord Ordinary to proceed therewith.

LORD STORMONTH-DARLING.—I concur.

The LORD JUSTICE-CLERK was absent.

THE COURT pronounced this interlocutor:—"Recall the . . . interlocutor reclaimed against, in so far as it repels the fifth plea in law for the defender, and also in so far as it finds that the legacy of £300 bequeathed to the pursuer under the will of Mrs Flora M'Leod or Maclean, dated 13th June 1898, has not been adeemed: Sustain the said fifth plea in law for the defender, and find that the said legacy has been adeemed. . . ."

YOUNG & FALCONER, W.S.—ALEX. ROSS, S.S.C.—Agents.

HENRY CASS (William H. D. Cass's Tutor), Pursuer (Reclaimer).— No. 122.
Orr, K.C.—Kemp.

THE EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED, May 23, 1908.
Defenders (Respondents).—*Watt, K.C.—R. S. Horne.*

Process—Proof—Proof or Jury Trial—Discretion of Lord Ordinary—*Cass v.*
Action of Damages—Special Cause—Evidence (Scotland) Act, 1866 (29 and *Edinburgh*
Tramways
Co., Limited.

¹ 1877, 4 R. 1101.

² Br. C. Cases, 108.

³ July 16, 1829, 1 Cox, 180.

May 23, 1908. 30 *Vict. cap.* 112), *sec.* 4.—In an action of damages at the instance of a father as tutor of his pupil child about five years of age, who had sustained personal injuries through being run over by a tramway car, the Lord Ordinary refused to send the case to a jury and allowed a proof, stating as his grounds for doing so that the case was of doubtful relevancy, and that it raised a question as to contributory negligence, which in the case of a child was always of a delicate nature, and also questions depending upon expert evidence as to the construction of tramway cars.

Cass v.
Edinburgh
and District
Tramways
Co., Limited.

The Court *refused* to interfere with what the Lord Ordinary had done in the exercise of his discretion as to the mode of trial.

Vallery v. M'Alpine & Sons, 1905, 7 F. 640, *followed*.

2D DIVISION.
Lord Guthrie.

HENRY CASS, insurance manager, Edinburgh, as tutor and administrator-in-law for his pupil son William Henry Duncan Cass, brought an action against the Edinburgh and District Tramways Company, Limited, in which he concluded for payment of £2500 as damages for personal injuries sustained by his said son, through being run over by a cable car belonging to the defenders.

The pursuer averred that about four o'clock on the afternoon of 16th November 1907, when it was broad daylight, his son, who was four years and eight months old at that date, was returning from Inverleith Terrace, where he had gone to buy nuts, and was in the act of walking across Inverleith Row to reach his father's house in Eildon Street, when he was suddenly knocked down and run over by one of the defenders' cable cars, which was running along Inverleith Row from the south towards Goldenacre, and sustained serious injuries through the wheel or wheels of the car going over his legs; that no bell was rung or other warning given of the approach of the car, and the pursuer's son did not and could not hear it approaching because of a strong head wind which was at the time blowing against it, and because, the day in question being damp, the rails were greasy, and the car made less noise than usual; that the "accident was caused through the fault of the defenders or of their servant the driver of said car," for whom they were responsible; that the stair leading to the roof of said car was built on a dangerous and obsolete system; "it starts from the left front of the platform, and in gradually rising to the level of the top of the car it passes obliquely in front of the driver of the car in such a manner as to completely obscure his vision to the front and left front of the direction in which the car is travelling. Further, the said car . . . was provided with a guard in front, which is intended to prevent any obstruction which may be encountered by the car on the street from passing under the car or its wheels. The guard on the car was quite out of date and ineffective for that purpose, for it allowed the boy's legs to pass freely underneath it, and so allowed the wheels to pass over them. Or otherwise, if it was at all possible for the driver to see what was in front or to his left front, he negligently and culpably failed to keep a proper lookout when the car was travelling. . . . As it was the driver did not and could not see the boy, or know that he was there, till the car was upon him. . . . The said accident was thus due either to the faulty and dangerous construction of said car, . . . or to the culpable failure of the driver to keep a good look-out and warn foot-passengers crossing the street of the approach of his car. . . . Further, the regulations and bye-laws of the Board of Trade relating to defenders' tramways provide that every car shall be so constructed as to enable the driver to command the fullest possible view of the

road, and also that every car shall be fitted with a suitable lifeguard. May 23, 1908.
 . . . The said car was so constructed as to prevent the driver from commanding the fullest possible view of the road, and was not fitted with a suitable lifeguard; and defenders, in continuing to use said car as presently constructed, acted knowingly or negligently in violation of said regulations.”

Cass v.
 Edinburgh
 and District
 Tramways
 Co., Limited.

The defenders pleaded, *inter alia*;—(1) The pursuer's averments being irrelevant and insufficient to support his pleas, the action should be dismissed. (3) The pursuer's son's injuries having been caused or materially contributed to by either (a) his own fault, or (b) the fault of his parents, decree of absolvitor should be pronounced.

The pursuer proposed an issue for the trial of the cause by jury.

On 6th March 1908 the Lord Ordinary (Guthrie) pronounced the following interlocutor:—“Having heard counsel on the proposed issue for the pursuer, and considered the question as to the mode of proof to be allowed in this cause, finds that the cause is more suitable to be disposed of by way of proof before his Lordship than by jury; Therefore disallows the issue; repels the defenders' first plea in law; allows to the parties a proof of their averments on record.”*

* “OPINION.—The pursuer's case is alternative. Either the car, which knocked down and ran over his pupil son, was so badly constructed that the driver could not have seen the child, so as to avoid knocking him down and running him over, or, if these averments are unfounded, then the accident was due to the driver's failure to keep a proper look-out. I do not think the pursuer is entitled so to state his case. The faulty condition of the car was of a permanent nature; and the identical car, according to him, is still running unaltered, as well as seven others of the same construction. His experts must know whether it is the fact, as alleged by him, that the stair of the car is so constructed ‘as to completely obscure his (the driver's) vision to the front and left front of the direction in which the car is travelling,’ and that ‘the driver did not and could not see the boy, or know that he was there, till the car was upon him.’ If permission to examine and test the car was refused, the pursuer could have got an order. The right to state alternative cases must be subject to some limitation. Obviously a pursuer would not be entitled to say, in the case of an existing and unaltered carriage, that it had no brake, or, if it had a brake, it was not applied. For the same reason, namely, that the alternatives are mutually inconsistent, I hold the pursuer to his primary averment of bad construction of the car, completely obscuring the driver's vision to his front and left front, so that he did not and could not see the boy, or know that he was there, till the car was upon him. If that averment is well founded, the accident could not have any connection with want of proper look-out on the driver's part, and the case made on record against the defenders, as being responsible for the driver's want of look-out, is irrelevant on the pursuer's averments.

“In the absence of any specialty, the result would be to send the case to jury trial, on the question of the faulty construction of the car. But the defenders maintain that, on the pursuer's averments, properly construed, it is clear that the proximate cause of the accident was, first, the action of the parents in allowing so young a child to go about unattended, and second, the action of the child in stepping in front of a moving car. They found on the averment in cond. 2 to the effect that the child, going unattended, after walking some distance along the pavement on the west side of Inverleith Row, left the pavement and was ‘in the act of walking across Inverleith Row,’ when he was knocked down by a car travelling northwards, but not at excessive speed, on the westmost pair of rails. As stated in cond. 2 the

May 23, 1908.

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Edinburgh
and District
Tramways
Co., Limited.

The pursuer reclaimed. The case was heard before the Second Division on 23d May 1908.

Argued for the pursuer and reclaimer;—This was an action of damages for personal injuries. It was, therefore, one of the class of causes enumerated as appropriate for jury trial both under the original enumeration in section 28 of the Court of Session Act, 1825,¹ and under the more restricted enumeration in section 49 of the Court of Session Act, 1850.² In the case of such an action the pursuer had a right to jury trial unless special cause was shewn to the contrary.³ Here no such special cause was shewn. Special cause meant exceptional grounds.⁴ There was nothing special, or exceptional, or complicated about this case. The averments were not alternative in the sense of being mutually exclusive. The pursuer did not plead the Board of Trade Regulations. He founded upon them merely as strengthening and emphasising his case at common law. There was no question as to the interpretation of bye-laws. Contributory negligence was a question of fact. The existence of a question as to contributory negligence did not constitute special cause even where it arose with regard to a child or its parents.⁵ Nor was the fact that expert evidence would be required a sufficient ground for refusing to send the case to a jury, where, as here, there was nothing specially complicated. Actions laid alternatively at common law and under the Employers Liability Act, 1880, were usually sent to a jury although legal complications were involved.⁶ The fact that a question of law, or even a difficult question of law, was involved, was not special cause shewn for sending the case to proof instead of jury trial.⁷

averments, so far as any explanation is given of the conduct of the child, resemble the facts as they came out in the case of *Fraser v. Edinburgh Tramways Co.*, 10 R. 264. But the pursuer explains that the child did not walk straight across, but was going in a slanting direction, the result being that the car was coming up behind him, so that he could not see the car, nor could he hear it, through the strong north wind, and the noiseless running of the car produced by the greasiness of the rails. The pursuer, who declined to amend, thus seems to me to table a case of such doubtful relevancy that, although with his counsel's explanation I am not prepared to throw it out, I think it ought to be sent to proof and not to jury trial. The reason for sending the case to proof is strengthened by these circumstances—first, the delicate nature of all questions of contributory negligence in the case of children; second, the effect of the Board of Trade regulations relied on by the pursuer, if they go beyond a mere statement of the defenders' common law liability; and third, because the question of the proper construction of cars, depending as it does on expert evidence, is better fitted for trial before a Judge than for jury trial."

¹ Judicature Act, 6 Geo. IV. cap. 120.

² 13 and 14 Vict. cap. 36.

³ Evidence (Scotland) Act, 1866 (29 and 30 Vict. cap. 112), sec. 4; *M'Avoy v. Young's Paraffin Co., Limited*, 1881, 9 R. 100 (Lord Ordinary reversed); *Rhind v. Kemp & Co.*, 1893, 21 R. 275 (Lord Ordinary reversed); *M'Intosh v. Commissioners of Lochgelly*, 1897, 25 R. 32; *Sharples v. Yuill & Co.*, 1905, 7 F. 657.

⁴ *M'Avoy v. Young's Paraffin Co., Limited*, 9 R. 100, *per* Lord Young, at p. 102.

⁵ *Fraser v. Edinburgh Street Tramways Co.*, 1882, 10 R. 264; *Campbell v. Ord & Maddison*, 1873, 1 R. 149.

⁶ *M'Avoy v. Young's Paraffin Co., Limited*, 9 R. 100.

⁷ *M'Intosh v. Commissioners of Lochgelly*, 25 R. 32; *Edinburgh Railway Access and Property Co. v. John Ritchie & Co.*, 1903, 5 F. 299.

If necessary the pursuer would prefer to have an issue on the ques- May 23, 1908.
tion as to the construction of the car alone, the case on the other
ground being held irrelevant. In *Jack v. Rivet, Bolt, and Nut Com-* Cass v. —
pany, Limited,¹ the question on which the case was decided was one Edinburgh
and District
Tramways
Co., Limited.
of law and not of fact. In the case of *Cooke v. Leith Harbour and
Dock Commissioners*² there was a cumulation of grounds for sending
the case to proof.

Argued for the defenders and respondents;—The Lord Ordinary had a discretion as to the mode of trial, and the Court would not interfere with what he had done in the exercise of that discretion.³ This rule applied in the case of an action of damages for personal injuries.⁴ But apart from that the Lord Ordinary was right. This was an action of doubtful relevancy in respect both of the nature of the allegations of fault and of the question as to contributory negligence on the part of the child or its parents which was raised by the pursuer's own averments.⁵ The contributory negligence of the parent might be imputed to the child.⁶ [LORD LOW.—The case cited was not at the instance of the child but of the parent.] Doubtful relevancy was a sufficient special cause for refusing to send a case to a jury.⁷ [LORD ARDWALL referred to *Govan v. J. & W. McKillop*.⁸] The case of *M'Intosh v. Commissioners of Lochgelly*⁹ had not been followed in practice. The case of *Edinburgh Railway Access and Property Company v. John Ritchie & Company*¹⁰ was an example of the rule that the Court would not interfere with what the Lord Ordinary had decided as to the mode of trial.

LORD STORMONTH-DARLING.—I concede that this case as being “properly and in substance an action of damages” is *prima facie* one for jury trial, and that special cause requires to be shewn before any other course can be followed. But the Lord Ordinary has applied his mind to the question of how the case should be tried, and he has decided that the mode of inquiry should be by a proof before himself, the date of which he has fixed. Now, I think we should do wrong to interfere with that which I think is in reality the exercise of a discretion. It may be said with some force that it is not the exercise of a discretion, and that the Lord Ordinary is practically bound to allow a jury trial unless he can shew something which is clearly a special cause; but in the case of *Vallery v. M'Alpine*,⁴ it was held by Lord Pearson, and approved by this Division of the Court that doubtful relevancy is a sufficient “special cause”; and accordingly, when the case came here, I find

¹ 1904, 6 F. 572.

² 1905, (O.-H.), 13 S. L. T. 536.

³ *Weir v. Grace*, 1898, 25 R. 739, *per* Lord Trayner, at p. 747; *Fearn v. Cowpar*, 1899, 1 F. 751, *per* Lord Young and Lord Trayner, at p. 755; *Vallery v. M'Alpine & Sons*, 1905, 7 F. 640.

⁴ *Vallery v. M'Alpine & Sons*, 7 F. 640.

⁵ *Grant v. Caledonian Railway Co.*, 1870, 9 Macph. 258; *Fraser v. Edinburgh Street Tramways Co.*, 10 R. 264; *Gibson v. Glasgow Police Commissioners*, 1893, 20 R. 466.

⁶ *Grant v. Caledonian Railway Co.*, 9 Macph. 258, *per* Lord Ardmillan, at p. 264.

⁷ *Vallery v. M'Alpine & Sons*, 7 F. 640; *Cooke v. Leith Harbour and Dock Commissioners*, (O.-H.), 13 S. L. T. 536; *Jack v. Rivet, Bolt, and Nut Co., Limited*, 6 F. 572.

⁸ 1907, 15 S. L. T. 658.

⁹ 25 R. 32.

¹⁰ 5 F. 299.

May 23, 1908. that the Lord Justice-Clerk, in delivering the only judgment which is reported, says,—“ In the present instance the Lord Ordinary has exercised his discretion by sending the case to proof, and I should be very slow to interfere with what he has decided in the exercise of his discretion. I do not say that there might not be cases in which the Court would interfere, but it would require to be on very strong grounds.”

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Edinburgh
and District
Tramways
Co., Limited.
LdStormonth-
Darling.

A similar course was followed in the other Division in the case of *Jack v. Rivet, Bolt, and Nut Company, Limited*,¹ and therefore I think we should not interfere with the discretion which the Lord Ordinary has exercised after a very full and careful consideration of the whole matter. This is a case, I think, of doubtful relevancy, both because there are two alternative grounds of liability averred, and because there is a question as to the application of the law of contributory negligence in the case of a child. That is always a matter of some delicacy; and on the whole matter I am of opinion that the interests of justice will be better served by following the course of the Lord Ordinary's judgment than by sending the case to a jury.

LORD LOW.—I have felt this case to be attended with great difficulty. I confess that if I had been sitting here as a Judge of first instance I should have been disposed, after the argument which we have heard, to allow an issue. But, very properly I think, the Inner-House has always been slow to disturb the conclusion arrived at by the Lord Ordinary on a question of this sort, which, after all, is really a question of procedure, and I quite recognise that there is a great deal to be said for the view that a right result is more likely to be reached in this case if it be tried by way of proof and not by a jury.

Accordingly I agree that we should not disturb the judgment of the Lord Ordinary.

LORD ARDWALL.—I concur with your Lordship in the chair.

The LORD JUSTICE-CLERK was absent.

THE COURT adhered, and remitted the cause to the Lord Ordinary.

FRANCIS S. COWNIE, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 123.
May 27, 1908.

JOHN GEORGE, Claimant (Appellant).—*Dickson, K.C.—Moncrieff.*
THE GLASGOW COAL COMPANY, LIMITED, Defenders (Respondents).—*Hunter, K.C.—Carmont.*

George v.
Glasgow Coal
Co., Limited.

Master and Servant—Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (2) (c)—Serious and Wilful Misconduct—Coal Mines Regulations Act, 1887 (50 and 51 Vict. cap. 58), secs. 51 and 52—Breach of Special Rule.—By the Additional Special Rules in force in a coal mine, under the provisions of the Coal Mines Regulations Act, 1887, it was provided, Rule 3:—“ The bottomer at a mid-working in a vertical shaft . . . shall not open the gate fencing the shaft until the cage is stopped at such mid-working.”

A bottomer at a mid-working in that mine, who required a cage, signalled for a cage at the bottom of the shaft to be sent to the mid-working. He did so by the ordinary method in use in that mine, viz., by calling to the

bottomer at the foot of the shaft, who thereupon signalled to the engineman at the surface to draw up the cage. On receiving such a signal the engineman usually stopped the cage in the course of its ascent at the mid-working, but was not bound to do so, and did not invariably do so. On the signal to raise the cage being given the bottomer opened the gate, and, without ascertaining whether the cage had really stopped, went behind a hutch to push it into the cage, but the cage on the occasion in question had not been stopped at the mid-working, and the hutch fell to the foot of the shaft, drawing the bottomer with it, whereby he was injured, but not seriously and permanently disabled.

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In an application for compensation under the Workmen's Compensation Act, 1906, the arbitrator found that the injuries were attributable to the serious and wilful misconduct of the workman, and assolized the defenders. In an appeal, *held* that the facts found proved were sufficient to entitle the arbitrator to arrive at that conclusion, and appeal *dismissed*.

JOHN GEORGE, bottomer, Wishaw, having claimed compensation for personal injuries from his employers, the Glasgow Coal Company, Limited, mineowners, Carmyle, the matter was referred to the arbitration of the Sheriff-substitute of Lanarkshire, at Airdrie (Glegg), who assolized the defenders, and, at the request of the claimant, stated a case for appeal.

1st DIVISION.
Sheriff of
Lanarkshire.

The case set forth,—“The following facts were proved:—(1) John George, aged twenty-one, was a bottomer in the employment of the Glasgow Coal Company prior to 22d August 1907. . . . (2) George's working place was at the ell coal seam bottom, which is a mid-working, and is situated 40 feet above the main coal bottom. (3) His duties were to take off empty hutches from the cage, and to put on full hutches. (4) There is no light at the ell coal except that supplied by miners' lamps. (5) Where the ell coal opens from the shaft there is no gate or fence which protects the opening automatically when the cage is not opposite the opening, but there is a gate which is opened and shut by the bottomer as required. (6) According to the customary working of the cage it stopped at the ell coal without a special signal when ascending empty from the main coal bottom, the engineman usually being able to tell from the pull on his engine when the cage was empty. (7) It was restarted on its ascent from the ell coal by a signal given from there. (8) The bottomer at the ell coal could also obtain the cage by signalling by bell when the cage was passing or had passed the ell coal, when it was stopped and sent back to the ell coal. (9) If the bottomer at the ell coal required a cage, and it was not obtainable at the time in the way last mentioned, he called down the shaft to the main coal bottomer who signalled to the engineman to raise the cage, when it would be stopped at the ell coal, either with or without a farther signal as above described. (10) The engineman, however, on receiving a signal from the main coal bottomer to raise the cage, was entitled, unless stopped by a farther signal, to raise the cage to the pithead, and sometimes he did so without stopping at the ell coal. (11) . . . (12) On the occasion in question George called to the bottomer at the main coal to send up the cage, and the latter did so, George hearing the signal given for raising; the time required to raise the cage from the main to the ell coal was a little over two seconds. (13) George expected that the cage would stop at the ell coal level, without any further signal being given, and acting on this assumption he, without ascertaining whether it had stopped, opened the gate, went some three

May 27, 1908. yards along the level behind a full hutch and pushed the hutch forward to the shaft. (14) The cage had passed the ell coal level without stopping, and George pushed the hutch into the shaft and fell with it to the bottom. (15) He sustained a severe scalp wound and had his right tibia and fibula fractured. . . . (19) At present George is still suffering from the effects of his injury to his leg to such an extent as to be totally incapacitated for work. (20) The ell coal level is a working to which Rule No. 3 of the Additional Special Rules under the Coal Mines Regulations Acts, 1887 to 1896, applies.* (21) George previously opened the gate fencing the shaft when the cage had not stopped, and he had been warned about this a day or two prior to the accident. On these facts I found that George had not been seriously and permanently disabled in consequence of his accident,† and that his injuries were attributable to his serious and wilful misconduct. I therefore assoilzied the defenders from the conclusions of the action."

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The question of law for the opinion of the Court was:—"Is the applicant, in view of the above findings, barred from recovering compensation for his injury in respect that it is attributable to his serious and wilful misconduct?"

The appeal was heard before the First Division on 27th May 1908.

Argued for the claimant and appellant;—The facts proved here did not justify a finding of serious and wilful misconduct. The real cause of the accident was, not the fault of the workman, but the fault of the respondents in not having a proper system of communication established in the mine, as they were required to have by section 29, Rule 25, of the Coal Mines Regulations Act, 1887.¹ The bottomer had to work with this defective system, and he naturally assumed, as he was entitled to assume, that the cage would stop, as it habitually did, at the mid-working. The factor of wilfulness was entirely absent here, for the workman never intended to push the hutch into the open shaft. He had duly signalled for the cage, and his further acts were done from a mistaken belief, the mistaken belief that the cage had stopped. The case was therefore clearly distinguished from *M'Ghie*,² where the workman had never even signalled. What had happened here might be negligence, but negligence without the element of wilfulness was not sufficient to set up the statutory exclusion.³ Even if in some circumstances negligence might amount to wilful misconduct there were no such circumstances here. This was clearly a case of one of the exceptions referred to by Lord M'Laren in the case of

* Rule No. 3 was as follows:—"The bottomer at a mid-working in a vertical shaft not provided with an appliance which constantly fences the shaft, being a mid-working in use for the regular passage of workers or the drawing of minerals from the mine, shall not open the gate fencing the shaft until the cage is stopped at such mid-working, and he shall not signal the cage away until he has closed the gate, and shall not permit any other person to open the gate while he is on duty."

† The Workmen's Compensation Act, 1906, sec. 1 (2) (c), enacts:—"If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed."

¹ 50 and 51 Vict. cap. 58.

² United Collieries, Limited, v. M'Ghie, June 7, 1904, 6 F. 808.

³ Johnson v. Marshall, Sons, & Co., Limited, [1906] A. C. 409; Bist v. London and South-Western Railway Co., [1907] A. C. 209.

Dobson,¹ to the principle that breach of a special rule would amount May 27, 1908.
to serious and wilful misconduct. Further, the duty here was not so
paramount as in *Dobson*,¹ for there the rule was for the protection of George v.
all in the mine, while here it was chiefly for the protection of the Glasgow Coal
individual workman. Co., Limited.

Counsel for the respondents were not called on.

LORD M'LAREN.—In deciding this case it is proper to refer to the variation in the law introduced by the Act of 1906, which provides that the objection of serious and wilful misconduct does not apply where death or serious and permanent disablement results from the accident, but still continues to apply in the case of lesser injuries. But whilst this provision limits the scope of this objection, it does not alter the nature of serious and wilful misconduct as it has been decided under the Act of 1897. There have been many cases in England dealing with this question, and the last was the case of *Bist v. The London and South-Western Railway Company*.² In that case the noble and learned Judges were agreed in stating that the question which they had to consider on appeal was whether the facts amounted to evidence that raised the question of serious and wilful misconduct for the decision of the County Court Judge who had heard the case. They do not give their own opinions as to whether the facts amounted to serious and wilful misconduct, but they think that the breach of a rule made by a railway company, and intended for the protection of their servants from injury, was *prima facie* a serious and wilful act, and that it was for the person who had broken the rule to displace the presumption. That, I think, is also the principle of the decision of this Court in the case of *Dobson v. United Collieries, Limited*,¹ and in that case the Lord President said that the infraction of a colliery rule, intended for the protection of life and property, was *prima facie* serious and wilful misconduct unless it was explained. Other Judges gave their opinions to the same effect.

Now, the present case is the case of a breach of a colliery rule, and the rule referred to is the third supplementary rule, which provides—I do not read the whole of it—that the bottomer shall not open the gate until the cage is stopped at the mid-working. In this case I do not think it is necessary to comment upon all the findings with reference to the practice existing in this mine regarding signalling for sending the cage up or down. But it results from all these findings that means existed by which the injured man, John George, who was a bottomer in the mid-working, could communicate with the engineman and desire that the cage should be stopped at the mid-working. On the occasion in question he wished the cage sent up because he had some loaded hutches which were to be sent to the surface. He did communicate in a manner which is not said to be inconsistent with the rules. I think he called down the shaft, and his communication was heard by the bottomer and signalled to the engineman, and the cage was sent up. Now, it results also from the Sheriff's findings that the engineman on getting such a message might, without any breach of duty,

¹ *Dobson v. United Collieries, Limited*, Dec. 16, 1905, 8 F. 241.

² L. R., [1907] A. C. 209.

May 27, 1908. either stop the cage at the place from which he believed the signal had come, or he might draw it to the top, leaving it to the man at the mid-working, if he pleased, to ring a bell which would have the effect of stopping the cage at the right place or of sending it back if it had passed.

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Lord M'Laren. Under these conditions it is quite plain that when a signal has been given by the person in charge of the gate at the mid-working to send up the cage, it is not a matter of absolute certainty that the cage will stop there. I have no doubt that in nine cases out of ten it will. But, then, rules are just made for the purpose of guarding against exceptional occurrences or mistakes. And this rule, if observed, was certainly a very effective way of preventing such an accident as occurred, because it provides that the bot-tomer shall not open the gate until the cage is there. Of course, if he had complied with the rule, it is conceivable that in a certain case the cage might start again without waiting for the hutchies, and, if an accident occurred, the man at the gate, of course, would not be responsible. But that was not the case here. The case was that the cage had passed him, and that he opened the gate without ascertaining whether the cage was standing there. Then, just assuming that the cage was there, he went back and pushed the loaded hutchies over into the shaft, and, being drawn over with them, fell and received the injuries from which he is suffering.

In these circumstances, if we apply the criterion of the decision of the highest Court, and consider whether there was evidence upon which the Sheriff as arbitrator could find that the accident was due to serious and wilful misconduct, I may say that in my opinion there was such evidence. It is not necessary that we should say how we would have decided the case. Indeed, we could not give a personal opinion upon it without having the evidence before us, because in a question of misconduct, and above all whether that misconduct is of such quality and degree as to fulfil the condition of being regarded as serious and wilful, it is impossible to proceed upon a dry statement of facts such as we have before us. We should need to know what George said on the subject when he was examined, and what sort of excuse he attempted to make for his action, before we could pronounce that he was excusable. I certainly do not feel that we have materials to decide that matter, and it is not at all necessary that we should, because we are only judges of law, and not judges of questions of fact. The materials before us are sufficient to satisfy me that there was a breach of the rule which, if unexplained in a manner consistent with innocence, would entitle the arbitrator to come to the conclusion which he has reached, and, therefore, my opinion is that this appeal should be dismissed.

LORD KINNEAR.—I am of the same opinion. The Sheriff has found that the injuries of which this man complains were attributable to his serious and wilful misconduct. That is a finding in fact, and we have no jurisdiction to review the Sheriff's judgment upon a mere question of fact. But it has been held, and I do not myself doubt, that the question whether the facts found by the Sheriff will support his decision as to the liability of the employers for compensation is within the jurisdiction of the Court of Appeal. But, then, I think, considering the statement that the Sheriff has given us here, there is no fault in point of law in his decision.

I concede that in order to bring the case within the statutory disability May 27, 1908. it is not enough to shew that a workman has been negligent, or that he has done something thoughtlessly that he ought not to have done. It is necessary to shew that the misconduct was wilful, which implies, in my opinion, that the thing was done, not by mere inadvertence, but with intention to do it. In this case the special rules of the mine laid upon the bot-
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Lord Kinnear.

Now, as to the element of wilfulness in that, I do not see that there can be any doubt upon the statement that what the man did was wilful. It is not suggested that the gate fell open by accident. He opened it on purpose, without performing the duty of ascertaining in the first place that the cage was stopped. I agree with the Sheriff that that justified a finding that there was a deliberate breach of the duty laid upon the man by the special rules of the mine. I think it was misconduct, and serious misconduct, because it was a breach of a rule intended for the safety of life and limb. The seriousness is obvious enough from the accident which followed, because he opened the gate and drove a hutch into the shaft so that the hutch and he following it fell down the shaft instead of entering the cage. The consequences to himself unfortunately are serious, and they might have been serious to others in the shaft below. But to the question whether it was or was not a wilful act in the sense of the statute the answer is plain. It was, because it was a deliberate breach of a rule which he knew, and which he ought to have observed.

LORD MACKENZIE.—I agree with your Lordships. I think that the facts found, and especially the facts contained in the 13th paragraph of the case, were amply sufficient to justify the learned Sheriff-substitute in reaching the conclusions that he did.

At the close of the advising,—

LORD M'LAREN.—I may add that, if it is necessary that we should consider whether the Sheriff's finding is correct, I should agree with what Lord Kinnear has said. I think that the act of the man George was serious and wilful misconduct; but I think it is sufficient for me to say that there were materials from which the arbitrator could draw that conclusion.

The **LORD PRESIDENT** and **LORD PEARSON** were absent.

THE COURT answered the question of law in the affirmative, and dismissed the appeal.

SIMPSON & MAIRWICK, W.S.—W. & J. BURNES, W.S.—Agents.

No. 124.

THE REVEREND WILLIAM BORLAND AND OTHERS (Minister and Kirk-Session of Dunbar), Petitioners.—*R. S. Horne.*

May 29, 1908.

Kirk-Session of Dunbar.

Charitable Trust—Alteration of Scheme—Bursary for natives of a town—Extension to those born elsewhere—Nobile Officium.—A testator bequeathed a sum of money to trustees for the purpose of founding a bursary to be granted by them "to any deserving young man, being a native of Dunbar, attending college in the prospect of becoming a minister of the Established Church of Scotland, or as a missionary." The trustees received payment of the bequest in 1888. In 1907 they presented a petition in which they stated that, although full publicity had been given to the bursary by advertisement and by intimation in the local schools, no application for it had ever been made, and craved the Court to empower them, failing application from natives of Dunbar, to grant the bursary to otherwise qualified applicants born in the Presbytery of Dunbar, or failing such applicants to otherwise qualified applicants without conditions as to nativity.

The Court *granted* the petition.

1st Division.

By his trust-disposition and settlement the late James Simson, accountant, Edinburgh, directed his trustees, on the death of the life-rentrix of his estate, to pay the following legacy, viz.:—"To the Minister and Kirk-Session of the Parish Church of Dunbar the sum of Five hundred and sixty pounds sterling, which shall be laid out by them on heritable security at interest, and the annual rent or interest thereof applied as a bursary, to be called the 'Simson Bursary,' to be granted by said minister and kirk-session to any deserving young man, being a native of Dunbar, attending college in the prospect of becoming a minister of the Established Church of Scotland, or as a missionary going abroad, said bursary to be continued to each recipient for a period not exceeding three years. And I further declare, that it shall be in the power of said minister and kirk-session, if they shall see good cause, to withhold or withdraw the grant of said bursary to any young man that they may have selected, if his conduct does not meet their approbation." The life-rentrix died in 1888, when the kirk-session received payment of the bequest, the free annual income of which, available for the bursary, amounted to about £21.

On 20th November 1907 the minister and kirk-session of Dunbar presented a petition to the Court in which they set forth the above facts, and also stated:—"Full publicity has been given to the bursary for some years past. In particular, since 1901 it has been repeatedly intimated in the public schools of the parish, either by notice posted up on the walls thereof, or by the schoolmasters, who have informed their scholars of the bursary, and it has also been intimated in the local newspapers and in the calendars of all the Scottish Universities. No application for it, however, has ever been made."

They accordingly craved the Court to add to the existing terms of the scheme the following provisions, viz.:—"In the event of no applicant fully qualified in terms of the will claiming the bursary after due advertisement on or before the 1st day of September in any year, the Minister and Kirk-Session shall be empowered to grant the free income of that year, or any portion thereof, to any applicant born within the bounds of the Presbytery of Dunbar who shall in other respects fulfil the conditions of the testator's settlement, and, failing such an applicant, to any applicant of whom they may approve without condition as to nativity, so long as he is otherwise qualified in terms of the will; provided always that any grant of the bursary under these conditions shall be for one year only." They also stated

that the Presbytery of Dunbar comprised nine parishes, viz., Belhaven (quoad sacra), Cockburnspath, Dunbar, Oldhamstocks, Prestonkirk, Spott, Stenton, Whitekirk, and Tynninghame and Whittinghame. May 29, 1908. Kirk-Session of Dunbar.

On 17th December 1907 the Court remitted to Lord Kinross, advocate, to inquire into the facts and circumstances and to report. In his report the reporter confirmed the statement of the petitioners as to the efforts made to obtain candidates, and the failure during the whole subsistence of the trust to receive a single application, and referred to the position of a similar bursary, The Clark Bursary, which was likewise confined to natives of Dunbar, for which, since its foundation in 1875 to the present time, no applicant had ever come forward. He also referred to the case of *The Grigor Medical Bursary Fund Trustees*,¹ where the Court refused the petition, and pointed to the distinction that, while in that case the only averment was that the trustees "experience difficulty" in obtaining candidates, here during the twenty years the trust had existed no candidate had ever come forward. He further stated:—"In view of the case of *Mailler's Trustees v. Allan*,² where the Court refused to extend the benefits of a bequest, destined to those born in two named counties, to persons born outside those counties, the reporter is doubtful whether an extension of the present scheme to those born within the wider area of the Presbytery of Dunbar can be said properly to fall within the expressed wishes of the testator."

On 26th May 1908 the Court, after hearing counsel for the petitioners, without delivering opinions, ordained the petitioners to lodge in process a copy of the scheme as proposed in the petition. The petitioners thereafter lodged a minute embodying the additional provisions craved for in the petition, as narrated *supra*, and on 29th May 1908 the Court pronounced this interlocutor:—

"APPROVE of said report and of the said scheme: Authorise and empower the petitioners to administer the bequest under their charge in accordance with the provisions contained in the scheme."

R. AINSLIE BROWN, S.S.C., Agent.

JOHN WANLISS BELL, Petitioner (Respondent).—*Hunter, K.C.*—*Munro.*

No. 125.

WILLIAM FINLAYSON (John Wanliss Bell's Trustee) AND OTHERS, Respondents (Appellants).—*Jameson.*

May 29, 1908.

Bell v. Bell's Trustee.

Bankruptcy—Sequestration—Discharge—Failure to pay five shillings in the pound—Bankruptcy and Cessio (Scotland) Act, 1881 (44 and 45 Vict. c. 22), sec. 6, subsecs. (1) and (3).—Where a bankrupt has not paid 5s. in the £1, the question whether his failure to do so has arisen from circumstances for which he cannot justly be held responsible is a question in the discretion of the Judge of first instance, and although his judgment is subject to review the Court will not interfere unless there are no reasonable grounds on which the judgment can be supported.

A bankrupt trader, more than two years after the date of his sequestration, applied for his discharge. Objections were lodged by the trustee in the sequestration and by the principal creditors of the bankrupt. The trustee

¹ July 15, 1903, 5 F. 1143.

² Dec. 21, 1904, 7 F. 326.

May 29, 1908. **Bell v. Bell's Trustee.** The trustee reported that the bankruptcy was caused by the culpable conduct of the bankrupt. It appeared that the bankrupt was a cattle-dealer; that his business had been throughout a period of twelve years a series of speculations in the market price of live stock; that his bank-book shewed a turn-over of £4000 a year; that at the end his liabilities were £1003 and his assets £156; that he had not kept proper business-books; and that he refused to assign to the trustee a *spes successionis*. No dividend was paid to the creditors, the assets recovered by the trustee, amounting to £156, having been lost by him in litigation.

The objecting creditors were a limited company, carrying on business as auctioneers and live-stock salesmen, the trustee was their secretary, and the bankrupt's operations had been carried on mainly at their auction mart. The Sheriff-substitute found the bankrupt entitled to his discharge, but suspended the granting of the discharge for three months.

On appeal the Court (*diss.* Lord Ardwall) affirmed the judgment of the Sheriff-substitute.

2D DIVISION.
Sheriff of
Perthshire.

ON 3d July 1905 the estates of John Wanliss Bell, sheep-dealer, Inveravon Bank, Perth, were sequestrated under the Bankruptcy Acts in the Sheriff Court of Perthshire, and William Finlayson, secretary to Macdonald, Fraser, & Company, Limited, auctioneers and live stock salesmen, Perth, was appointed trustee. Macdonald, Fraser, & Company, Limited, were the principal creditors in the sequestration.

In October 1907 the bankrupt presented a petition in the Sheriff Court of Perthshire for his discharge.*

The report by the trustee under section 146 of the Bankruptcy (Scotland) Act, 1856, was produced with the petition.†

* The Bankruptcy and Cessio (Scotland) Act, 1881 (44 and 45 Vict. cap. 22), enacts:—

Sec. 6. "Notwithstanding anything contained in the Bankruptcy Acts, the following provisions shall have effect with respect to bankrupts undischarged at the commencement of this Act, and to bankrupts whose estates may be thereafter sequestrated, that is to say—(1) A bankrupt shall not at any time be entitled to be discharged of his debts, unless it is proved to the Lord Ordinary or the Sheriff, as the case may be, that one of the following conditions has been fulfilled:—(a) That a dividend or composition of not less than five shillings in the pound has been paid out of the estate of the bankrupt, or that security for payment thereof has been found to the satisfaction of the creditors; or (b) that the failure to pay five shillings in the pound, as aforesaid, has in the opinion of the Lord Ordinary or the Sheriff, as the case may be, arisen from circumstances for which the bankrupt cannot justly be held responsible. . . . (3) Any deliverance of the Lord Ordinary or Sheriff, as the case may be, under this section shall be subject to appeal in the manner provided in sections 171 and 170 of the Bankruptcy (Scotland) Act, 1856: Provided always that the judgment of the Inner-House of the Court of Session on any such appeal shall be final and not subject to review. . . ."

† The report bore:—

"1. The bankrupt has made a fair discovery and surrender of his estate, except that he refuses to make available for his creditors,—(a) An estate belonging to him in expectancy, namely, his hope of succession on the death of his mother. . . .

"2. The bankrupt has attended the diets of examination.

"3. The bankrupt has not been guilty of any collusion so far as known to the trustee.

"4. The bankruptcy has arisen from culpable conduct on the part of the bankrupt. He carried on business from about the year 1894 as a dealer in live stock (chiefly sheep and cattle). His business appears to have been

On 22d October 1907 the Sheriff-substitute (Sym) ordered intimation to be made to the creditors, and appointed a copy of the petition and of the trustee's report to be transmitted to the Accountant of Court in order that he might have an opportunity of reporting whether the bankrupt had fraudulently concealed any part of his estates, or whether he had wilfully failed to comply with any of the provisions of the Bankruptcy (Scotland) Act, 1856. May 29, 1908.
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Notes of objections were lodged by the trustee and by Macdonald, Fraser, & Company.

On 5th November 1907 the Accountant of Court reported:—

"So far as regards the two points specified in the Sheriff's interlocutor, viz., 'fraudulent concealment,' and 'wilful failure to comply with any of the provisions of the Bankruptcy (Scotland) Act, 1856,' he has nothing unfavourable to submit.

"The trustee qualifies his report by a reference to the bankrupt's refusal to make available for his creditors (1) a *spes successionis* under a joint settlement of his parents, and (2) a portion of his salary as land steward or manager of a sheep farm."

On 19th December 1907 the Sheriff-substitute pronounced this interlocutor:—"Finds that the bankrupt's failure to pay a dividend of five shillings in the pound has arisen from circumstances for which he cannot justly be held responsible: Therefore finds the bankrupt petitioner entitled to his discharge, but for the reasons stated in the subjoined note postpones the granting of the same till Friday, the 3d day of March 1908, at 2 P.M."*

throughout the twelve years a series of speculations in the fluctuations of market prices of such stock. He never at any time made up a balance-sheet, but his own story is that partly through the bad season of 1901 he was thenceforward embarrassed for money until he applied for sequestration in 1905. Yet he continued all the while to speculate as before.

"5. The bankrupt kept no proper business-books, and in particular no cash-book or account of money received and paid by him. When called upon to deliver his business-books to the trustee the bankrupt gave up as all he had three bank pass-books and three pocket diaries. The diary entries were not regular or complete, and ceased altogether in April 1904. He was then being pressed by his creditors more than before. His bank-book shews that his turnover was above £4000 a year. He said at his public examination that he had bought as much as £1000 worth of stock in one day. His liabilities at the date of sequestration according to his state of affairs amounted to £1003, 9s. 5d.

"6. No dividend or composition has been paid to the creditors. The assets, as stated by the bankrupt, were £142, 11s. 9d., but the gross sum recovered by the trustee was £156, 19s. 5d. This fund was lost in an endeavour by the trustee to recover the bankrupt's legitim from his father's testamentary trustee."†

* "NOTE.— . . . It is the duty of the Sheriff (*Bremner*, 2 F. 1114) to consider whether the failure to pay the creditors a dividend of 5s. per £1 is due to circumstances for which he is not responsible, even if the trustee give a not unfavourable report and the creditors do not oppose. A bankrupt is not entitled to his discharge on merely producing favourable reports.

"In this case the Sheriff's duty is increased. This trustee's report has unfavourable features. The Sheriff-substitute has thought it his duty to read carefully the report of the examination of the bankrupt, and to consider his conduct and the matters which have occurred since the sequestration.

† See *Bell's Trustee v. Bell's Trustee*, 1907, S. C. 872.

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Trustee.

The trustee and the objecting creditors appealed.

The case was heard before the Second Division on 22d February 1908.

Argued for the appellants;—The bankrupt was not entitled to his discharge unless he had paid 5s. in the £1, or had shewn that his failure to do so was due to circumstances for which he could not justly be held responsible. The *onus* lay on the bankrupt to shew that he was not responsible for his failure to pay 5s. in the £1.¹ In the present case that *onus* had not been discharged. The bankrupt had indulged in a course of reckless speculation for a period of twelve years. During that time he had kept no business-books, and had thus been guilty of an offence for which he might have been prosecuted.² At the present time he was in possession of an asset which he refused to make available to his creditors. On these facts it could

“ Grave objections are stated.

“(1) The Sheriff-substitute takes first the matter of alleged reckless trading. The dealings of the bankrupt were chiefly in sheep, but also in cattle. They were at times considerable in amount. The great bulk of them was conducted at the mart of the objecting creditors. Now, this kind of business is often speculative, and when it is so it often consists very much in buying at a mart merely to speculate on the ‘turn of the market.’ The stock is bought to be immediately resold if the market rises, and often such a dealer knows that he cannot keep the stock and must sell at a loss even if the market falls. If there is a course of dealing of this kind to which in the circumstances rashness and improvidence causing loss to others must be attributed, then the Sheriff-substitute is of opinion that the person so acting ought not lightly to be freed of his debts. In this case he is not of opinion that by any means all the bankrupt’s dealings were merely speculative and to be disapproved. It is true that the bankrupt admits that he was somewhat ‘hard hit’ in 1901, which was a bad season for the grazing trade, and it is true that he went on till 1905. But it is thought that on the whole his action does not deserve that he be kept in the status of an undischarged bankrupt for an indefinite time. The view taken is that, while there is always risk in such dealings, because the sheep market fluctuates according to weather and many trade causes (which are out of the power of these graziers to shelter themselves from, if they are doing business at all), the bankrupt did not act so rashly and unreasonably as to justify severe censure; on the contrary, that part of his dealing was wholesome, and would not have been discouraged by the objecting creditors.

“(2) Along with the matter just mentioned must be taken the fact that records of transactions kept by the bankrupt were at the very best most scanty and imperfect. It is not an answer to this to say that most of his transactions could be discovered in the books of Macdonald, Fraser, & Company, and so that the defects in his bank-books and little memorandum-books could be filled up. It is one’s own business to be able to give an account of one’s own affairs. The Sheriff-substitute does not leave out of view that the bank-book entries cease to give any aid after a date some time before the application for sequestration, and that no memorandum-book could be produced after 1904.

“Taking these two matters together the Sheriff-substitute does not consider that the discharge should be refused, but at most that it may for a brief time be suspended. . . .”

¹ Bankruptcy and Cessio (Scotland) Act, 1881 (44 and 45 Vict. cap. 22), sec. 6, subsec. 1; John Wilson & Co., Sept. 14, 1882, 20 S. L. R. 17; Clarke v. Crockatt & Co., Dec. 8, 1883, 11 R. 246; Neilson, Feb. 12, 1901, 3 F. 446.

² Debtors (Scotland) Act, 1880 (43 and 44 Vict. cap. 34), sec. 13 (A), subsec. 6.

not be said the failure to pay 5s. in the £1 had arisen from circumstances for which the bankrupt was not responsible. In any view, if the bankrupt were to be discharged it should only be on condition that he assigned his *spes successionis* to the trustee for behoof of his creditors.¹

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Argued for the petitioner;—The Sheriff was right. There was no good reason for refusing the discharge. The failure to keep books, while it might render the bankrupt liable to a statutory penalty,² was not relevant to the question of discharge. There was no evidence that the failure to keep books had brought the bankrupt down, or had resulted in a decrease of the assets. There was no case where discharge had been refused because proper books had not been kept. This was not a case of reckless speculation, but of legitimate trading. Although the bankrupt's turnover was £4000 a year, his total liabilities were only £1000. While the trustee's report was to a certain extent adverse to the petitioner, it did not reflect on his conduct as a bankrupt, and it must be remembered that the trustee could not be regarded as disinterested, he being the secretary of the principal creditors. The Sheriff-substitute had come to a conclusion favourable to the bankrupt, and his judgment should not be disturbed. There was no good reason for imposing the condition that the bankrupt should assign his *spes successionis*. There was no case where that course had been taken.³ The refusal to assign the *spes* was not a good ground for withholding the discharge. All the competent objections to the discharge were to be found in the Bankruptcy Statutes,⁴ and refusal to assign a *spes successionis* was not one of them.

At advising on 29th May 1908,—

LORD STORMONTH-DARLING.—The discharge of a bankrupt is now regulated by section 6 of the Bankruptcy and Cessio (Scotland) Act, 1881, which provides that “a bankrupt shall not at any time be entitled to be discharged of his debts unless it is proved to the Lord Ordinary or the Sheriff, as the case may be, that one of the following conditions has been fulfilled,” and the conditions are defined thus: (a) that a dividend or composition of not less than 5s. in the £1 has been paid, or security for it has been found; or (b) “that the failure to pay 5s. in the £1 as aforesaid has, in the opinion of the Lord Ordinary or the Sheriff, as the case may be, arisen from circumstances for which the bankrupt cannot justly be held responsible.”

In this case no dividend has in fact been paid, and the *onus* of proving that the circumstances are not such as to render the bankrupt justly responsible for not paying 5s. in the £1 must lie on the bankrupt himself. But the puzzle remains, who is to be satisfied? Is it to be the Lord Ordinary or the Sheriff, whose opinion, as the case may be, seems to be made decisive

¹ Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), sec. 95; Reid v. Morison, March 10, 1893, 20 R. 510; Leslie v. Cumming & Spence, Feb. 20, 1900, 2 F. 643.

² Debtors Act, 1880, sec. 13 (A), subsec. 6.

³ Blaikie v. Peddie, Nov. 25, 1871, 10 Macph. 140; Kirkland v. Kirkland's Trustee, March 18, 1886, 13 R. 798; Reid v. Morison, 20 R. 510.

⁴ Bankruptcy (Scotland) Act, 1856, sec. 146; Bankruptcy (Scotland) Amendment Act, 1860 (23 and 24 Vict. cap. 33), sec. 3; Bankruptcy and Cessio Act, 1881, sec. 6, subsec. 1.

May 29, 1908. by the terms of subsection (b), or is it to be the Inner-House in either Division, to whom an appeal is allowed, and whose judgment is made final and non-appealable by the terms of subsection (3)? That is a real puzzle, which I think must be solved in some such way as that adopted by Lord President Inglis in the case of *Millar*.¹ There his Lordship had to deal with a somewhat similar difficulty created by the Bankruptcy (Scotland) Amendment Act, 1860. The third section of that statute made a change in the former law under which, if no opposition was raised on the part of creditors, the Court was bound to grant a discharge to the bankrupt. The change made rendered it no longer obligatory to grant the discharge, and the Act effected its object by giving a discretion to the Sheriff or the Lord Ordinary or the Court to refuse the discharge even though there was no opposition offered by creditors, "if it shall appear from the report of the Accountant in Bankruptcy, or other sufficient evidence, that the bankrupt has fraudulently concealed any part of his estate or effects, or has wilfully failed to comply with any of the provisions of the Bankruptcy (Scotland) Act, 1856." Now, it was with reference to this change in the law—which, be it observed, gives a discretion equally to the Sheriff or the Lord Ordinary in the first place, and to the Court in either Division in the second—that the Lord President used these expressions:—"I confess that in a matter of this sort I am not willing to interfere with the discretion of an inferior Judge, once exercised. The discretion of the Sheriff was appealed to, and the Sheriff has exercised his discretion, and has refused the application, and when a Judge has once exercised his discretion, and exercised it in such a way that it is impossible to say that he has done wrong, a superior Court will hesitate to interfere, even though looking at the matter independently they might feel inclined to come to a different conclusion."

It humbly seems to me that these observations are very relevant to the question how we are to reconcile the provision as to the question of the right of the bankrupt to discharge, being, in the first place, one for the opinion of the Lord Ordinary or the Sheriff, as the case may be, with the provision that it shall be in the end one for the opinion of the Inner-House. Plainly the two provisions can never be reconciled by making that for appeal incompetent. This Court has a certain duty of review thrown upon it of which it cannot rid itself. The two provisions, as I read the cases, are only to be reconciled by the Inner-House not going against the opinion of the inferior Judge in a matter of discretion, unless it can say that he has gone clearly wrong. It is true that in *Millar's* case² the Sheriff had refused the discharge, while here the Sheriff has found the bankrupt entitled to his discharge, but has merely postponed it to a day named, being less than three months from the date of his interlocutor. Nobody can say that that by itself makes any difference, because refusal of the discharge, or granting it, or postponing it, was equally within his competency if any one of these courses represented his real opinion. I should be prepared to follow Lord President Inglis' mode of dealing with a Sheriff's discretion all the more because the reference in section 6 (b) of the Act of 1881 to the "opinion of the Lord Ordinary or the Sheriff" is an

¹ 5 R., at p. 146.

² 5 R. 144.

express reference, and not merely an implied one, as in the case of the Act May 29, 1908. of 1860, section 3. There is hardly any question which can more properly Bell v. Bell's be described as one of pure discretion than to determine whether a man's Trustee. conduct has or has not arisen from circumstances for which he cannot justly LdStormonth-Darling. be held responsible. In *Millar's case*¹ the Court, agreeing both with the Sheriff and with the Accountant in Bankruptcy, thought the case "a very bad one indeed." Here, the Accountant of Court, to whom the matter was referred by the Sheriff, has nothing unfavourable to report of the bankrupt, i.e., nothing unfavourable about his conduct as a bankrupt; and in the case of *Cooper v. Fraser & Scott*,² where the Court decided that the bankrupt's discharge should no longer be delayed (although he had been convicted of embezzlement of trust funds and had suffered a sentence of three months' imprisonment), I observe that Lord Neaves (at page 42 of the report) distinguishes between a case where the bankrupt's conduct as a bankrupt has been unexceptionable, and a case where he may have acted culpably towards one or more of his creditors.

Now, there being nothing here to which exception can be taken in the conduct of the bankrupt as a bankrupt—no concealment of funds, or failure to comply with statutory requirements—the only thing to which the trustee or the objecting creditors can take exception is that his bankruptcy was brought about by what the trustee describes as "culpable conduct" in (a) carrying on business as a dealer in sheep and cattle from about the year 1894 as a "series of speculations" in the fluctuations of the market prices of such stock; and (b) in keeping no proper business-books. I do not say that the conduct of the bankrupt in either of these respects was to be applauded. But the Sheriff points out that the great bulk of his dealings was "conducted at the mart of the objecting creditors," and he is of opinion on the whole that his action does not deserve that he be kept in the status of an undischarged bankrupt for an indefinite time. I think that in characterising part of his dealings as "wholesome," though that is not a very apposite phrase, the Sheriff must be taken to mean that the objecting creditors who encouraged him to go on speculating by giving him credit are the last persons to complain of such dealing, because for their own purposes they encouraged it. I do not find that peculiarity in any of the cases which involved more or less reckless trading. In *Clarke v. Crockett & Company*,³ which was the first case in which the Court had to consider the effect of the Act of 1881, the bankrupt had lost £6000 by speculations on the Greenock Sugar Exchange, and at last had attempted to evade apprehension by absconding in female attire, and the Sheriff-substitute was against him on the question whether his failure to pay 5s. in the £1 arose from circumstances for which he was not justly responsible. The Court refused the appeal, thus agreeing with the Sheriff-substitute in the view that the bankrupt was entirely responsible for having incurred debts at all, and in not being able to discharge these debts. So that case affords no countenance to the view that the Court ought without some strong and compelling ground to overrule the opinion of the Judge of first instance when he has come to a conclusion, as the Sheriff does here, favourable to the bankrupt's right to a

¹ 5 R. 144.² 11 Macph. 38.³ 11 R. 246.

May 29, 1908. discharge. A strong example of the unwillingness of a Court of review to interfere with the exercise of discretion of a local Judge, particularly when it is in favour of the bankrupt, is afforded by the case of *Buchanan v. Wallace*,¹ where the bankrupt had kept no books, and had speculated in house property and shares, with the result that he failed with liabilities over £19,000, and assets only £200, and the Lord President characterised his conduct as "extremely blameworthy"; and yet the Court refused to interfere with the discretion of the Sheriff-substitute, who had found the bankrupt entitled to his discharge, but delayed extract for three months.

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Now, I think that the case of *Buchanan v. Wallace*¹ establishes that, even where the Sheriff-substitute imposes a "very mild penalty" on the bankrupt (as all the Judges thought it was) for reckless trading or other misconduct, the matter is left to a great extent to the discretion of the Sheriff, and the Court will not interfere with his discretion except upon the strongest grounds. I think that this is especially so where the discretion of the inferior Judge is exercised in favour of the bankrupt's discharge, because "a somewhat penal statutory discretion" (as Lord M'Laren calls it in *Petition Shand*²) must always receive the milder construction, if that be at all possible. His Lordship therefore adopted that construction in holding that the bankrupt was only partly responsible for the failure to pay 5s. in the £1. It is true that in that case, where Lord M'Laren was Lord Ordinary on the Bills in vacation, and therefore exercising the functions of the statutory Court of review, he did not adopt the view of the Sheriff-substitute; but that was because he thought that the Sheriff-substitute, in refusing the discharge, had not acted on his own personal view of the evidence, but on a mistaken view of what the Act required. There is another case, *Petition Boyle*,³ which illustrates how strongly the Court leans to what may be called the more merciful view towards the bankrupt, because there the Sheriff-substitute had been against the bankrupt, and yet the Second Division granted the discharge. In short, I do not know a single case where the Court of first instance has been in favour of discharge (either immediately or after an interval), and where the Court has in the end refused it.

In the present case the Sheriff-substitute has found the bankrupt entitled to his discharge, but has postponed the granting of the same till Friday, 3d March 1908 (now past). It is impossible to read his note without seeing that what has weighed with him chiefly has been (1) that the objecting creditors were largely responsible for the speculative trading, and (2) that both they and the trustee (who is secretary of their auction mart) are trying to make available to the creditors what the bankrupt is not bound to assign—*Reid v. Morison*.⁴ I am of opinion that, although speculative trading and the non-keeping of business-books are to be condemned, they are not more to be condemned than the attempt to lay hands by a legal artifice on property which does not by law belong to the creditors. In short, I think that the Sheriff-substitute has properly exercised his discretion, and even if I disagreed with him as to his reasons for exercising his discretion in that particular way, I should be slow to disturb it. I cannot

¹ 1882, 9 R. 621.

² 1885, 22 S. L. R. 767.

³ 19 S. L. R. 562.

⁴ 20 R. 510.

agree that the Act of 1881 has the effect of displacing all judicial discretion May 29, 1908.
 as to a bankrupt's discharge and making it obligatory to refuse the discharge when the bankrupt has been unable to pay 5s. in the £1. That Bell v. Bell's
 would practically be to read out of the statute the whole provisions of Trustee.
 section 6 (b), and especially the words "cannot justly be held responsible." LdStormonth-
 Darling.

I am aware that the Act was passed at the instance of a private member of the House of Commons, and that its main intention was to make it more difficult for a bankrupt to obtain his discharge. But it was never intended to make that impossible, and the course of decision for the past twenty-six years does not shew that the statute has been very extensively used in the interests of creditors, for it still left a large measure of discretion in the hands of the Court, and particularly as I read the decisions, in the hands of the local Judge. I am further of opinion that the objections which are stated to the bankrupt's discharge truly represent only one interest, that of the conductors of the auction mart, and that those objections may and ought to be taken into account when they are put forward for the purpose of securing for a necessarily inadequate price property which has not yet vested in the bankrupt. The course followed by the Sheriff-substitute has already had the effect of leaving to the creditors nearly three months for the expectancy dependent on the bankrupt's survivance of his mother to become a vested interest, and, in my view, the creditors have had all, and possibly more than all, they were entitled to. I am therefore in favour of refusing the appeal, and finding that the bankrupt is now entitled to his discharge.

LORD LOW.—I have found this case to be attended with much difficulty. By section 6 of the Bankruptcy and Cessio Act, 1881, it is enacted that in order to entitle a bankrupt who has not paid a dividend of 5s. in the £1 to his discharge, it must be proved that his failure to do so has arisen from circumstances for which he cannot justly be held responsible. Here the trustee has reported that the bankruptcy arose from culpable conduct on the part of the bankrupt, and that his business has been, throughout a period of twelve years, a series of special speculations in the fluctuations of the market prices of sheep and cattle. That is the purport of the trustee's report, and the bankrupt has led no evidence to shew that his failure to pay 5s. in the £1 has arisen from circumstances for which he cannot justly be held responsible. The Sheriff-substitute refers to the report of the examination of the bankrupt. I have read a copy of that report, and I cannot say that, to my mind, it throws much light on the question. If I had nothing but the examination of the bankrupt before me, I should have difficulty in forming my opinion as to whether or not the bankrupt can be justly held responsible for his failure to pay 5s. in the £1.

In such circumstances it is very important to observe that the statute gives very great weight to the opinion of the Judge of first instance—the Lord Ordinary or the Sheriff as the case may be. The enactment is extremely badly framed, and indeed, if read literally, is nonsense, but I think that what was meant, and what the enactment must be read as meaning, is that the bankrupt shall not be entitled to his discharge unless, in the opinion of the Lord Ordinary or the Sheriff, he was not justly responsible for his failure

May 29, 1908. to pay 5s. in the £1. If that be the sound construction of the enactment, then, although an appeal is allowed, it gives such weight to the opinion of the Lord Ordinary or the Sheriff that the Court of Appeal is not justified in altering his determination unless it is so plainly wrong that there are no reasonable grounds upon which it can be supported. I am not prepared to go so far as that in this case. I read the Sheriff-substitute's note as meaning that his investigations into the case have led him to the conclusion that to a considerable extent the bankrupt's losses were due rather to misfortune than to a course of dealing which could properly be described as rash or reckless speculation. That being so, I concur, although I confess with much hesitation, in the result at which Lord Stormonth-Darling has arrived.

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Lord Low.

LORD ARDWALL.—I am of opinion that in this case the bankrupt is not entitled to his discharge.

Under the Bankruptcy Act of 1860 the granting or refusing of a petition for discharge of a bankrupt was one entirely of discretion, and as was laid down in the case of *Millar*,¹ under that Act the Court would not on appeal readily interfere with the judgment of the Lord Ordinary or the Sheriff, but that case and others under the Bankruptcy Acts prior to 1881 have little application to the present question. By the Bankruptcy and Cessio Act of 1881 the law was altered and restrictions were placed on the right to discharge. By that Act, section 6 (1), it was provided as follows:—"A bankrupt shall not at any time be entitled to be discharged of his debts, unless it is proved to the Lord Ordinary or the Sheriff, as the case may be, that one of the following conditions has been fulfilled: (a) That a dividend or composition of not less than 5s. in the £1 has been paid out of the estate of the bankrupt, or that security for payment thereof has been found to the satisfaction of the creditors; or (b) that the failure to pay 5s. in the £1, as aforesaid, has in the opinion of the Lord Ordinary or the Sheriff, as the case may be, arisen from circumstances for which the bankrupt cannot justly be held responsible"; and by subsection 3 of the same section it is provided that "any deliverance of the Lord Ordinary or Sheriff, as the case may be, under this section shall be subject to appeal in the manner provided in sections 171 and 170 of the Bankruptcy (Scotland) Act, 1856, provided always that the judgment of the Inner-House of the Court of Session on any such appeal shall be final, and not subject to review."

It must be kept in view that the discretion reposed in the Lord Ordinary and the Sheriff under the Act of 1881 is much more restricted than in either of the previous Bankruptcy Acts so far as they related to the discharge of bankrupts; but yet I am of opinion that under these sections the Judge of the first instance may exercise a certain amount of discretion in granting or refusing the discharge, but that only where there is something in the report of the trustee or other evidence going to shew that the failure to pay 5s. in the £1 has wholly or partly arisen from circumstances for which the bankrupt cannot justly be held responsible. An example of this is to be found in the case of *Shand (Petr.)*,² where the deficiency was due in some measure to the

¹ 5 R. 144.

² 1882, 19 S. L. R. 562.

bankrupt's fault, but in a greater degree to the forced realisation of his May 29, 1908. effects. In such cases I would agree with what has been said by your Lordships as to the undesirability of interfering with the decision arrived at by the Judge of the first instance on a balancing of evidence, but in my opinion the present is not a case of that sort at all. I must however say that I respectfully differ from the views expressed by my brother Lord Stormonth-Darling as to the duty of the Court of Appeal in considering such a case as is presented to us by the Sheriff-substitute's interlocutor and note.

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Trustee.
Lord Ardwall.

Before considering what the facts in this case are upon which the Sheriff-substitute has proceeded, I think it right to point out that the effect of the provisions of the Act of 1881 under consideration is not now being considered for the first time. In the case of *Clarke v. Crockatt & Company*,¹ the Court very clearly laid it down that the burden of proving that his failure had arisen from circumstances for which he could not justly be held responsible lay upon the bankrupt himself. Lord President Inglis says,—“The enactment is that the bankrupt shall not be entitled to a discharge unless one of two things is proved—either that he has paid a dividend of 5s. in the £1, or that his failure to do so has ‘arisen from circumstances for which the bankrupt cannot justly be held responsible’; and the statute further lays upon the bankrupt himself the burden of proving that the failure has arisen from such circumstances. The question therefore is, no dividend of 5s. having been paid in the present case, whether the failure so to pay has been proved by the bankrupt to have arisen from circumstances for which he cannot be held to be justly responsible.”

Then in the case of *Neilson (Petr.)*,² Lord President Kinross expresses himself thus regarding the subsection in question :—“This subsection clearly lays upon the bankrupt the *onus* of proving that the failure to pay 5s. in the £1 arose from circumstances for which he cannot justly be held responsible, because it declares that unless this or another condition has been fulfilled, he shall not be entitled to be discharged. That proposition must be established affirmatively by the bankrupt, and the question is, has it been so established in this case?” And Lord Adam says in the same case :—“I agree, however, that the *onus* is on the bankrupt of shewing that he cannot justly be held responsible for the failure to pay 5s. That was most distinctly stated by Lord President Inglis in the case of *Clarke v. Crockatt & Company*,¹ and I do not think that it is possible to maintain the contrary. Now it appears to me that this is a case of reckless, not perhaps trading, but of reckless speculation.”

No doubt in thus stating the import and effect of the Act the learned Judges above referred to had in view the terms of subsections (1) and (2) of section 6 of the Act of 1881, which very plainly by their terms lay upon the bankrupt the duty of submitting such evidence as will prove to the Lord Ordinary or the Sheriff that one or other of the conditions (a) and (b) mentioned in subsection (1) have been fulfilled.

Accordingly the question comes to be in the present case whether the bankrupt has proved that either of the conditions has been fulfilled.

The Sheriff-substitute has found in his interlocutor “that the bankrupt's

¹ 11 R. 246.

² 3 F. 446.

May 29, 1908. failure to pay a dividend of 5s. in the £1 has arisen from circumstances for which he cannot justly be held responsible," yet he has not pointed out in his note any such circumstance. After some observations about the buying and selling of stock at auction marts, the Sheriff-substitute goes on to say in his note:—"The view taken is that, while there is always risk in such dealings, because the sheep market fluctuates according to weather and many trade causes (which are out of the power of these graziers to shelter themselves from, if they are doing business at all), the bankrupt did not act so rashly and unreasonably as to justify severe censure; on the contrary, that part of his dealing was wholesome, and would not have been discouraged by the objecting creditors."

It is not very easy to extract any definite meaning from this somewhat strangely worded paragraph. The Sheriff-substitute seems to think that the question he had to decide was whether the bankrupt acted "so rashly and unreasonably as to justify severe censure." That is not the question which he had to determine, the question was whether the bankrupt had discharged the *onus* lying upon him of shewing that his failure to pay 5s. in the £1 had arisen from circumstances for which he could not justly be held responsible? The Sheriff-substitute goes on to express the opinion that part of the bankrupt's dealings was "wholesome" (whatever that may mean), and would not have been discouraged by the objecting creditors. Here, perhaps, is an indication that the Sheriff-substitute blames the objecting creditors for having contributed to the bankrupt's failure, but of this there is no evidence. Taking the paragraph as a whole, it seems to imply that because occasionally graziers cannot "shelter themselves" from the fluctuations of the sheep market "according to weather and many trade causes," the bankrupt who has for twelve years carried on a series of speculations resulting in a sequestration shewing £1003, 9s. 5d. of liabilities and £156, 19s. 5d. of assets is to be held to have been brought into that position "by circumstances for which he cannot justly be held responsible." It need hardly be pointed out that every trade and business is liable to fluctuations, and that every trader is liable to losses of more or less magnitude from time to time owing to circumstances for which possibly he cannot be held responsible; but it is manifestly the duty of any such trader when such inevitable losses occur to circumscribe his operations till his estate has recovered from such losses, and not to go on adding to the deficit by continued persistence in the same kind of dealings as led to them.

I must therefore hold that the Sheriff-substitute's suggestion, made in the passage I have quoted, does not afford the slightest foundation for the finding above quoted from his interlocutor.

I now turn for a moment to the facts of the case as ascertained from the trustee's report. These, shortly stated, are that for the long period of twelve years the bankrupt carried on a series of speculations upon fluctuations in the market prices of stock—in short, his business for the most part was of the same character as that known as gambling for differences on the Stock Exchange; that he never made up a balance-sheet, and kept no proper business-books, not even a cash-book. Apparently the only books that he can produce are three bank pass-books and three pocket diaries. The entries in the diaries were neither regular nor complete,

and ceased altogether in April 1904, about fourteen months before his May 29, 1908. sequestration.

It was pleaded that although failure to keep books might render the bankrupt liable to prosecution under the Debtors (Scotland) Act, 1880, section 13, subsection 6, yet it had no bearing on the present case. I must differ from this view, because it was just a piece of the bankrupt's reckless trading that he went blindly on, speculating with other people's money, without knowing at any one time how his affairs stood, so as if necessary to stop his speculative operations.

On the facts therefore as stated in the trustee's report, which under the Act is the proper evidence unless the Sheriff has required further evidence to be led, which apparently he has not done, I am of opinion that it has been shewn that the bankrupt's failure to pay 5s. in the £1 has arisen solely from circumstances for which the bankrupt, and the bankrupt alone, is responsible, and I have been unable to find in the whole proceedings any evidence to the contrary. But having regard to the *dicta* of the Judges in the cases of *Clarke v. Crockatt & Company*¹ and *Neilson (Petr.)*,² the *onus* lies upon the bankrupt of shewing that the failure to pay 5s. in the £1 has "arisen from circumstances for which the bankrupt cannot justly be held responsible," and what has to be decided in this case is whether the bankrupt has discharged that *onus*.

I have been unable to find in the whole proceedings a tittle of evidence to justify the view that he has discharged it. I cannot find a single fact proved, or even, for that part of the matter, averred, which goes any length towards discharging that *onus*. The Sheriff-substitute's note, as I have shewn, does not shew that the bankrupt has discharged that *onus*, nor, so far as I have been able to follow them, do the opinions of your Lordships. There is no question of discretion here, the question is whether we are to affirm a finding which cannot be supported by a single fact in the case.

I am therefore of opinion that the Sheriff-substitute has gone so far wrong in the present case and has so completely disregarded the requirements of the Act of 1891 as expounded in former decisions of the Supreme Court, that it is the duty of this Court as a Court of appeal to reverse his judgment and refuse the petitioner's discharge, on the ground that he has not discharged the *onus* lying upon him of shewing that his failure to pay 5s. in the £1 has arisen from circumstances for which he cannot justly be held responsible.

It is unnecessary in the view I take of the case to go into the question raised in the Sheriff-substitute's note regarding the *spes successionis* of the bankrupt.

LORD JUSTICE-CLERK.—I have found the case very difficult, but I concur with the majority of your Lordships. The proceedings in a question of bankruptcy discharge have somewhat of a penal character, and the withholding of a discharge is a very serious matter for a bankrupt, the subsistence of his sequestration after a considerable lapse of time being like a chain around his neck, hampering him in any effort he may be making to

¹ 11 R. 246.

² 3 F. 446.

May 29, 1908. recover himself and make progress as a citizen. It is therefore, I think, a case in which, except upon the strongest grounds, the Court should not interfere with the decision of the Judge of first instance, where that has set the bankrupt free, even although his doing so may be held to go rather far in the exercise of his discretion. The present case is, I admit, not a very favourable one. But as the Judge of first instance has held that the door may open for the bankrupt to go free, I am not prepared to shut it in his face. I concur generally in what Lord Stormonth-Darling has said, and while I agree with much of the animadversion which Lord Ardwall has expressed, I cannot see my way to set aside the decision of the Sheriff, a course which should only be taken if there are no reasonable grounds for the decision.

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Lord Justice-
Clerk.

THE COURT pronounced the following interlocutor:—"Dismiss the appeal, and affirm the . . . interlocutor appealed against: Of new find the bankrupt petitioner entitled to his discharge, and remit the cause to the Sheriff to proceed therein," &c.

MENZIES, BRUCE-LOW, & THOMSON, W.S.—CARMICHAEL & MILLER, W.S.—Agents.

No. 126. THE HORSLEY LINE, LIMITED, Pursuers (Respondents).—*Aitken, K.C.*
—*C. H. Brown.*

May 29, 1908. ROECHLING BROTHERS, Defenders (Reclaimers).—*Dickson, K.C.*—*Spens.*

Horsley Line,
Limited, v.
Roehling
Brothers.

Ship—Charter-party—Lay-days—Commencement—"Time for discharging to commence on being reported at custom-house"—Ship reported before being berthed.—By a charter-party it was provided that a vessel, after loading a cargo at Middlesborough, "should proceed to Savona or Genoa as ordered, . . . and there deliver the same, . . . time for discharging to commence on being reported at the custom-house."

The vessel having been ordered to Savona, anchored in the roads there on a Tuesday morning, and was reported at the custom-house at 3 P.M. on that day, but had to wait until a later date before she could get into the harbour, and until a still later date before she got into the berth where she discharged her cargo.

In an action for demurrage it was admitted that the roads were outside the geographical limits of the port of Savona and of what was known commercially as the port, and were the ordinary place at which vessels lay until there should be room in the harbour where alone discharging could be effected. The pursuers averred "that according to the custom of the port, vessels on arrival in the roads are reported at the custom-house, and are allotted berths in the harbour according to the order of reporting."

Held that, assuming the pursuers' averment to be accurate, the time at which under the charter-party the lay-days began was 3 P.M. on Tuesday, the hour of reporting at the custom-house, although the vessel had not then arrived at a place in the harbour where she could discharge.

Ship—Charter-Party—Lay-days—Demurrage—Computation—Whole days or Fractions.—A charter-party provided "cargo to be received at the port of discharge at the rate of 400 tons per weather working day. . . . Demurrage at the rate of £25 per running day." The cargo was 2850 tons.

Held (1) that the charterers were only entitled to lay-days amounting to seven days and three hours (the time actually required for unloading the cargo at the specified rate) and not, as they contended, to eight complete

days; (2) that the vessel having been on demurrage for a period of six days and one and a half hours of a seventh day, the owners were only entitled to demurrage for six days one and a half hours, and not, as they contended, for seven complete days.

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Hough v. Athya & Son, 1879, 6 R. 961, and *Commercial Steamship Company v. Boulton*, 1875, L. R., 10 Q. B. 346, distinguished, *Yeoman v. The King*, [1904] 2 K. B. 429, approved and followed.

Ship—Charter-Party—Exception—Hands striking work—Regulations of Co-operative Societies of Labour.—Under a charter-party, dated January 1907, the charterers were bound to discharge cargo at a certain rate per day, "except in cases of riot, or any hands striking work."

For a certain period after her arrival in the port of discharge, the ship lay stern on to a quay until a berth became available at which she could lie broadside on. No cargo was discharged during this period, owing to a declaration of the presidents of the two co-operative societies of labour at the port that steamers were not to be discharged while moored end on to a quay. This declaration was published in November 1906, and was widely known and regularly acted upon. Held that this delay did not fall within the exception, and that the time during which the ship lay stern on to the quay must be counted in reckoning lay-days and demurrage.

By charter-party, dated 14th January 1907, and entered into between the agents of the Horsley Line, Limited, owners of the steamship "Dalmally," on the one part, and Messrs Roechling Brothers, iron merchants, Glasgow and Milan, Italy, on the other part, it was stipulated:—"That the said steamship . . . shall after discharging present cargo with all convenient speed proceed to Middlesbrough and there load . . . a cargo, and " . . . with all convenient speed proceed to Savona or Genoa, as ordered on signing bills of lading, and there deliver the same to the order of the said freighters, or their assigns . . ."

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"Steamer not to be responsible for any loss, damage, or delay to cargo caused by strikes, lockouts, and/or combinations of officers, engineers, crew, dock labourers, stevedores, lightermen, or any other hands or agencies connected with the loading or discharging of the steamer. . . ."

"The cargo to be supplied at the port of loading as fast as the steamer can stow same, and received at the port of discharge at the rate of 400 tons per weather working day (Sundays and holidays excepted) except in cases of riot, or any hands striking work, or accidents to machinery which may impede the ordinary loading and discharging of the steamer. The reckoning for loading to commence when the steamer is berthed at the respective wharves, and notice given that she is ready to receive cargo.

"Time for discharging to commence on being reported at the custom-house.

"Demurrage at the rate of £25 per running day to be paid by the freighters or consignees for any detention in the loading and delivery, as above. Freighters' liability to cease on cargo being shipped, except as regards demurrage, if any, incurred in the loading. . . ."

"Finally, this charter in all its clauses to be binding on both parties, notwithstanding any and every custom of the port of discharge to the contrary. . . ."

The "Dalmally" proceeded to Middlesbrough, loaded there a cargo of pig-iron weighing 2850 tons, and proceeded therewith, as ordered, to Savona. She anchored in the roads there on 12th February 1907, and was reported at the custom-house at Savona at 3 P.M.

May 29, 1908. on the same day. Her discharge was completed on 27th February at 7.30 P.M.

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The Horsley Line, Limited, brought an action against Roechling Brothers in which they concluded for payment of £175 as demurrage at the rate stipulated in the charter-party for seven days, reckoned from 6 P.M. on Thursday, 21st February, when the lay-days expired, the lay-days being counted from 3 P.M. on Tuesday, 12th February, and not including Wednesday, 13th February, which on account of the weather was not a "weather working day."

The defenders maintained that the lay-days did not begin to count until Wednesday, 20th February, the vessel not having arrived, as they alleged, where her cargo could be delivered until the evening of Tuesday, 19th February; and that consequently no demurrage was due.

The following joint minute of admissions was put in by the parties:—“(1) That the s.s. ‘Dalmally’ anchored in the roads at Savona at 8.40 A.M. on Tuesday, 12th February 1907. (2) That the s.s. ‘Dalmally’ was reported at the custom-house at Savona at 3 o’clock on the afternoon of 12th February 1907, and the same day was reported to the defenders’ agents at Savona as having arrived in the roads. (3) That the roads at Savona where the s.s. ‘Dalmally’ was anchored is an ordinary place of anchorage for vessels to lie while unable owing to the harbour being full to get into same and preparatory to their entering the harbour of Savona, where alone discharging and unloading is effected. (4) That the roads at Savona are outside of the geographical limits of the port of Savona and of what is known commercially speaking as such port. (5) That it is not the custom at Savona to discharge cargo from vessels lying in the roads. (6) That the s.s. ‘Dalmally’ lay in the roads until 3.25 P.M. on Saturday, 16th February 1907, when she entered the harbour of Savona and moored stern on to a quay at a discharging berth in the inner harbour, and that it could not be moored in any other way. (7) That, in November 1906, the presidents of the two co-operative societies of labour at the port of Savona published a declaration that from said month of November until further notice steamers were not to be discharged while moored end on to the quay in said inner harbour. (8) That this declaration, which has been regularly acted upon since its date, was published in the Italian newspapers, and wide publicity was given to same. (9) That the s.s. ‘Dalmally’ did not discharge any of her cargo while she was moored end on to the quay as aforesaid.”

The pursuers averred;—(Cond. 4) “ . . . According to the custom of the port, vessels on arrival in the roads are reported at the custom-house, and are allotted berths in the harbour according to the order of reporting. . . . ”

The defenders denied this averment.

The pursuers also averred that after lying moored stern on to the breakwater from Saturday, 16th February, the “Dalmally” was placed in a berth at the quay on Tuesday, 19th February, at 10 A.M., and that the defenders did not actually commence unloading until 19th February.

The pursuers pleaded, *inter alia*;—(2) On a sound construction of the charter-party the lay-days commenced to count on 12th February when the vessel was reported at the custom-house. (3) The sum sued for being due by the defenders to the pursuers as demurrage under the charter-party condescended on, decree should be pronounced as craved.

The defenders pleaded, *inter alia*;—(1) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (3) The defenders fall to be assuizied in respect that the ship, after being an arrived ship, was discharged within the lay-days stipulated in the charter-party. (4) Upon a sound construction of the charter-party the lay-days do not commence to count until the ship has arrived at a usual and recognised place of discharge in the port of destination. (5) Upon a sound construction of the charter-party the unit by which the time falls to be computed is a day. (6) *Separatim*, any delay in the discharge over and above the lay-days having been occasioned by strikes or combinations of stevedores, the defenders fall to be assuizied in respect of the exemption of their liability for these causes of delay in the charter-party.

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On 21st February 1908 the Lord Ordinary (Salvesen) repelled the first and sixth pleas in law for the defenders, and allowed both parties a proof of their averments.*

* "OPINION.—In this action the pursuers, who are the owners of the s.s. 'Dalmally,' seek to recover from the defenders seven days' demurrage. Various questions are raised which mainly depend on a construction of the charter-party entered into between the pursuers and defenders, but there are also some facts in dispute, and although the parties have put in a joint minute of admissions (No. 10 of process) they have failed to come to an agreement as to what appears to me to be a vital part of the pursuers' case. The defenders, however, maintain that they have sufficient admissions from the pursuers to justify the action being dismissed as irrelevant, and I shall accordingly deal with the argument on this head.

"The 'Dalmally' was chartered on 14th January 1907 to load a cargo of pig-iron of about 2900 tons at Middlesborough, and to proceed to Savona and there deliver the same. The charter-party provided 'that the cargo should be received at the port of discharge at the rate of 400 tons per weather working day, except in cases of riot, or any hands striking work, or accidents to machinery which might impede the ordinary loading and discharging of the steamer. . . . Time for discharging to commence on being reported at the custom-house.' The facts admitted by the parties are as follows:—The 'Dalmally' anchored in the roads at Savona at 8.40 A.M. on Tuesday, 12th February 1907. She was reported at the custom-house at Savona at 3 o'clock on the afternoon of that day. The place where she anchored is an ordinary place of anchorage for vessels unable to get into the harbour, in which alone discharging is effected, but is outside the limits of the port. The pursuers further aver that according to the custom of the port vessels on arrival in the roads at Savona are reported at the custom-house, and are allotted berths in the harbour according to the order of reporting. (1) The first question in the case is: Are these facts relevant to infer that the lay-days under the charter-party in question commenced to run from 3 o'clock on the afternoon of 12th February? In my opinion they are.

"Practically the only argument submitted for the defenders was that the 'Dalmally' was not an arrived ship when she lay in the roads outside Savona, and they figured the case of a vessel being reported at the custom-house when she was still a long way from the port. I do not suppose such a thing would be commercially possible, but if it were I should of course not consider that the lay-days could possibly commence from the time of such reporting. The case is, however, quite different if it is the recognised custom of the port that vessels on arrival are reported at the custom-house, and are allotted berths according to the order of reporting, for I should then assume that the parties had this custom in view when they agreed on the terms of the charter-party. It may be noted that the defenders carry on business in Italy as well as in Glasgow; and shipowners, of course, make it

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The defenders reclaimed, and argued;—(1) The lay-days only commenced to run on the vessel's arrival in the port of Savona, of which, admittedly, the "roads" were not a portion. It was unnecessary to consider anything beyond the charter-party itself, seeing that its ruling clause was that the vessel was to proceed to Savona, and there deliver her cargo. Accordingly until Savona was reached the vessel was under no obligation to deliver, and the charterers were not bound to receive cargo. This conclusion further followed from the well-known rule of law that before lay-days could commence to run a vessel must have arrived at her destination, and be what was termed an "arrived" ship.¹ A vessel lying in "roads," which she might be compelled to leave at a moment's notice from stress of weather, was in no sense "arrived." The clause as to the custom-house report, on which the pursuers' case depended, was obviously qualified by the implied condition that the vessel must have "arrived." The date of

their business to ascertain the customs of the ports to which they send their vessels. On this assumption, therefore, I think it is not a just implication that the running of the lay-days should be suspended until the vessel actually got into the harbour. I asked the defenders' counsel if the vessel was to report a second time at the custom-house after she had got into the harbour, and if there was any provision for such a report being received. I could get no satisfactory answer to either of these questions; but it appears to me that whatever assumption is made on these points the terms of the charter-party would be directly contradicted if the defenders' interpretation were adopted; for you would require to substitute for the quite unequivocal language used a clause such as this: 'The time of discharging to commence after vessel has arrived in the harbour, and has been reported at the custom-house.' I see no warrant for this. I recognise, of course, that if the contract does not state from what point of time the lay-days shall commence to run, they will not run until the ship has arrived in the port, and may not run until she is actually in a discharging berth, or at all events until such a berth is available. But there is nothing to prevent parties agreeing that the risk of the vessel's detention through the harbour being full shall be thrown on the charterer, and this—if the pursuers prove their averments—is what I think the parties truly intended.

"None of the reported cases seem to me to have any bearing on this question; but I note those to which I was referred: *Jackson*, 1838, 5 Bing. N. C. 71; The '*Machrahanish*,' Shipping Gazette, 4th April 1906; The '*Katy*,' [1895] P. p. 56, and *La Cour*, 1 R. 912.

"(2) If I am right in this, it follows that the lay-days commenced to run at 3 P.M. on 12th February, and must be reckoned as periods of twenty-four hours. The obligation of the defenders was to take delivery at the rate of 400 tons per day. The cargo consisted of 2850 tons; and the defenders claim that they were entitled to eight weather working days for unloading it, as it exceeded by fifty tons what they were bound to take out in the seven days. The only Scotch case cited by the defenders was that of *Christie*, 1896, 3 S. L. T. 284; but it has only a superficial resemblance. On the other hand I was favoured with a citation of two decisions in England—one supporting the pursuers' contention—(*Yeoman*), [1904] 2 K. B. 429, and the other (*Houlder*, [1905] 2 K. B. 267, at p. 271), which quite as clearly supports the defenders'. The latter was the decision of a single Judge, Channell, J., but was subsequent in date to the decision of the Court of Appeal in *Yeoman's* case, which it professed to distinguish. It was held by

¹ *Leonis Steamship Co., Limited, v. Rank, Limited*, [1908] 1 K. B. 499, Lord Justice Kennedy, at p. 517; cf. *La Cour v. Donaldson & Son*, May 22, 1874, 1 R. 912.

her entering the harbour was accordingly the earliest date from which lay-days could be counted. The "*Machrahanish*,"¹ founded on by the pursuers, was distinguishable, because in it there was an express contract as to when the ship was "arrived." (2) The cargo was fifty tons in excess of the amount which they were obliged to unload in seven days. Accordingly they were entitled to eight complete days as lay-days, the rule being that in calculating lay-days, days meant calendar days from midnight to midnight and not periods of twenty-four hours, and that a fraction of a day counted as a whole day.² *Yeoman v. The King*,³ at first sight an adverse authority, was distinguishable, because in that case the contract made it clear that the calculation was to be made in hours. (3) Lastly, they were not bound to receive cargo until the vessel obtained her proper berth alongside the quay. So long as she remained stern on operations were prevented by a state of matters

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Channell, J., that if a fraction of a day is required for the completion of the discharge the charterer is entitled to the whole of that day.

"The clause here under construction is practically identical with that in *Houlder's* case. No reasons, however, are given for the judgment except that there is a general rule that for purposes of demurrage fractions of a day are not to be taken into consideration. That, however, must always yield to the intention of parties as deduced from the words used; and I am unable to see how a provision that a vessel shall be discharged 'at the rate of 400 tons per weather working day' is satisfied by the charterer receiving the cargo at the rate of 362½ tons. In *Yeoman's* case there were no doubt words which are not here, for demurrage was to be paid at 4d. per net register ton per day 'and *pro rata*'; whereas here the corresponding clause is 'demurrage at the rate of £25 per running day.' So far as I can judge, however, the majority of the Court of Appeal would have reached the same result on the language of the clause with regard to the average rate of discharge alone. I agree with Romer, L. J., when he says,—'I do not see why because the average rate mentioned does not work out to an exact number of days it should therefore follow that it does not apply to a portion of a day.' I think it also obvious that if the day is interrupted by bad weather—say, for three hours—the charterer would be entitled to the benefit of these three hours on the succeeding day; and the same with strikes or riots which interfered with the discharge of the vessel for less than a day. On the other view—that only whole days can be taken account of—either the charterer would fall to be debited with a whole lay-day if discharging took place during any part of it, although it had to be stopped through an excepted cause; or the charterer might take up the position that no day on which there was an interruption could be reckoned as a lay-day. In short, in my opinion the only way in which a commercial contract like this can be expiscated is on the assumption of the parties having had in view lay-days consisting of twenty-four consecutive hours, which would fall to be extended in proportion to the number of hours that the vessel's discharge was interrupted through the excepted causes.

"(3) The third question relates to the construction of the clause, 'except in case of riot or any hands striking work which might impede the ordinary discharging of the steamer.' The '*Dalmally*' was taken into the harbour of Savona at 3.25 on Saturday 16th February, and was moored stern on to a quay at a discharging berth—there being no discharging berth available for her. She lay in this position without discharging any cargo until

¹ Shipping Gazette, April 4, 1906.

² *Houlder v. Weir*, [1905] 2 K. B. 267; *Hough v. Athya & Son*, May 27, 1879, 6 R. 961; The "*Katy*," L. R., [1895] P. 56.

³ [1904] 2 K. B. 429.

May 29, 1908. which amounted to hands "striking work," and which fell under the clause of exceptions.

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Argued for the pursuers and respondents;—(1) In this case the parties had contracted that the lay-days were to commence at a fixed *punctum temporis*, viz., "on being reported at the custom-house." The general doctrine of the "arrived" ship was accordingly superseded, it being in fact the object of the contracting parties to steer clear of the many difficulties which that rule had given rise to. The "roads" at Savona were the customary place from which to report. There was nothing extraordinary or unusual in a contract that lay-days should commence prior to arrival in port.¹ (2) The defenders were not entitled to eight days as lay-days, but only to seven days and a fraction, days meaning periods of twenty-four hours, and not calendar days from midnight to midnight.² *Hough v. Athya & Son*³ and *Commercial Steamship Company v. Boulton*⁴ were cases dealing with demurrage to which a different

Tuesday, 19th February, at 10 A.M., or—according to the defenders—till the morning of 20th February. The defenders claim to deduct this period from the 16th to the 20th in respect that until then they were prevented by a combination of stevedores from discharging the vessel. The facts upon which I am asked to decide this question are narrated in articles 7 and 8 of the joint minute of admissions, and come to this, that the presidents of the two co-operative societies of labour at Savona published a declaration in November 1906 that from that time steamers were not to be discharged while moored end on to the quay in said harbour; and that this declaration, which has since been regularly acted upon, received wide publicity. The charter-party, however, was entered into on 14th January 1907, and I think it is impossible to hold that this declaration, which merely settled the custom of the port as to discharging of steamers for the future, can be held to come under the clause dealing with riots or hands striking work. I was referred to the case of *Richardson*, [1898] 1 Q. B. 261, where it was said that the exception as to strikes and lockouts applies generally to labour disputes. I daresay it does; but so far as this discharge is concerned I see no evidence that there was any dispute—certainly none of any dispute arising with reference to the discharge of the 'Dalmally.' In fact I should not wonder if the declaration of the labour presidents had been published at the suggestion of the receivers of cargo, for it is they alone who have an interest in reducing the expense of discharge.

"(4) The last question relates to a period of one and a-half hours on the 27th of February for which the pursuers claim a whole day's demurrage. Assuming their calculation to be correct, the lay-days expired on Thursday, 21st February, at 6 P.M., but the 'Dalmally' was not completely unloaded before 7.30 on the 27th. I should have been very glad if I could have given effect to the defenders' contention on this head, but I consider myself foreclosed by the decision in *Hough v. Athya*, 6 R. 961, by the First Division approving of the decision of the English Courts in *Commercial Steamship Company v. Boulton*, L. R., 10 Q. B. 346, where it was held that in the case of demurrage a fraction of a day counts as a day. I do not think that the reasons assigned by the learned Judges for the rule which they laid down at all accord with the more modern practice under which demurrage in the case of large steamers is generally reckoned by the hour. On the other hand parties who still contract on the footing that the only unit which they provide for calculating demurrage is a day cannot

¹ The "Machrahanish," *Shipping Gazette*, April 4, 1896; *Jackson v. Gal- loway*, 5 Bingham, N. C. 71.

² *Yeoman v. The King*, L.R., [1904] 2 K. B. 429.

³ May 27, 1879, 6 R. 961.

⁴ 1875, L. R., 10 Q. B. 346.

rule applied. The "*Katy*"¹ and *Houlder v. Weir*² were distinguish- May 29, 1908.
able, because in them no definite time was fixed at which discharge
was to begin. (3) The running of the lay-days was not suspended while
the vessel lay stern on to the quay, the fact that she was not unloaded
being due not to a strike, which admittedly would have fallen under
the clause of exceptions, but to a custom of the port which ought to
have been within the cognisance of parties when they made their con-
tract.³ (4) Lastly, the ship having been on demurrage for six days and a
fraction of a day, they were entitled to payment for seven days, the
rule in calculating demurrage being the reverse of that applicable to
lay-days, a fraction of a day counting as a whole day.⁴ The reason
for the difference was due to the fact that the payment of demurrage
was a penalty, and calculated accordingly in the way most unfavour-
able to the delinquent party.

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At advising on 29th May 1908,—

LORD JUSTICE-CLERK.—The facts of this case are most simple. They are stated very clearly in an opinion prepared by Lord Low, which I have had an opportunity of perusing, and in which I concur. The principal point in the contract between the parties is whether the days of discharge of the ship at Savona are to count from the time when the ship was reported at the custom-house after reaching the outer harbour, or whether they are to count from the time at which she reached a berth for discharge. In my opinion the view the Lord Ordinary has taken is right. The words of the charter-party are distinct and unambiguous, fixing the time as being the time of the vessel being reported at the custom-house. Presumably those who signed the contract intended what it expresses. To say that the time is to commence to run from some other occurrence seems to me to be nothing short of saying that the words of the contract are either not to be held to mean what they say, but something different, or are to be ignored altogether in respect of some custom or practice inconsistent with it. I cannot assent

complain if they be held to have so contracted in view of the rule laid down more than thirty years ago. In the case of the *Brackelow s.s. Company*, 1897, 1 Q. B. 570, Lord Russell of Killowen introduced a kind of rough and ready method for calculating weather working days when there had been an interruption from bad weather, and held that where substantial work was done, though not amounting to half a day, the charterers were to be charged with half a day; and where substantially a full day's work—though not amounting to twelve hours—was done, the charterers were to be charged a full day. I confess I see no merit in this except the simplicity of the arithmetic, and it has this disadvantage that the charterer is in both cases overcharged. It would seem much simpler, as well as more equitable, to take the actual hours during which discharging was stopped by bad weather. But for the purposes of the present question Lord Russell's decision is also an authority for the proposition that after the loading-days are exhausted every part of a day counts as a whole day's demurrage.

"As already indicated, parties on more than one point are at serious variance as to the facts; and all therefore that I can do at present is to repel the defenders' first and sixth pleas in law and allow parties a proof of their averments."

¹ [1895] P. 56.

² [1905] 2 K. B. 267.

³ *Stephens v. Harris & Co.*, 1887, 57 L. T. 618.

⁴ *Commercial Steamship Company v. Boulton*, L. R., 10 Q. B. 346; *Hough v. Athya & Son*, May 27, 1879, 6 R. 961.

May 29, 1908. to either contention. I think the words must be taken according to their plain meaning, it being right to presume that the charterers knew what they were doing when they accepted the terms contained in the document. All arguments about it being unfair and unreasonable to make the days run from arrival at the harbour, and not from arrival at a berth, are futile. The answer is plain, that the time must count according as it is fixed by the agreement between the parties, and that time is the time of the reporting at the custom-house. If the charterer made a bad bargain for himself, *sibi imputet*.

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The second question is whether a fraction of a day necessary to complete the discharge is to be reckoned as a whole day for demurrage. The Lord Ordinary holds himself bound by two cases to which he refers. If I thought that the terms of the contract in these cases were of similar import to those in the present case, I should, though with reluctance, come to the same conclusion. In one case the words were "thirteen running days to be allowed for loading and unloading and ten days on demurrage at £40 per day." In the other case the words were, "a minimum of seven days to be allowed the merchants and ten days' demurrage over and above the said lying-days at £35 per day." In this case the terms are somewhat different. The cargo is to be received "at the rate of 400 tons per weather working day." Thus the delivery is to be at a rate per day, and that would in my view be fulfilled although the end of the discharge took place not at the exact close of any particular working day but at any hour. If for a broken day running beyond the discharging time payment was made for the broken time at the rate specified, the contract would in my opinion be fulfilled, the demurrage being at a rate, as the discharge was to be at a certain rate. I therefore cannot agree with the contention that the defenders are liable for a whole day in respect of a fraction of a day, namely, one hour and a half—See the case of *Yeoman*.¹

As regards the question of strikes, the Lord Ordinary's view seems to me to be entirely sound, and I do not find it necessary to add anything to what he has said.

I would fain hope that if your Lordships concur, as I understand you do, in the views I have expressed, that it may not be found necessary to send the case back for proof, and incur further expense.

LORD STORMONTH-DARLING.—I also have had an opportunity of reading and considering the opinion of my brother Lord Low in this case, and I entirely concur in it. The only legal point in which we differ from the Lord Ordinary is one at which he arrives unwillingly, for he says he would have been very glad if he could have given effect to the defenders' contention, but he considers himself foreclosed by the decision of the First Division in *Hough v. Athya & Son*² in 1879, approving and following the judgment of the Queen's Bench in 1875 in *Boulton's* case.³ Now I do not suppose for a moment that any of us desire to impugn the soundness of either of these judgments with reference to the charter-parties affecting the cases then under consideration. But in neither of these charter-parties was there any reference to a unit of time other than a day. That, I apprehend, was the real

¹ [1904] 2 K. B. 429.

² 6 R. 961.

³ 1875, L. R., 10 Q. B. 346.

ground of the decision in the English case which was followed by the First May 29, 1908. Division of this Court. "There is no ground for saying" (so said Mr Justice Lush) "that in the case of demurrage there can be any division of a day without express stipulation to that effect." Mr Justice Quain was equally distinct to the same effect,—“It was contended for the defendants that they are only liable for one day or only for a portion of the second; but it was not suggested how the proportion was to be calculated, and it is clear that, in the case of demurrage like this, we cannot go into the calculation of part of a day.” So it was a difficulty of calculation according to the terms of the particular charter-party that led to the judgment, and nothing else. The framers of modern charter-parties have, as the Lord Ordinary indicates, got over this difficulty by naming as a unit hours instead of days; and Lord Low suggests other words in this charter-party which sufficiently distinguish its language from those of *Hough's case*¹ and *Boulton's case*.² I therefore think that the present case is not ruled by *Hough*¹ and *Boulton*,² and that there is no legal necessity for holding that the defenders are liable to pay as demurrage more than a proportionate part of the £25 applicable to the time actually occupied in discharging the cargo. And I agree that *Yeoman's case*³ affords strong confirmation of that view.

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With respect to the parts of the Lord Ordinary's judgment in which we agree with him—which are chiefly the question at which point of time the “Dalmally” became an “arrived” ship, and the question whether the “strike” clause in the charter-party affected her or not—I do not desire to add anything to what the Lord Ordinary and Lord Low have said, and I agree with the latter that the question whether the proof allowed by the Lord Ordinary shall go on or not must depend on the real attitude of the defenders towards their own averments.

LORD LOW.—The first question in this case is, When did the lay-days commence to run?

The clauses in the charter-party in regard to loading and unloading are to the following effect:—“The cargo to be supplied at the port of loading as fast as the steamer can stow same, and received at the port of discharge at the rate of 400 tons per weather working day . . . The reckoning for loading to commence when the steamer is berthed at the respective wharves, and notice given that she is ready to receive cargo; time for discharging to commence on being reported at the custom-house.”

The port of discharge in the charter-party was Savona or Genoa, and it was to the former that the “Dalmally” was sent. It is admitted that she anchored in the roads at Savona at 8.40 A.M. on Tuesday the 12th February 1907, and that she was reported to the custom-house at 3 P.M. on the same day; that the roads at Savona are outside of the geographical limits of the port of Savona, and of what is known, commercially speaking, as such port; and that the roads where the “Dalmally” was anchored is an ordinary place of anchorage for vessels which cannot get into harbour (where alone cargo can be discharged) on account of its being full. It is

¹ 6 R. 961.

² 1875, L. R., 10 Q. B. 346.

³ [1904] 2 K. B. 429.

May 29, 1908. also averred by the pursuers (cond. 4) that "according to the custom of the port, vessels on arrival in the roads are reported at the custom-house, and are allotted berths in the harbour according to the order of reporting." That averment is denied by the defenders, but upon a question of relevancy it must be assumed to be true.

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In these circumstances, it seems to me that the provision in the charter-party in regard to the time when the lay-days shall commence is quite distinct—they are to commence when in ordinary course the arrival of the vessel is reported at the custom-house. The defenders argued that such a construction of the charter-party was inconsistent with the leading provision that the vessel should "proceed to Savona," and "there deliver" the cargo, because until she got within the limits of the port she was not an "arrived" vessel, and was not in a position to deliver the cargo. Assuming that the averment of the pursuers which I have quoted is correct, I am of opinion that that argument cannot be sustained. The pursuers' averment amounts to this, that the custom of Savona is that when the harbour is full, an arriving vessel anchors in the roads and reports her arrival to the custom-house, and that that report regulates the order in which she gets a berth in the harbour. If that be so, then the report to the custom-house which the "Dalmally" made when she had anchored in the roads is the report referred to in the charter-party, and accordingly she must then be regarded as having been an "arrived" ship within the meaning and for the purposes of the charter-party. I am therefore of opinion that upon this branch of the case the Lord Ordinary is right.

The result is that the lay-days commenced to run at 3 P.M. on the 12th February 1907, and if so it was not seriously disputed that they must be reckoned as periods of twenty-four hours. So calculating the lay-days, they expired at 6 P.M. on the 21st February, and the discharge was completed at 7.30 P.M. on the 27th February. The vessel was therefore on demurrage for a period of six days (reckoning a day as a period of twenty-four hours) and a fraction (one hour and a half) of a seventh day, and the question is whether that fraction of a day is, for the purpose of calculating the amount of demurrage due, to be regarded as a whole day?

The clause in the charter-party fixing the rate of demurrage is as follows: "Demurrage at the rate of £25 per running day to be paid by the freighters or consignees for any detention in loading or delivery as above."

The Lord Ordinary has held that the fraction of a day must count as a day. He has arrived at that conclusion unwillingly, and only because he regards the question as settled by the decision in *Hough v. Athya & Son*¹ and *Commercial Steamship Company v. Boulton*.² It was no doubt laid down in these cases, in somewhat absolute terms, that in the case of demurrage a fraction of a day is counted as a day. In both cases, however, the terms of the charter-parties differed very materially from those of the charter-party now under construction. In *Hough v. Athya & Son*,¹ the provision in the charter-party in regard to loading and unloading was "thirteen running days to be allowed for loading and unloading, and ten days on demurrage at £40 per day"; and in the *Commercial Steamship*

¹ 1879, 6 R. 961.

² 1875, L. R., 10 Q. B. 346.

*Company v. Boulton*¹ it was provided that the charterers should be bound May 29, 1988.
 "to load and discharge as fast as the ship can work, but a minimum of seven days to be allowed merchants, and ten days on demurrage over and above the said lying-days at £25 per day."

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Now, it is to be observed that in these cases there is nothing to suggest that any period of time is to be considered except the day, that is, the ordinary working day. So many lay-days are allowed, and so many days on demurrage, and the amount of demurrage is fixed at a given sum "per day." Compare these terms with the charter-party in this case. The consignees are bound to receive the cargo "at the rate of 400 tons per weather working day." If in discharging the cargo at that rate the unloading is completed in so many days and a fraction of another day, the obligation of the consignees is fulfilled, and I have difficulty in understanding why they should nevertheless be dealt with as if the completion of the discharge had occupied a whole day instead of a fraction of a day. Then demurrage is fixed "at the rate of £25 per running day." I regard the words "at the rate of" as important, because they seem to me to be consistent with the view that only a portion of the £25 is to be payable in respect of a day a part only of which is occupied in discharging. As the discharge is to be at the rate of 400 tons per day, so demurrage is to be at the rate of £25 per day. That seems to me to distinguish the present case entirely from those of *Hough*² and the *Commercial Steamship Company*,¹ and I am of opinion that upon a sound construction of the charter-party the defenders are not liable to pay as demurrage for the hour and a half of the seventh day which was occupied in completing the discharging of the cargo more than a proportionate part of £25. In that view I am confirmed by the judgment of the Court of Appeal in England in *Yeoman v. The King*,³ where the terms of the charter-party closely resembled those with which we are dealing.

I should explain that I have dealt only with the time during which the vessel was on demurrage, because the pursuers' claim is for demurrage. I may say, however, that, in my opinion, precisely the same considerations which have led me to the conclusion that in a question of demurrage a portion of a day does not count as a whole day apply to lay-days. I know of no reason why a different principle should apply in the two cases, and I observe that in *Hough v. Athya & Son*,³ Lord President Inglis said: "I do not see any distinction between lay-days and days of demurrage in the matter of counting."

The only other question which was argued relates to the construction of the clause in the charter-party which refers to strikes, and in regard to that matter I need only say that I agree with the Lord Ordinary.

I am not sure whether the defenders seriously deny the pursuers' averment in cond. 4, which I have quoted in regard to the custom of the port. If they do not do so, the case might be disposed of without further procedure, because, if the views which I have expressed be sound, all that would require to be done would be to adjust the amount. If, however, the

¹ L. R., 10 Q. B. 346.

² 6 R. 961.

³ L. R., [1904] 2 K. B. 429.

May 29, 1908. defenders dispute the averment, the proof allowed by the Lord Ordinary
Horsley Line, must proceed.

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LORD ARDWALL.—On the question, when did the lay-days commence, I entirely agree with the views expressed by the Lord Ordinary and the reasoning by which he supports them. The case of the "*Machrahanish*"¹ as read to us by counsel from the Shipping Gazette appeared to be an authority in favour of the proposition, which indeed seems self-evident, viz., that although when there is no express stipulation on the subject in the contract, lay-days will not be held to commence to run till the ship becomes what has been called "an arrived ship," yet the parties may contract otherwise, and, as in this case and the "*Machrahanish*," fix the date of arrival in the Harbour Roads as the commencement of the lay-days, thus throwing on the charterers the risk of the vessel failing to get a harbour berth for some time after arrival in the roadstead off the port. I accordingly agree with the Lord Ordinary and your Lordships that the lay-days commenced to run at 3 P.M. on the 12th February.

(2) The next question is, how many lay-days were the charterers entitled to under the charter-party? They maintain that they were entitled to eight "weather working days" for unloading, because, as they argue, there is no specified number of lay-days in the charter-party, and the obligation on them, the defenders, is to take delivery at the rate of 400 tons per day. Now, the cargo consisted of 2850 tons, and the defenders claim that they were entitled to eight weather working days for unloading it, as it exceeded by 50 tons what they were bound to take out in seven days, and they claim this on the principle that, in questions under charter-parties regarding demurrage and the like, days must mean whole days, and that if a part of a day is occupied they are entitled to the whole day. The Lord Ordinary has decided this matter against the defenders and in favour of the pursuers' contention, principally, apparently, upon the case of *Yeoman*,² and in this I think he has done rightly. According to this calculation the lay-days amounted to seven days three hours, and they accordingly expired on Thursday 21st February at 6 P.M.

(3) It will be convenient now to advert to what the Lord Ordinary treats as the fourth question. Keeping in view that the lay-days expired on Thursday 21st February at 6 P.M., the "*Dalmally*" was not completely unloaded until 7.30 on the 27th, being six days of twenty-four hours and one hour and a half in addition. The pursuers claim that they are entitled to seven days' demurrage in respect that the unloading ran into a seventh day to the extent of one hour and a half. The Lord Ordinary has unwillingly given effect to this contention, but I agree with my brother Lord Low, and upon the grounds set forth by him, that in this particular case the proper computation is not limited to a computation by days, but should also deal with fractions of days where the facts render that course equitable. The Lord Ordinary has applied this principle to the question of lay-days, and I am of opinion that by parity of reasoning it ought to be applied to questions of demurrage arising under the same

¹ Shipping Gazette, April 4, 1906.

² L. R., [1904] 2 K. B. 429.

contract of charter-party. I entirely agree with the Lord Ordinary and May 29, 1908.
your Lordships upon the question turning upon the construction of the strike clause.

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The defenders having intimated that they did not intend to dispute the accuracy of the averment made by the pursuers in cond. 4 regarding the custom of the port of Savona, the Court, on 12th June, pronounced an interlocutor refusing the reclaiming note, adhering to the interlocutor reclaimed against, and granting decree against the defenders for the sum of £151, 11s. 3d. with interest at 5 per cent from the date of citation.

F. J. MARTIN, W.S.—J. & J. ROSS, W.S.—Agents.

HUGH NELSON & COMPANY, Pursuers (Reclaimers).—Orr, K.C.— No. 127.
A. M. Anderson.

THE CORPORATION OF THE CITY OF GLASGOW, Defenders (Respondents). May 30, 1908.
—Cooper, K.C.—A. Crawford.

Hugh Nelson
& Co. v.
Glasgow
Corporation.

Expenses—Agent-disburser—Compensation.—In an action for payment of a sum claimed as due under a contract the defenders pleaded no title to sue, and also that the matters in dispute fell to be determined by arbitration.

After a proof the Lord Ordinary repelled the plea of no title to sue, found the pursuers entitled to expenses, and remitted the account to the Auditor.

Thereafter the Lord Ordinary sustained the plea that the matters in dispute fell to be determined by arbitration, and sisted the process, reserving the question of expenses.

The pursuers thereafter moved for approval of the Auditor's report on their account of expenses, and for decree in name of the agents-disbursers.

The defenders maintained that to grant decree as craved would prevent them setting off a claim for expenses if they should be found entitled to expenses when the merits of the action were decided.

The Lord Ordinary (Mackenzie) superseded consideration of the pursuers' motion, and granted leave to reclaim.

The pursuers having reclaimed, the Court granted decree in name of the agents-disbursers.

Opinions that the course taken by the Lord Ordinary was competent.
Oliver v. Wilkie, 1901, 4 F. 362, *distinguished*.

HUGH NELSON & COMPANY, builders, Glasgow, in June 1907 brought an action against the Corporation of the City of Glasgow, in which they concluded for payment of the sum of £750. 2D DIVISION.
Lord Mac-
kenzie.

The pursuers averred that in the year 1902 the defenders contracted with them, *inter alia*, for the execution of the excavator and mason work of two tenements and saloons in High Street and Duke Street, Glasgow, that the pursuers duly executed the work for the defenders except a small portion which had been executed by other contractors, and that the sum due to the pursuers under the contract was £750.

The defenders averred that "by contract, dated 8th and 20th November 1902, the now dissolved firm of Hugh Nelson & Company undertook to execute for the defenders the excavator and mason work for, *inter alia*, two tenements and saloons in High Street and Duke Street, Glasgow." In a statement of facts the defenders further averred:—(Stat. 2) "The said dissolved firm of Hugh Nelson & Company commenced work under said contract as afore-mentioned in August 1902 and carried it on until 4th March 1903 when, by decree of the Sheriff of Lanark-

May 30, 1908. shire, their estates were sequestrated. Thereafter a trustee for their creditors was elected and his election confirmed, and the said trustee continues to act as such on said sequestrated estates. The defenders have never had any contract with pursuers, who are unknown to them."

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The pursuers averred in answer:—(Ans. 2) "Denied. Explained that on 22d February 1907 the creditors on the sequestrated estates of Mr Hugh Nelson, who was and is sole partner of said firm of Hugh Nelson & Co., resolved not to proceed with any action against the defenders in respect of said claim, 'but had no objections to Mr Nelson moving in the matter on his own responsibility.' . . . The said claim was thereby abandoned by said creditors, and the pursuers have thus a good title to sue the present action. The pursuers have received their discharge."

The defenders pleaded, *inter alia*;—(1) No title to sue. (5) Alternatively, the action ought to be sisted until the matters in dispute have been determined by arbitration in terms of the contract.

On 5th December 1907 the Lord Ordinary (Mackenzie) allowed a proof on the question of title to sue, which was led accordingly.

Thereafter, on 8th January 1908, the Lord Ordinary repelled the first plea in law for the defenders, and found the pursuers entitled to expenses since 5th December 1907, and remitted the account to the Auditor.

On 10th January 1908 the Lord Ordinary, after hearing counsel in the Procedure-roll, sustained the fifth plea in law for the defenders, and sisted the process to allow the matters in dispute to be determined by arbitration, reserving the question of expenses.

On 18th February 1908 the pursuers moved for approval of the Auditor's report on their account of expenses, and for decree in name of the agents-disbursers. The Lord Ordinary superseded consideration of this motion, and granted leave to reclaim.

The pursuers reclaimed. The case was heard before the Second Division on 30th May 1908.

Argued for the pursuers and reclaimers;—A law-agent was entitled to a preference on the expenses recovered from his client's opponent,¹ because these expenses formed a fund which had been brought into existence by the exertions of the agent. Decree in name of an agent-disburser was withheld only in cases where the effect of granting it would be to deprive the opponent of a right to set off a decree for taxed expenses against the expenses for which he had been found liable.² The principle was compensation, and compensation could operate only as between two liquid claims. In the present case the defenders' claim was not liquid, it had not even come into existence. Accordingly decree should be granted in name of the agents-disbursers.

Argued for the defenders and respondents;—Decree in name of an agent-disburser would be withheld in cases where the effect of granting it would be to deprive the opposing party of a right to set off a claim for expenses against the expenses for which he had been found liable. It was not necessary that the opponent's claim should be

¹ Begg on Law-Agents, 2d ed., p. 190; 2 Bell's Com. (M'Laren's ed.) 35.

² Gordon v. Davidson, June 13, 1865, 3 Macph. 938; Oliver v. Wilkie, Dec. 12, 1901, 4 F. 362; Lochgelly Iron and Coal Co. v. Sinclair, 1907, S. C. 442.

liquid.¹ Here the merits of the case had not been disposed of. If May 30, 1908. the defenders were successful on the merits, and were found entitled to expenses, they would have a claim which they would be entitled to set off against the expenses for which decree was now sought. The Lord Ordinary's judgment, therefore, was right. Hugh Nelson & Co., v. Glasgow Corporation.

LORD JUSTICE-CLERK.—If the question before us were whether the course taken by the Lord Ordinary was competent, I should hold that it was quite competent. I can easily see that there might be circumstances in a particular case in which the Lord Ordinary might be justified in doing what he has done here. But I must say, that taking the facts of this case as they are presented to us, I think that decree should be granted in name of the agents-disbursers. The history of the case is very simple. The pursuers brought this action against the defenders to obtain payment of the sum of £750. The first plea with which they were met was the plea of no title to sue. That led to a proof which must have cost a considerable sum of money, with the result that the plea was held to be a bad plea and was repelled, the pursuers being found entitled to expenses. When the pursuers moved for approval of the Auditor's report and for decree in name of the agents-disbursers, the Lord Ordinary took the course of superseding consideration of that motion, in respect that the merits of the case have still to be disposed of, and that the pursuers may fail and be found liable in expenses to the defenders. I know of no case in which such a course has ever been followed. The pursuers have been successful after incurring considerable expense, a great part of which must have been borne by the agents. To say that the agents are not to get decree for expenses already incurred, because the pursuers may ultimately be found liable to the defenders in expenses on the completion of the litigation, does not seem to me to be reasonable. I think that this is a case where we ought to carry out what the Lord Ordinary has done in finding the pursuers entitled to expenses, by granting decree in name of the agents-disbursers.

LORD STORMONTH-DARLING.—This is a matter of procedure, and I quite recognise that in such cases it is undesirable to interfere with the discretion of the Lord Ordinary. But here it is evident that the Lord Ordinary must have thought the expenses of the proof a separable matter, because he found the pursuers entitled to these expenses. Then the Lord Ordinary was moved by the defenders to supersede consideration of the pursuers' motion for decree in name of the agents-disbursers, and he superseded consideration. That was a matter of discretion, no doubt. But it was impossible for us to deal with the reclaiming note without hearing what the defenders' counsel had to say in explanation of the request which they made to supersede consideration of the pursuers' motion. The only explanation that was given was that as against the pursuers' liquid claim there might arise in an arbitration a counter claim for expenses in favour of the defenders. I never heard of a counter claim which might arise being dealt with as if it had already arisen. I think that the course which the Lord Ordinary has taken sins against the rule that compensation can only operate when you have two liquid claims.

¹ Oliver v. Wilkie, 4 F. 362.

May 30, 1908. I think, therefore, that the Lord Ordinary's interlocutor should be recalled, and decree granted in name of the agents-disbursers.

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LORD LOW.—I think it was clearly recognised in the case of *Oliver*¹ that extract of a decree for expenses may be superseded if another litigation is going on between the same parties in which a cross award of expenses may be made. If that be so when different actions are going on, I think it must also be so when an incidental award of expenses is made during the course of an action. What the Lord Ordinary has done is practically to supersede extract on the ground that a counter claim for expenses may arise. I have no doubt that that was a competent course to follow, and, as incidental expenses in the Outer-House are very much in the discretion of the Lord Ordinary, I confess I should always be slow to interfere with what the Lord Ordinary has done. But the Lord Ordinary evidently recognised that this was a matter on which the parties were entitled to take the judgment of the Inner-House, because he granted leave to reclaim, which he was not bound to do. That leaves us free to consider the case on its merits, and so considering it, I think it is one in which there should be decree in name of the agents-disbursers.

LORD ARDWALL.—The only cases cited to us in which a motion for decree in the name of the agent-disbursers for expenses which have been found due has been refused have been those in which there was a then existing right of set-off for expenses already found due to the other party, and the ground for refusing the motion was that that existing right would be injured if the motion were granted. But no case has been cited to us in which a motion for decree in the name of the agents-disbursers has been refused merely because there might possibly arise, either in the same or in another action, a claim for expenses on the other side. In the case of *Oliver v. Wilkie*,¹ where two actions were in dependence between the same parties, the facts were that an interlocutor in each of the separate actions was pronounced on the same day. And in one of the actions the Court found that the pursuer's expenses were of a certain amount, but found that she was not entitled to obtain decree therefor in her agent's name in respect that the defender was entitled to set off the expenses due to him in the other action. The whole question there dealt with, therefore, was as to two sets of expenses both presently due, and the observations in certain of the Judges' opinions as to supersession of extract were not strictly necessary for the decision of the case. What was said in these opinions was that if two actions were running side by side, extract of the principal decree in the one action might be superseded until decree should be pronounced in the other action. That, certainly, is a competent course for the Court to take. But it is only if it is clearly shewn that one of the parties will be unjustly prejudiced that that course will be adopted, because when once a party has been found entitled to expenses he has a right to obtain extract of the decree, and it is only for very strong reasons that he will be deprived of that right. No such reasons have been shewn in the present case, and, accordingly, I think the pursuers' motion should be granted.

¹ 4 F. 362.

THE COURT pronounced the following interlocutor:—"Recall the May 30, 1903. said interlocutor, and remit the cause to the said Lord Ordinary to approve of the Auditor's report on the pursuers' account of expenses, No. 68 of process, to decern for the taxed amount thereof in name of the agents-disbursers, and to proceed therein: Find the pursuers entitled to expenses since 18th February 1908," &c.

Hugh Nelson
& Co., v.
Glasgow
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CLARK & MACDONALD, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

THE REVEREND HUGH MAIR AND OTHERS (Robert Blackburn Turner's Trustees), First Parties.—*Chree*. No. 128.

MARGARET FERNIE AND OTHERS, Second Parties.—*Cullen, K.C.*— May 30, 1908.
Valentine.

Turner's
Trustees v.
Ferne.

Succession—Trust—Directions to purchase annuities—Right of beneficiary to payment of the capital—Government Annuities.—A testator directed his executor or his trustees to invest certain sums in the purchase of annuities in the name and for the benefit of certain persons. He further provided: "And I declare that all annuities . . . shall be purchased by him or them from the British Government or from the Scottish Widows' Insurance Company, Limited, of Edinburgh, in Scotland, and any other first-class company or annuity office as my said executor or . . . trustees shall in this behalf think fit." There was no declaration that the annuities were to be alimentary, but Government annuities, purchased under the Government Annuities Act, 1853, are not assignable except on the insolvency or bankruptcy of the annuitant.

The beneficiaries having called on the trustees to pay over the principal sums instead of investing them in the purchase of annuities, held that the beneficiaries were entitled to payment of the principal sums.

Tod v. Tod's Trustees, March 18, 1871, 9 Macph. 728, followed.

Hutchinson's Trustees v. Young, Oct. 29, 1903, 6 F. 26, distinguished and commented on.

ROBERT BLACKBURN TURNER, a domiciled Scotsman, of Goosery, 1st Division, Bengal, India, died in India on 17th March 1906. He left a will whereby he appointed the Administrator-General of Bengal for the time being to be his sole executor, and also appointed the Rev. Hugh Mair, the Rev. Gilbert Lawrie, and James B. Goold, all of whom were resident in Scotland, to be his trustees for certain purposes therein mentioned. He directed his executor, *inter alia*, to "pay to my Scotch trustees hereinafter named the sum of Rs.10,000, to be invested by them in the purchase of an annuity or annuities in the name and for the benefit of Margaret Fernie, at present residing at Glasgow, in Scotland, for her life." He further directed his executor to pay to his Scotch trustees "a sum sufficient for the purposes next mentioned, to be held by them on and for the trusts hereinafter declared." These trust purposes were declared to be, *inter alia*:—" (1) To set apart three several sums of Rs.15,000 each, and to invest each of the said three sums of Rs.15,000 in the purchase of three several annuities, that is Rs.15,000 to be expended in the purchase of each such annuity, one in the name and for the benefit of my sister Jane Wilson, the wife of William Wilson, residing at Possil Park, in Glasgow aforesaid, another for the benefit and in the name of my sister Jane Fleming, the widow of Joseph Fleming, of Glasgow aforesaid, and the third for the benefit and in the name of my sister Martha Morgan, the wife of James Morgan, at present residing in Slottville, in the State of New York, in the United States of America."

May 30, 1908.

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The will also contained this provision:—"And I declare that all annuities which by this my will I direct to be purchased by my executor or my Scotch trustees shall be purchased by him or them from the British Government or from the Scottish Widows' Insurance Company, Limited, of Edinburgh, in Scotland, and any other first-class company or annuity office, as my said executor or Scotch trustees shall in this behalf think fit, and that such annuities shall be made payable to the persons in whose names and for whose benefit they have respectively been purchased, in equal half-yearly or quarterly portions, and shall be enjoyed by them respectively as their respective separate property, free from the control of any husband to whom any of them respectively may be married." The will contained no provision that the annuities should be alimentary or non-assignable.

The Scotch trustees duly accepted office, and received payment from the executor of the sums necessary for the purchase of the fore-said annuities; but before any of the annuities had been purchased the annuitants called upon the trustees to pay over to them the respective capital sums instead of investing them in annuities.

The trustees being in doubt as to whether they were bound or entitled to make such payment, a special case was, on 12th December 1907, presented for the opinion of the Court. To the special case the Scotch trustees were the first parties, and the four annuitants were the second parties.

Besides a narrative of the facts above set forth, the special case contained the following statements:—"6. The purchase of Government annuities is mainly regulated by the Acts 16 and 17 Vict. cap. 45, and 45 and 46 Vict. cap. 51, section 2. Section 25 of the former Act provides that 'the right, title, interest and benefit in and to any annuity . . . purchased under the provisions of this Act shall not be assignable by the original proprietor thereof so as to enable the assignee to receive the same during the lifetime of the said proprietor, except in case of the insolvency or bankruptcy of an individual proprietor, when the same shall become the property of his or her assignee or assignees for the benefit of his or her creditors.' The section further provides that in case of any such bankruptcy or insolvency, the Commissioners for the Reduction of the National Debt shall repurchase and cancel the annuity, the receipt of the assignee or assignees to the Commissioners being constituted a sufficient discharge thereof.

"7. The first parties have ascertained that, according to the practice of the department with regard to annuities issued by it, while the right to an annuity itself cannot, apart from insolvency or bankruptcy, be assigned, the half-yearly payments are made either to annuitants themselves or parties holding powers of attorney granted by annuitants; and further, that under their regulations the department cannot, or at any rate will not, grant a bond of annuity containing a clause that the annuity shall be strictly alimentary and shall exclude a trustee in bankruptcy."

The contentions of the parties were stated to be:—"In these circumstances the first parties maintain that they are not bound to pay over said sums to the second parties, and that they are bound to purchase the annuities on behalf of the second parties, or otherwise, that they are entitled in their discretion to purchase annuities for the second parties, or such of them as they may consider proper. The second parties respectively maintain that having intimated a demand

for payment of the said capital sums, viz., Rs.10,000 to the said ^{May 30, 1908.} Margaret Fernie, and Rs.15,000 to each of the said Mrs Jane Wilson, Mrs Janet Fleming, and Mrs Martha Morgan, the first parties, ^{Turner's} as Trustees v. ^{Fernie.} trustees foresaid, are bound to make payment of said sums to them, after deduction of the legacy-duty payable to the Government and the interest thereon and the expenses of this case, and that in lieu and place of the annuities directed to be purchased for them under the will of the said Robert Blackburn Turner."

The questions of law for the opinion of the Court were:—“(1) Are the first parties bound to purchase annuities for behoof of the second parties as directed by the will? (2) Are the first parties entitled in their discretion to purchase annuities for behoof of the second parties or such of them as they shall consider proper? (3) Are the first parties bound to make payment to the second parties respectively of the capital sums directed to be invested in the purchase of annuities on their behalf?”

The case was heard on 30th May 1908.

Argued for the first parties;—The trustees did not feel in safety to pay over the principal sums in view of the decision in *Hutchinson's Trustees v. Young*.¹ There was a special direction to the trustees here, in their discretion, to purchase Government annuities, and these annuities were in certain circumstances non-assignable. The testator, therefore, must be held to have contemplated and provided for the protection of the beneficiaries' provisions, and that brought the case within the application of the principle of the decision in *Hutchinson's Trustees*.¹ In *Tod v. Tod's Trustees*² and *Murray v. Macfarlane's Trustees*³ the restrictions were only in general terms, and there was no provision for the purchase of non-assignable annuities, and therefore these cases were distinguishable. In any event, *Hutchinson's Trustees*¹ was the more recent decision, and must rule. As to a beneficiary's freedom to deal with a restricted annuity, the case of *Cosens v. Stevenson*⁴ was referred to.

Counsel for the second parties were not called on.

LORD PRESIDENT.—The late Mr Blackburn Turner left a will, the material provisions of which, so far as the questions before your Lordships are concerned, are these,—he directed his executors to pay to certain Scotch trustees Rs.10,000 to be invested by them in the purchase of an annuity or annuities in the name and for the benefit of Miss Margaret Fernie. He further directed his executors to pay to these trustees a sum sufficient to enable them to set apart three sums of Rs.15,000 each, to be invested in the purchase of annuities in the name and for the benefit of three other ladies, whom he there named. Then, near the end of the will, he made this declaration,—“that all annuities which by this my will I direct to be purchased by my executor or my Scotch trustees shall be purchased by him or them from the British Government or from the Scottish Widows' Insurance Company, Limited, of Edinburgh, in Scotland, and any other first-class company or annuity office, as my said executor or Scotch trustees shall in this behalf think fit.”

These ladies now come forward, and they ask the trustees to pay over to

¹ Oct. 29, 1903, 6 F. 26.

² March 18, 1871, 9 Macph. 728.

³ July 17, 1895, 22 R. 927.

⁴ June 26, 1873, 11 Macph. 761.

May 30, 1908. them the capital sums mentioned in the will, because they say that they do not desire to receive them in the form of annuities, as provided for in the will, it being their intention, should they receive them in that form, to realise the annuities and possess themselves of the capital sums. In fact, *Turner's Trustees v. Fernie.* the situation here is exactly like the situation that existed in the case of *Tod's Trustees*.¹ The trustees, however, have felt bound to resist that proposal, professedly on the authority of the decision in the recent case of *Hutchinson's Trustees*.²

I confess if the matter had to be considered in the light of these two decisions I would have found a difficulty in reconciling the case of *Hutchinson*² with the case of *Tod*,¹ and if the matter were to come up in a form requiring it, I think it would be necessary that these decisions should be reconsidered. But here I think no such necessity arises, for the present case is easily distinguishable from that of *Hutchinson*.² I think the decision in the case of *Hutchinson*² went on the ground that the Judges found there an expressed anxiety on the part of the testator to protect the legacies she was giving, i.e., not to give the legacies in the form of a capital sum to the beneficiaries. There that anxiety was extracted from two provisions in the will. First, no option was given to the trustees—they were to purchase Government or Savings Bank annuities only. Secondly, the annuities were declared to be strictly alimentary. Here neither of these provisions is present. The direction in the will to purchase Government annuities is not specific as it was in *Hutchinson*; ² it is merely mentioned as one of several investments that the trustees may in their discretion make. In other words, the mention of Government annuities can in no way be attributed to a desire for cutting down the rights of the annuitants; it is obviously introduced for the sole purpose of ensuring the safety of the provision. And there is no declaration that the annuities are to be alimentary only. That seems to take the present case out of the circumstances that had to be considered in the case of *Hutchinson*,² and to bring it into line with *Tod*¹ and many other cases in which a similar decision has been arrived at. That leads me to the conclusion that the beneficiaries here are entitled to what they ask.

I reserve my opinion as to the difficulty of reconciling the case of *Hutchinson*² with that of *Tod*.¹ But if this matter should come up again in a form requiring the reconsideration of the more recent decision, I think that greater attention should be given to the differences between the various classes of Government annuities than seems to have been done in the case of *Hutchinson*.²

LORD M'LAREN.—If the testator had shewn by the use of the word "alimentary" that it was his desire to give some protection to the objects of his gift, and had limited the trustees to such Government annuities as were non-assignable, I should have thought there was some substance in the argument—that is to say, that the trustees were bound to carry out the testator's direction to buy non-assignable annuities, and so to give the annuitants such protection as that class of annuities would afford. I wish

¹ 9 Macph. 728.

² 6 F. 26.

to reserve my opinion on such a case as I have indicated, as also in regard May 30, 1908. to the case where a testator has conferred on his trustees a discretion to make the annuity alimentary.

I see no evidence, however, that this testator in directing his trustees to buy annuities intended anything more than to bestow these annuities as a convenient form of investment. There is no indication that he thought these ladies were likely to run into debt or to require protection by way of restriction, and that, I think, is why the annuities he selected were such as might be realised by the annuitants.

In these circumstances the principle of *Tod v. Tod's Trustees*¹ and other cases, such as *White's Trustees v. Whyte*,² is, I think, clearly applicable, because the Court ought not to compel a beneficiary to accept a gift in a disadvantageous form when it is in his power, by calling it up, to obtain possession of the principal sum.

LORD KINNEAR.—I am of the same opinion. This testator has left sums of money to certain ladies, and he has given them the sole and exclusive right therein, so that no one else has any interest whatever in the sum so bequeathed, and there is no restriction or limitation whatever on the absolute right given to the legatees. I think it clear we cannot infer a direction to trustees to restrict the rights of an annuitant from the duty to select a good investment, even although among the investments favoured by the testator there may be one which would make it more difficult for the annuitants to sell or assign their annuities. If a testator wishes to impose on trustees a duty to restrict the rights of a beneficiary, he must do so in plain terms. There are many cases in which a discretion of this kind has been given to trustees for the protection of beneficiaries; but to infer such a discretion solely from the existence of a power to select one of several investments is, I think, out of the question.

As to the power to select investments, it was given, I think, for the ordinary and material purpose of securing safety; and accordingly the trustees are directed to purchase from the Government or from a first-class company or annuity office. The beneficiaries demand payment of the money which it is proposed to sink on the purchase of annuities; and since there is nothing in the will to prevent their turning the annuities into money if they please, it is for them to determine whether it is more for their advantage to take these legacies in the one form or in the other. I think the case of *Tod v. Tod's Trustees*,¹ which follows a long series of decisions, is sufficient authority for declaring that the beneficiaries are entitled to what they demand.

LORD PEARSON was absent.

THE COURT answered the third question in the affirmative, and found it unnecessary to answer the other questions.

M. MACGREGOR & Co., W.S.—ALEXANDER MORISON & Co., W.S.—Agents.

¹ 9 Macph. 728.

² June 1, 1877, 4 R. 786.

No. 129. THE NATIONAL HOUSE PROPERTY INVESTMENT COMPANY, LIMITED, AND
 June 5, 1908. ANOTHER, Pursuers (Reclaimers).—*Cullen, K.C.—Sandeman.*
 JOHN WATSON, Defender (Respondent).—*Graham Stewart, K.C.—Jameson.*

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Co., Limited,
v. Watson.

Company—Members and their Liability—Agreement to take Shares—Illegal issue of Shares—Condition of setting off calls against fees to be earned—Ultra vires—Contract.—A applied for shares in a company, and paid the amount due on application, on the express condition that the firm of which he was a member should be appointed to a certain office, and that he should be at liberty to pay up the balance due upon his shares by fees to be earned by the firm. Before the balance had been paid the company went into liquidation. The company and its liquidator sued A for the amount unpaid upon his shares.

Held that it was *ultra vires* of the directors to agree to the stipulation as to payment for the shares, and therefore that the defender was not a shareholder and was entitled to absolvitor.

Pellatt's case, 1867, L. R., 2 Ch. Ap. 527, followed.

Company—Members and their Liability—Agreement to take Shares—Conditional Application—Contract—Condition—Precedent or Subsequent—Appointment to office.—A applied for shares in a company, his letter of application containing the following condition:—"This application is made on the distinct understanding . . . that my firm is appointed surveyors to this company over an average radius of thirty miles from Edinburgh . . . and that my firm is also appointed advisory surveyors to the Advisory Board for Scotland at fees to be adjusted." He paid the amount due on application. His firm obtained the appointment as surveyors for the Edinburgh district, but were never made advisory surveyors to the Board for Scotland, the company having gone into liquidation before that Board was constituted.

Opinions that the application was one for an immediate allotment of shares provided the company agreed to the conditions specified, and that the condition as to the advisory surveyorship was not a condition precedent but subsequent and collateral to the contract, and meant that A's firm should obtain the appointment when the Board was constituted.

2D DIVISION.
Lord Guthrie.

THE NATIONAL HOUSE PROPERTY INVESTMENT COMPANY, LIMITED, incorporated under the Companies Acts, 1862 to 1906 inclusive, and having its registered office at Bristol, and James Mills Franklin, the liquidator of the Company, brought an action against John Watson, architect, 24 Castle Street, Edinburgh, in which they concluded for payment of the sum of £87, 10s. as the amount of the call due by him as at 28th June 1906 on 50 preference shares of £1 each and 50 ordinary shares of £1 each, which they averred he held in the Company.

The National House Property Investment Company, Limited, was incorporated on 29th December 1902. In February 1903, following upon negotiations between Mr Brooks, the managing director of the National House Property Investment Company, Limited, and the defender, the defender applied for 50 preference and 50 ordinary shares in the Company, paying at the same time the sum of £12, 10s., the amount due on application. His letter of application bore this endorsement:—"This application is made on the distinct understanding, as arranged with Mr Brooks, that my firm (M'Arthy & Watson) is appointed surveyors to this Company over an average radius of thirty miles from Edinburgh, the fees to be not less than those adopted by the English surveyors for the Company, and that my firm is also appointed advisory surveyors to the Advisory Board

for Scotland at fees to be adjusted; also that I am to be at liberty, if June 5, 1908. I so desire it, to pay up the balance of my shares by allowing the fees to be earned by my firm to accumulate for this purpose."

The shares thus applied for by the defender were allotted to him. In February 1903 the defender received from Mr Brooks a letter, dated 18th February 1903, which contained the following paragraph:—"I have pleasure in sending herewith copy of resolution passed at the board meeting to-day. 'It was proposed by Mr E. J. White and seconded by Mr N. A. Jones that Messrs M'Arthy & Watson be appointed valuers for this Company in the Edinburgh district, and that their application for shares be accepted upon the terms contained on the back of said application.'"

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In reply to a request made in April 1903 for payment of the amount due on allotment of the shares applied for by him, the defender replied that in accordance with the conditions in his application he elected that any balance payable on the shares should be paid out of fees; and, the request having subsequently been repeated, he wrote a letter to the Company's secretary, dated 15th July, in the following terms:—"We would point out that we decided to apply for shares in your Company after certain representations made to us by Mr Brooks, and on specific conditions as stated in our application. As you are now unable to comply with these conditions, we shall feel obliged by your returning our applications, along with your cheque for the amount of our deposits plus the interest for the time you have had the money. In the event of your forming a Scottish Board later on, we are quite prepared to again consider the matter."

The directors of the Company never formed an Advisory Board for Scotland, and never appointed the defender's firm as advisory surveyors. Between July 1903 and November 1905 the defender on several occasions wrote to the Company demanding the return of his deposit on the ground that the Company had failed to comply with the conditions contained in his letter of application.

In April 1906 the Company went into voluntary liquidation, and James Mills Franklin was appointed liquidator.

The pursuers pleaded, *inter alia*;—(1) The sum sued for being due and resting owing, the pursuers are entitled to decree, with interest and expenses as craved. (2) No relevant defence.

The defender pleaded, *inter alia*;—(2) The defender never became a member of the pursuers' Company, and is not liable to pay calls in respect . . . (b) that his application for shares was subject to conditions precedent which have never been purified; and (3) that the alleged agreement to take shares was *ultra vires* of the Company, and is not binding on the defender.

On 26th August 1907 the Lord Ordinary (Guthrie), after hearing counsel in the Procedure-roll, pronounced this interlocutor:—"Assolzie the defender from the conclusions of the action, and decerns."*

* "OPINION.—The pursuing Company and its liquidator seek to have the defender made liable as a member of the Company now in liquidation.

"The defender denies the alleged membership on two grounds. He says, first, that *in gremio* of his application for shares was a condition precedent which has not been fulfilled, and second, that the alleged contract between him and the Company contained a condition which was *ultra vires* of the Company, and therefore that the contract was not enforceable by them.

"The pursuers reply to the first line of defence that the condition in

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The pursuers reclaimed, and argued;—The condition as to the appointment to the advisory surveyorship was not a condition precedent and suspensive, but subsequent and collateral. Its non-fulfilment could, at most, form the ground of an action of damages. This was clearly the defender's view prior to the present action, for when he applied for his shares he paid the amount due on application, and, when subsequently asked for a further payment, he did not state that he was not a shareholder, but merely intimated that he would pay in fees to be earned in the future. The criterion applicable in this class of cases was given by Lord Cairns in *Elkington's case*,¹ viz., was there a *de presenti* intention to become a shareholder with a collateral agreement as to the effect of so becoming, or was there only an intention to become a shareholder if and when a preliminary condition should be performed? The former was clearly the case here. The cases² relied on by the defender were all distinguished from the

question was collateral or subsequent, not precedent, and to the second line of defence that none of the conditions were *ultra vires*. I think that the defence is well founded on both points.

"(1) Was there a condition precedent in the contract to take shares which was not fulfilled?

"It is admitted (1) that the conditions printed in statement 2 of the defender's statement of facts, whether precedent or not, were duly made part of the contract; (2) that the first of these conditions, providing for the appointment of the defender's firm of M'Arthy & Watson as Edinburgh and district surveyors or valuers was duly fulfilled; and (3) that the third condition as to the method of paying up the balance of the shares was not a condition precedent.

"The question then of condition precedent arises only in regard to the second condition, which runs as follows:—'That my firm is also appointed advisory surveyors to the Advisory Board for Scotland, at fees to be adjusted.' Was that a condition precedent or a condition subsequent? The nature of this question is precisely defined by Lord Cairns in *Elkington's case*, L. R., 2 Ch. 511, 522 (1867)—'The real point for determination in this case might be said to be this,—Did Messrs Elkington intend and agree to become members and shareholders *in presenti* with a collateral agreement as to what should be the effect of their so becoming shareholders? or, on the other hand, did Messrs Elkington agree, that if and when a certain preliminary condition should be performed; and not otherwise, they would become members and shareholders?' There are no Scotch cases directly applicable; summing up the English cases, the question may be expressed thus, does the second of the above conditions fall under the rule of condition precedent given effect to in *Wood's case*, 3 De Gex & Jones, 85 (1858); *Pellatt's case*, L. R., 2 Ch. 527 (1867); *Simpson's case*, L. R., 4 Ch. 184 (1869); and *Rogers' case*, L. R., 3 Ch. 633 (1868), or under the rule of condition subsequent or collateral, that is an agreement apart from and collateral to a concluded agreement to become a member, given effect to in *Elkington's case*, L. R., 2 Ch. 511 (1867); *Bridger's case* (1870), L. R., 5 Ch. 305; *Wheatcroft's case* (1873), 29 Law Times, 324; and *Fisher's case* (1885), L. R., 31 Ch. Div. 120?

"On this question I cannot distinguish between conditions one and two. It seems clear that the intention of parties was that there was to be no con-

¹ L. R., 1867, 2 Ch. App. 511, at 522, *cf.* also *Bridger's case*, 1870, L. R. 5 Ch. App. 305.

² *Pellatt's case*, 1867, L. R., 2 Ch. App. 527; *Rogers' case*, 1868, L. R., 3 Ch. App. 633; *Wood's case*, 1858, 3 De G. and J. 85; *Simpson's case*, 1869, L. R., 4 Ch. App. 184.

present by the fact that in them in some way or other it was otherwise apparent (apart from the question of the effect of the particular condition in each) that there had been no *consensus in idem* between the parties, *e.g.*, no proper allotment, and no proper acceptance. Here there was only a collateral agreement, of which there had been no breach, since the advisory board had never been constituted, but even if there had been a breach a claim for damages could not be set off against the liquidator's calls.¹ There was nothing *ultra vires* on the part of the directors in the agreement that fees might be set off against calls. Some such agreement was to be found in most of the cases cited. It was said that it was an agreement to issue shares for a consideration other than cash, but that was no longer illegal, section 25 of the Companies Act, 1867,² having been superseded by section 7 of the Companies Act, 1900.³ The *dicta* in *Pellatt's case*⁴ as to *ultra vires* were *obiter*.

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Argued for the defender and respondent;—The Lord Ordinary was right upon both points. Properly construed, the agreement was one to take shares if and when the firm received the appointment. The appointment never having been made the defender had never become a shareholder.⁵ The cases where it had been held that persons were shareholders were either cases in which the conditions were such *ex sua natura* as could only be fulfilled after they had become shareholders,⁶ or cases in which conditions, which were

tract unless the defender's firm received the local appointment. Shares were applied for not for the ordinary purposes of investment or speculation but in connection with and for the promotion of the business of the defender's firm. But this consideration applies equally to the advisory surveyorship to the Advisory Board for Scotland. It may be that, if the defender's firm had accepted the local appointment, without insisting on the obligation as to the advisory surveyorship being first fulfilled, the defender would be held to have waived his right to treat the latter as a condition precedent. Equally, if the defender, as in *Elkington's case*, L. R., 2 Ch. 511 (1867), had accepted allotment and paid the money due on allotment, he could not thereafter have founded on the conditions being precedent. But he refused to pay the allotment money, and he insisted that both conditions must be treated as conditions precedent. I think he was right in this. The Company called itself by the ambiguous title 'National,' but its registered office was in England, and all the subscribers to the memorandum and all the original directors were resident in England. It was only if such a Company established a regular Scottish business that the defender's firm of architects would have any reasonable interest to take shares.

"There was therefore, in my opinion, no such agreement to become a member as is necessary under the 23d section of the 1862 Act.

"(2) Was the condition *ultra vires*?

"I see no answer to this objection. It seems to me that all the considerations stated by Lord Cairns in *Pellatt's case*, L. R., 2 Ch. 527 (1867), apply in this case, with the result that the conditions, being *ultra vires*, vitiated the contract."

¹ Black & Co.'s case, 1872, L. R., 8 Ch. App. 254.

² 30 and 31 Vict. c. 131.

³ 63 and 64 Vict. c. 48.

⁴ 1867, L. R., 2 Ch. App. 527.

⁵ *Pellatt's case*, 1867, L. R., 2 Ch. App. 527; *Rogers' case*, 1868, L. R., 3 Ch. App. 633; *Wood's case*, 1858, 3 De G. and J. 85; *Simpson's Case*, 1869, L. R., 4 Ch. App. 184.

⁶ *E.g.*, *Fisher's case*, 1885, L. R., 31 Ch. Div. 120; *Bridger's case*, 1870, L. R., 5 Ch. App. 305.

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originally precedent were treated by the parties as subsequent and collateral.¹ At anyrate, the condition setting off calls against fees was *ultra vires* of the directors.² There was no difference in principle between setting off calls against goods to be supplied² and setting them off against fees to be earned. *Pellatt's case*² came under the notice of the Court in *Black's case*,³ and was regarded as authoritative upon the point by Buckley.⁴

LORD LOW.—I confess that I have difficulty in adopting the view of the Lord Ordinary that the second condition upon which the defender applied for shares in the pursuers' company (namely, that his firm should be appointed advisory surveyors to the Advisory Board for Scotland) was a condition precedent.

The first condition—that the defender's firm should be appointed surveyors to the pursuers in the Edinburgh district—was one which could be fulfilled at once, but the constitution of an Advisory Board for Scotland was a matter which necessarily required time, and there was nothing to be gained by appointing an advisory surveyor to the Advisory Board until that Board came into existence. That was the view which was taken by the pursuers, because by the resolution which the directors passed the defender's firm was then appointed valuers for the Company in the Edinburgh district, and the other conditions for which he had stipulated were simply accepted. That obviously meant that the directors agreed to appoint the defender's firm advisory surveyors to the Scotch Advisory Board when that body was formed. I think that that was all that the defender could ask, because I cannot read his application as meaning that the allotment of shares to him should be postponed for an indefinite time until an Advisory Board should actually be formed. In the first place, the application itself was for an immediate allotment of shares, and the amount due on application, and requisite to entitle the applicant to an immediate allotment, was paid. Further, it is to be remembered that apparently there was nothing to prevent the pursuers doing business in the Edinburgh district, if occasion offered, even before an Advisory Board was constituted; and by applying for an immediate allotment of shares, and obtaining an immediate appointment as local surveyor, the defender was in a position to obtain the benefit of any business which might be done. Accordingly, I read the application as being an application for an immediate allotment of shares if the pursuers agreed to the conditions annexed.

For the reasons which I have given I think the pursuers did agree to these conditions. They certainly intended to do so; and (what is more important) it is evident that the defender was satisfied with the resolution passed by the directors as being an acceptance of the conditions. I say so because in answering a letter from the pursuers' secretary asking for payment of the amount due on allotment, the defender did not suggest that the conditions upon which he had agreed to become a shareholder had not yet

¹ *E.g.*, *Elkington's case*, 1867, L. R., 2 Ch. App. 511.

² *Pellatt's case*, 1867, L. R., 2 Ch. App. 527.

³ 1872, L. R., 8 Ch. App. 254.

⁴ *Buckley's Companies Acts*, 8th ed., p. 78.

been fulfilled. He merely intimated that he would avail himself of the third June 5, 1908.
condition, which was that he should be entitled to pay off the balance due upon his shares by allowing fees to be earned by his firm to be accumulated.

If, therefore, the only defence to the action had been that the formation of an Advisory Board for Scotland and the appointment of the defender's firm as surveyors to that Board was a preliminary condition which must be performed before the defender would become a shareholder in the Company, I should have thought that the defence had not been established. I think, however, that a complete defence is furnished by the third condition to which I have referred. It is expressed in these terms: "I am to be at liberty, if I so desire it, to pay up the balance of my shares by allowing the fees to be earned by my firm to accumulate for this purpose."

The defender paid to the pursuers the sum of £12, 10s., being the amount of 2s. 6d. per share due on application for an allotment of shares, but when he was asked to pay the additional sum of 2s. 6d. per share upon the shares allotted to him, he intimated that he elected to "allow our fees to accumulate to meet the balance payable on our shares."

The pursuers argued that the condition in regard to fees amounted to no more than this—that if the defender's firm should be employed and should actually earn fees, the defender should be entitled, instead of demanding payment of the fees, to allow the pursuers to retain them, and to attribute them to account of, or, so far as necessary, in payment of, calls. If that was all that was meant I hardly think that any special agreement was necessary, because if at the time when a call was made the pursuers were due to the defender in fees a sum equal to the amount of the call, I think that he would be entitled, without any special agreement, to set the amount due by the pursuers to him against the amount due by him to them, unless, it may be, the Company was in liquidation. It is to be remembered that when the application for shares was made the pursuers had never done any business in Scotland, and, notwithstanding their utmost endeavours, might not be able to establish a business there. In these circumstances the object of the conditions with which the defender qualified his application for shares was, on the one hand, to secure employment for his firm in the event of the pursuers doing business in Scotland, and, on the other hand, to protect himself against loss in the event of business not being done; and he attained the latter object (as I read the conditions) by stipulating that he should not be bound to pay calls in cash, but that the pursuers should be entitled to retain and accumulate any fees which might become due to him until the calls were in that way extinguished.

If that be a sound view, then the pursuers would not be entitled to decree for immediate payment of the sums sued for, even although the defender had become a shareholder, but would only be entitled to accumulate any fees which might be earned by the defender's firm to meet his liability upon the shares. I think, however, that the defender is entitled to absolver, because, in my opinion, the agreement in regard to fees was *ultra vires* of the directors. I think that the present case is, in principle, indistinguishable from *Pellatt's case*¹ (*In re Richmond Hill Hotel Company*). In

¹ L. R., 2 Ch. 527.

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that case, Pellatt, who was a glass and china merchant, agreed to take fifty shares in the hotel company, paying 70s. on application and 30s. on allotment, while the hotel company agreed to purchase the glass and china goods required by them from Pellatt, and that all calls on the shares after allotment should be placed to his credit to account of goods to be supplied by him. Pellatt refused to carry out the agreement, and the company having gone into liquidation, the question arose whether he was liable to be placed on the list of contributories. It was held that he was not, because it was *ultra vires* of the directors to agree that calls should be set off against goods to be supplied.

In giving judgment Lord Cairns said,—“Without laying down any general rule, but looking only to the particular circumstances of this case, I entertain a strong opinion that the contract was *ultra vires*. The intention of the Act is, that shares shall be held as shares wholly or in part paid up, or not paid up at all, and that so far as they are not paid up the ordinary liability to pay up the remainder in cash, when required, should attach on the holder of them; and it is required to be entered in the register how much is paid up on them. If some consideration is given it may be quite right for the directors to state on the register that they are to be treated as part paid up, though no money has passed; but I do not think it within their power to contract that the calls in respect of what remains to be paid up shall be set off against goods to be supplied by the shareholder, and shall not be paid in money. The inconvenience arising from such a contract might be almost incalculable. Goods might not be supplied at all, or they might be supplied of such a quality that they ought to be rejected, and the remedies against the shareholder might be unavailable while the other shareholders had all along been paying in cash.”

I think that these considerations are directly applicable here. I see no difference in principle between setting off calls against goods to be supplied, and setting them off against fees for services to be rendered, and accordingly I am of opinion that it was *ultra vires* of the directors to agree to the stipulation in question. But if that be so, then the whole contract is vitiated, and cannot be enforced either by or against the Company.

I am therefore of opinion that the Lord Ordinary was right in assoilzieing the defender.

The LORD JUSTICE-CLERK, LORD STORMONTH-DARLING, and LORD ARDWALL concurred.

THE COURT adhered.

THOMAS WHITE & PARK, W.S.—T. F. WEIR & ROBERTSON, S.S.C.—Agents.

DAVID M'ALLISTER KENNEDY AND JOHN KENNEDY, Petitioners.—
Dickson, K.C.—Spens.

No. 130.

CLYDE SHIPPING COMPANY, LIMITED, AND OTHERS, Claimants.—
R. S. Horne.

June 5, 1908.

FLETCHER, SON, & FEARNALL, LIMITED, AND OTHERS, Claimants.—
C. D. Murray—F. C. Thomson.

Kennedys v.
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JAMES STIRLING, Claimant.—*Dykes.*

Process—Expenses—Ship—Limitation of Liability—Competitive claims on limited fund—Expenses of competition—Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), secs. 503 and 504.—In a petition at the instance of shipowners for limitation of liability under secs. 503 and 504 of the Merchant Shipping Act, 1894, *observed (per the Lord President)*,—"Where no question is raised as to the right of petitioners to have their liability limited, and where the ship, as it were, tables its stake, then such expenses as are given against the petitioners over and above the limited fund must be restricted to the expenses of lodging the claims and taking decree, and not extended to any expenses incurred in the competition between the claimants."

Process—Interlocutor—Alteration of interlocutor—Timeous Application.—*Observed (per the Lord President)*,—"When an interlocutor is signed and given out to the parties it must be noted by the profession that if anything is to be said about altering the form of it, it must be said at once."

DAVID M'ALLISTER KENNEDY and John Kennedy, 36 Oswald ^{1st} Division. Street, Glasgow, the registered owners of the steamship "Welshman," presented a petition to the Court under secs. 503 and 504 of the Merchant Shipping Act, 1894,* for limitation of their liability for loss and damage arising out of a collision between the "Welshman" and the "Portland"; and the Court appointed consignation of £2596, 16s., with interest, being the whole sum for which, on the tonnage of the ship, the petitioners were liable.

Claims on this fund were lodged for the owners, officers, and crew of the "Portland," and for various cargo owners who had shipped goods in the "Portland." As their claims amounted *in cumulo* to a sum exceeding the consigned fund, the Court remitted to Mr Richard Clancey, average adjuster, to adjust and settle the claims, and to report.

Mr Clancey having reported, and certain objections to his report on the part of some of the claimants having been disposed of, the Court, on 18th March 1908, pronounced an interlocutor granting warrant to the bank with which the money was consigned to pay to the claimants the sums to which they had been found entitled, and containing this finding as to expenses:—"Find the petitioners liable in expenses to the respective claimants, including the expense of the remit to Mr Clancey and the procedure thereunder, and the objections to his report, and remit the account thereof to the Auditor to tax and to report."

The Auditor having taxed the accounts and lodged his reports, the

* The Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), enacts, sec. 503, that in certain circumstances the liability of shipowners for loss occasioned by their vessel may be limited to a fixed sum calculated on the tonnage of the vessel; and by sec. 504 it provides that a shipowner seeking such limitation of liability shall apply in Scotland to the Court of Session, and the Court "may proceed in such manner and subject to such regulations . . . as to payment of any costs, as the Court thinks just."

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petitioners presented a note of objections to a number of items allowed by the Auditor, on the ground that only one set of cargo owners should get their full expenses; and argued (on 2d June 1908) that the petitioners should not have to pay the expenses of the competition between the claimants, in which they had no interest; that although the Court had absolute discretion under sec. 504 of the Merchant Shipping Act as to awarding costs, yet the rule laid down in *Burrell v. Simpson & Co.*¹ was the just rule, and should be followed here, and therefore only one set of cargo owners should get full expenses, while the others should only get the expenses of preparing and lodging their claims and of one appearance to take decree.

The Court continued the cause for the purpose of consulting the Auditor.

At advising on 5th June 1908,—

LORD PRESIDENT.—I have looked into the case of *Burrell v. Simpson*,¹ and I draw attention to the fact that, while the form of interlocutor here is “Find the petitioners liable in expenses to the respective claimants, including the expenses of the remit to Mr Clancey and the procedure thereunder, and the objections to his report,” the interlocutor in *Burrell*¹ was “Find the petitioner liable to the claimants in the expenses of this process, except such expenses, if any, as have been solely occasioned by the discussion between the claimants.” I do not lay stress on the fact that the word “respective” does not occur in the interlocutor in *Burrell*,¹ while it does in this, but the true difference lies in the express inclusion of the expenses of the remit and procedure thereunder.

If this matter had been raised when the decree was given I do not think that the interlocutor would have been pronounced in its present form. Where no question is raised as to the right of petitioners to have their liability limited, and where the ship, as it were, tables its stake, then such expenses as are given against the petitioners over and above the limited fund must be restricted to the expenses of lodging the claims and taking decree, and not extended to any expenses incurred in the competition between the claimants. Here the various accounts were given in, and I find from an examination of them that the way they were treated was this: Most of them were passed, but some of them were docked, and one I notice was increased. Now, that seems to me to be clearly competition.

But I want to say this, and I hope it will be noted and remembered by the profession, that where a discussion has taken place and the Court pronounces an interlocutor following on the discussion, the Court is responsible for that interlocutor. But where there has been no discussion, although the Court is of course technically responsible for the interlocutor, in practice it signs whatever interlocutor is handed up to it. Now, of course, the time is long passed when insuperable difficulties would be raised to the alteration of an interlocutor that had once been signed. But when an interlocutor is signed and given out to the parties it must be noted by the profession that if anything is to be said about altering the form of it, it must be said at once. If this question as to the liability for expenses had been brought up at once I do not think the Court would have allowed this interlocutor to

¹ July 19, 1877, 4 R. 1133, following on previous report, 4 R. 177.

remain in its present form. But it is far too late to raise the question now June 5, 1908. when the interlocutor has been allowed to stand, and the whole matter has been before the Auditor. I am afraid, therefore, we can do nothing to give the petitioners the relief they ask for.

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LORD M'LAREN and LORD KINNENAR concurred.

LORD PEARSON was absent.

THE COURT repelled the petitioners' objections to the Auditor's reports on the claimants' accounts of expenses, and approved of said reports.

J. & J. ROSS, W.S.—WEBSTER, WILL, & CO., S.S.C.—BOYD, JAMESON, & YOUNG, W.S.
—J. DUNBAR POLLOCK, Solicitor—Agents.

FRED OLIVER HEMMING, Pursuer (Appellant).—*Morison, K.C.*—*A. M. Anderson.*

No. 131.

WILLIAM BRODIE GALBRAITH, Defender (Respondent).—*Blackburn, K.C.*—*Kemp.*

June 6, 1908.

Hemming v.
Galbraith.

Bankruptcy—Termination of Bankruptcy—Payment of Composition—Discharge of Trustee—Action of accounting at instance of bankrupt against discharged trustee—Competency—Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), secs. 141 and 142.—A bankruptcy had been terminated on payment of a composition, and the trustee, after the statutory audit of his accounts by the Commissioners, had been discharged. Thereafter the bankrupt brought an action of accounting under sec. 142 of the Bankruptcy Act, 1856, against the trustee, calling on him to account for his whole intrusions with the estate.

Held that it was not competent to call on the trustee to account twice over for the same intrusions; and as there were no averments that the intrusions called in question had not already been adjudicated on by the Commissioners, action *dismissed* as irrelevant.

Opinion (per Lord Kinnear) that if a bankrupt desires to call on the trustee for an accounting under sec. 142 of the Bankruptcy Act, 1856, he must do so before the trustee has been discharged.

THE estates of Fred Oliver Hemming, hardware merchant, Leith, were sequestered on 18th January 1907, and William Brodie Galbraith, C.A., Glasgow, was elected trustee in the sequestration. On 15th March 1907 the bankrupt submitted to a meeting of his creditors an offer of a composition of 6s. per £1, and at a subsequent meeting that offer was accepted. The Court thereafter approved of the offer, and the bankrupt was subsequently discharged and re-invested in his estates. The trustee's accounts having been duly audited by the Commissioners, the trustee was also discharged, and his bond of caution delivered up.

1ST DIVISION.
Sheriff of the
Lothians and
Peebles.

Thereafter, on 2d April 1908, Hemming presented a petition in the Sheriff Court of the Lothians at Edinburgh against Galbraith, his former trustee, in which he prayed the Court "to ordain the defender to produce a full account of his intrusions as trustee on the sequestered estates of the pursuer, and to pay the pursuer the sum of £100 sterling, or such other sum as may appear to be the true balance due by him . . ."

The pursuer averred (Cond. 3) that in the negotiations between himself and the defender with regard to the offer of the composition,

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he was assured by the defender that the expenses would not exceed £350. That "the defender's fee was fixed by the pursuer at 250 guineas, and this arrangement was confirmed by pursuer's law-agent by letter of 14th March 1907, copy of which is produced. Said fee was to cover all defender's charges, except those of his valuator, which were fixed at £1, 11s. 6d. per day. In particular, the foresaid large fee was to cover all charges for copyings by and expenses of defender's clerks." (Cond. 4) "The defender, as trustee foresaid, received and has in his hands the sum of £100 and upwards of funds which belonged to the said sequestrated estate, and which now belong to the pursuer, and for which the defender refuses to account. The pursuer desires that the defender's account of intromissions should be remitted to the Accountant of Court for audit, and that the law-agent's account appearing therein should be taxed by the Auditor of Court. The pursuer objects to the defender's accounts in the following respects:—(1) Because the defender has, in breach of the foresaid arrangement as to remuneration, charged large sums for clerks' copyings and expenses; (2) the account of his present law-agent charged therein, amounting to £42, 11s. 5d., is grossly overcharged, and falls to be taxed. . . . (3) the valuator's expenses and fees charged in said account are overstated; (4) the excessive charge for postages, viz., £29, 7s. 4d.; (5) sundry other charges which are not authorised or are overcharged. With reference to the audit by the Commissioners referred to in answer, the pursuer had no notice of it, and is not bound by it. The said Commissioners had no interest to make a proper audit, and, in point of fact, did not do so. . . . When defender applied for his discharge the pursuer lodged answers, and moved that the defender's account should be audited, but the Sheriff-substitute held he had no power to do so in a petition for the trustee's discharge. . . . The defender's account of expenses, instead of being £350, amounts to over £500."

The pursuer pleaded, *inter alia*;—(1) The defender, as trustee foresaid, having in his hands funds belonging to the pursuer, is bound in virtue of sections 86 and 142 of the Bankruptcy (Scotland) Act, 1856,* to hold count and reckoning for his intromissions and management with the pursuer as craved.

* The Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), enacts:—

Sec. 86. "The judicial factor, the trustee, and commissioners shall be amenable to the Lord Ordinary and to the Sheriff . . . at the instance of any party interested, to account for their intromissions and management, by petition served on them . . ."

Sec. 141. "Before the Lord Ordinary or the Sheriff shall pronounce the deliverance approving of the composition, the commissioners shall audit the accounts of the trustee, and ascertain the balance due to or by him, and fix the remuneration for his trouble, subject to the review of the Lord Ordinary or the Sheriff, if complained of by the trustee, the bankrupt, or any of the creditors; and the expense attending the sequestration and such remuneration shall be paid or provided for to the satisfaction of the trustee and commissioners before such deliverance is pronounced."

Sec. 142. "Notwithstanding such offer of composition and proceeding consequent thereon, the sequestration shall continue, and the trustee shall proceed in the execution of his duty as if no such offer had been made, until the deliverance by the Lord Ordinary or the Sheriff be pronounced, when the sequestration shall cease and be at an end, and the trustee be

The defender pleaded;—(2) The action is incompetent. (3) The pursuer's averments are irrelevant. June 6, 1908.

On 5th February 1908 the Sheriff-substitute (Guy) pronounced an interlocutor repelling, *inter alia*, the second plea in law for the defender, and appointing the defender to lodge in process the account called for. Hemming v.
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The defender appealed to the Sheriff (Maconochie), who, on 5th March 1908, recalled the interlocutor of the Sheriff-substitute, sustained the second and third pleas in law for the defender, and dismissed the action.*

exonerated and discharged: Provided, nevertheless, that the trustee and his cautioner shall be liable, on petition to the Lord Ordinary or Sheriff by the bankrupt or his cautioner for the composition, to account for his intromissions and other acts as trustee."

* "NOTE.—The plea of no jurisdiction was not maintained before me, and it therefore falls to be repelled. I am afraid, however, that I cannot agree with the finding of the Sheriff-substitute, under which he remitted the cause to probation. The facts are that, after all the provisions of the Bankruptcy Act, 1856, had been duly carried out—an offer of composition accepted, the trustee's accounts audited by the Commissioners, and the law-agent's account taxed—the trustee was exonerated and discharged, the bankrupt discharged and re-invested in his estates, and the sequestration came to an end, in terms of section 142 of the Act. Against all or any of these proceedings the bankrupt might have appealed under section 141, but no appeal was taken. In these circumstances, the pursuer, who was the bankrupt, presents this petition, calling on the trustee 'to account for his intromissions as trustee,' and in condescendence 4 states that 'he desires that the defender's account of intromissions should be audited by the Accountant of Court, and that the law-agent's account appearing therein should be taxed by the Auditor of Court.' The first of these accounts has, as I have said, been audited by the statutory auditors, and the second has already been audited by the Auditor of the Court of Session. He states in the same condescendence five objections which he takes to the defender's accounts, but at the hearing before me his counsel gave up objections 3, 4, and 5. The first objection is that the trustee, in breach of agreement, 'charged large sums for clerks' copyings and expenses.' That averment, in the first place, seems to me to be irrelevant on the ground of want of specification. The trustee was entitled to make some charges for such expenses, and this does not say what charges are objected to. But, in the second place, it seems to me that it is for the very purpose of having any such question raised and decided, that the appeal under section 141 is given, and, at the hearing, the pursuer's counsel had to admit that the question might have been brought up by such an appeal, and to argue that in all sequestrations the bankrupt might choose whether he would appeal under section 141, or allow the sequestration to come to an end, and then proceed by petition under section 142 to bring up any question he chooses. That virtually renders the right of appeal under section 141 needless. In my opinion, it is incompetent to bring under section 142 a general action for accounting relating to matters which have been already adjudicated on by the Commissioners, and that the provisions of the last clause of that section are limited to an accounting on the ground of malversation or mismanagement in office. It would lead to endless litigation were persons in the position of this pursuer to be allowed, by bringing such a petition as this, to obtain review of the whole proceedings in the sequestration. This view is, I think, borne out by the *dicta* of the Judges of the Court of Session in the cases of *Henderson v. Henderson's Trustee*, 10 R. 188, and *Duke v. More*, 6 F. 190.

"The second objection relates to the law-agent's account. The account

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The pursuer appealed to the Court of Session, and the case was heard on 27th May 1908.

Argued for the pursuer and appellant;—(1) *Competency*.—It was perfectly competent for the bankrupt, under sec. 142, to call on the trustee to account, even though the trustee had been discharged;¹ that, indeed, was the meaning, and the only possible meaning, of the word “nevertheless” in that section. The provisions of the statute with respect to the proceedings following on a composition, and those on payment of a dividend, were distinct.² The object of sections 141 and 142 was quite clear, and it was that when a composition was offered and accepted it should be carried through as soon as possible, and not delayed by all the appeals competent to the bankrupt against the trustee’s administration. But by section 142 it was provided that the bankrupt should not be prejudiced thereby, and therefore his right of challenge of the trustee’s administration was preserved. That right was not affected by the audit by the Commissioners under section 141, as was clear from the fact that the bankrupt was not entitled to any intimation of that audit; and, indeed, the Commissioners had not necessarily any interest in the grounds of challenge founded on here, which had not, or might not have, emerged at the time of their audit. (2) *Relevancy*.—The averments were sufficiently relevant, for they inferred illegal charges on the part of the trustee. The trustee here was paid by a commission, and therefore he had no right to charge for copyings or for a law-agent’s expenses.³

Argued for the respondent;—It was incompetent to call on the trustee to account for intromissions that had already been audited. He could not be called on to account twice over for the same items. The bankrupt had his remedy here of appealing either to the Lord Ordinary or the Sheriff against the Commissioners’ audit under section 141, but had failed to avail himself of it; and he could not now re-open the whole question, after the previous audit had been allowed to stand and the trustee had been discharged. To hold otherwise would be to render section 141 nugatory. The word “nevertheless”

has already been taxed by the Auditor of the Court of Session, and the pursuer was made aware of that fact. He might have appealed the Auditor’s decisions, but did not, and I certainly see nothing in the averment to lead me to hold that at this stage the Auditor should be instructed to tax the account a second time. What I have said on objection (1) as regards the scope of section 142 applies with equal force to this objection.

“I only wish to add that, at the beginning of condescendence 4, the pursuer avers that the trustee received and has in his hands the sum of £100 of funds belonging to the estate. Had it been stated that the sum was in the defender’s hands when his accounts were audited, and was not entered in them, or that he had somehow got hold of it since that date, I might very probably have held that that was a matter which could properly be raised under this petition, but there is no such averment, and the question is not raised in the detailed objections set forth in the latter part of the condescendence.

“On these grounds, I think that the action must be dismissed.”

¹ Burns v. Craig, Feb. 4, 1869, 7 Macph. 476.

² Goudy on Bankruptcy, 3d ed., p. 380, *et seq.*, and forms in Appendix thereto.

³ Lindsay v. Hendrie, June 15, 1880, 7 R. 911; Wilson’s Trustee v. Wilson’s Creditors, Nov. 4, 1863, 2 Macph. 9; Goudy on Bankruptcy, 3d ed. 383.

in section 142 referred to the continuing of the sequestration, not to the trustee's discharge, and was intended to cover intromissions by the trustee subsequent to the audit by the Commissioners. (2) *Relevancy.* ^{Hemming v. Galbraith.} June 6, 1908. —The trustee was willing to account for any intromissions subsequent to the Commissioners' audit, but all the matters called in question here were covered by that audit, and there were no averments to the contrary. Section 86 had been construed in *Duke v. More*¹ and in *Henderson v. Henderson's Trustee*,² and the requisites for a relevant case for inquiry, as indicated in these decisions, were not present in the pursuer's averments here. The same requisites were necessary to make a relevant case for an accounting under section 142 as were necessary under section 86.

At advising on 6th June 1908,—

LORD KINNEAR.—This is a petition to the Sheriff Court of the Lothians at the instance of a bankrupt calling on his trustee to produce a full account of his intromissions as trustee and to pay certain sums. It is therefore a petition that the trustee shall account for his whole intromissions during the sequestration. The Sheriff-substitute has sustained the petition and ordered a general accounting. On appeal the Sheriff-depute took a different view, and has sustained the two pleas of incompetency and irrelevancy stated by the defender, and dismissed the action, and the question is which of these views is right. I think that taken by the learned Sheriff-depute is correct, and that we should affirm his judgment.

The question arises on the construction of section 142 of the Bankruptcy Act, but the material facts to be kept in view in considering the application of that section to the present circumstances are that this is a case of the discharge of a bankrupt on payment of composition, that the sequestration is at an end, and that the trustee has been exonerated and discharged from his liabilities as trustee.

Before the trustee could obtain his discharge it was necessary under the preceding sections that a large amount of procedure—what the Lord President in a former case described as a well-considered and well-digested scheme—should be followed in order to safeguard the interests of creditors, and all others concerned. Section 142 is one of a series of sections which provide for the discharge of a bankrupt on composition. The scheme is that the bankrupt may offer a composition, that the offer may be entertained by the creditors, that if it is accepted the bankrupt shall find caution for the amount, and that ultimately the Sheriff, before giving effect to the agreement, shall hear objecting creditors, consider the effect of their opposition, and sustain or reject their votes, according to the provisions of the statute. It is only after all that has been done, and the Sheriff has pronounced a deliverance approving of the composition, that the bankrupt is allowed to get his discharge on making a declaration that a full and fair disclosure has been made and the other conditions satisfied.

Section 141 enacts :—[His Lordship quoted the section.] And therefore before the composition is approved of at all, the question of the accuracy and sufficiency of the trustee's accounts, and the balance due to or by him, as well as the question of his remuneration in conducting the sequestration, are to

¹ Dec. 8, 1903, 6 F. 190.

² Nov. 22, 1882, 10 R. 188.

June 6, 1908. be made matters of adjudication by the Commissioners in the first instance, and, if any of the creditors are not satisfied, by the Sheriff or Lord Ordinary on appeal, and ultimately—under the general appeal clause—by this Court if the parties are not satisfied. It is only after all that has been done that the statute goes on to say that “the sequestration shall cease and be at an end, and the trustee be exonerated and discharged.”

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Now, in the present case all that has been done, except that no objection has been taken to the Commissioners' decision, and consequently there has been no appeal under section 141, and it is only now, after all the statutory procedure has been followed, that it is maintained by the bankrupt that the trustee is still liable to a general accounting at his instance. It is argued that if sections 141 and 142 are taken together they confer on the bankrupt an option either to appeal in the way prescribed in section 141, or to allow the trustee to obtain his discharge, and then to appeal under section 142. I can see some difficulty in construing section 142, but I think it cannot be construed so as to give the bankrupt any such option. The clause does not in terms provide for any appeal whatever. The two supposed appeals between which he is to elect are not commensurate, nor are they given to the same persons. Section 141 says the appeal may be at the instance of the trustee, the bankrupt, or any of the creditors, whereas the remedy given by section 142 is given to the bankrupt alone. The words of the section are:—[His Lordship quoted the section.] Now, according to the appellant's contention the creditors may take an appeal under section 141 in which a decision may be given against them, and then the bankrupt may come forward under section 142 and say he is not satisfied, and go back to the same Judge and argue before him the same question that was argued already under the previous section. I do not think that such a construction of the statute is admissible. According to the appellant's argument this right of appeal may be exercised by the bankrupt without limit of time, so that there would be no final discharge short of the negative prescription, and an action might be brought years after the proceedings were at an end for an account of the whole intromissions of the trustee, notwithstanding that he had given a full account at the time prescribed by the statute, and had thereupon been judicially discharged. I observed that the argument for the appellant seemed to imply that the bankrupt had this special remedy even although the creditors had challenged the trustee's accounts on the very same grounds, and their challenge had failed before all the Courts. I think that necessarily follows from his argument on the word “nevertheless,” viz., that it relates to the whole provisions of section 141. I cannot see any reasonable reading of the statute which would support that contention. I agree that the clause in question is difficult of construction, and I am not at all sure that the view I take of it is the view that has been previously taken in this Court. There is no decision on the point, but there is a case in which Lord President Inglis, speaking of the proviso in section 142, referred to it “as a remarkable remedy given to the bankrupt,”¹ and seems to have assumed that it might be available against a trustee who had been discharged.

¹ Burns v. Craig, 7 Macph. 476.

I am, however, rather disposed to think that this remedy is enforceable June 6, 1908. before and not after the discharge of the trustee. An enactment that a trustee shall be exonerated and discharged, and thereafter shall be liable to ^{Hemming v.} account for his intromissions, is a contradiction in terms; and I am not ^{Galbraith.} prepared to put any such meaning, if it be called a meaning, on an Act of ^{Lord Kinnear.} Parliament if the language will reasonably bear another. The proviso must, I think, be read with reference to the whole scheme, and the important thing to observe is that the preceding sections relate to the discharge of a bankrupt on composition, which may be obtained though the whole estate has not been realised and handed over to the creditors, for the creditors by accepting the composition may forego their claims to the remainder. Now, that being the purpose of the series of clauses, the procedure adopted is one for the settlement of matters between the bankrupt and his trustee on the one side, and the creditors on the other, and questions between the bankrupt and the trustee on the sequestrated estate may remain to be disposed of after questions between the bankrupt and the creditors have been settled. I think the natural meaning of the series of sections is that the trustee is not to be exonerated and discharged without giving the bankrupt an opportunity for investigating his administration and calling him to account, and that the true meaning of the proviso in section 142 is not that the trustee is to be first discharged and afterwards called upon to account, but that notwithstanding the provision that when the sequestration shall cease the trustee is to be discharged, the bankrupt may still call him to account for his intromissions, although all questions between him and the creditors are determined. But that implies that he is to account before he obtains a discharge, and not that he is to be discharged first and to account afterwards. Were it otherwise the discharge and exoneration to which the trustee is clearly entitled would be perfectly useless. There can be no judicial discharge and exoneration until the trustee has done everything he was bound to do in the exercise of his office, and paid over any balance which may be in his hands, and if a discharge which has followed on that complete accounting is to afford no answer to a new action of accounting it goes for nothing. I cannot accept a reading which would reduce a judicial discharge prescribed by statute to a mere futility.

While that is my own view I do not wish to decide more than is necessary for the disposal of this case, more especially as the view I have stated is not the view taken by the Sheriff, or that argued by counsel at the Bar. But assuming against my own impression that the trustee is still liable to account after he has been judicially discharged, I agree with the Sheriff in thinking that it is incompetent to bring under section 142 a general accounting as to matters which have been already adjudicated on, and that if there is still a liability to account it must be with reference to matters which have not been settled in the course of the prior proceedings. The Sheriff goes on to examine the pursuer's averments, and gives his reasons for holding that these are irrelevant. Without examining them in detail, I may say that I agree with the learned Sheriff's judgment with reference to all the objections taken by the pursuer. I think the Sheriff's judgment is right, and that it should be affirmed.

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LORD M'LAREN.—To a right understanding of sections 141 and 142 of the Bankruptcy Act two things have to be kept in mind, first, that the trustee's discharge is really a double discharge, for he is entitled to be discharged in a question with the creditors and also in a question with the bankrupt. Secondly, that in the case of a discharge not following on a composition the interests of the creditors and the bankrupt are practically identical. On looking at section 152 it will be found that very careful provision is made for the satisfaction of the creditors before the discharge can be obtained, for there it is provided that a meeting of creditors shall be held at which the trustee shall produce his books and accounts, and the Sheriff shall hear the creditors thereon before granting the discharge. Now in that matter there is a practical identity of interest between the creditors and the bankrupt. Of course if only a dividend can be paid out of the estate the bankrupt has no real interest, but if the creditors are to be paid in full then he clearly has an interest.

But in the case of the termination of the bankruptcy by payment of a composition the question of the trustee's discharge is quite different. For the interests of the creditors and the bankrupt are then not the same. The interest of the creditors is only to be secured in the payment of the composition; they have bargained to accept so much, and security has been given that they will receive it. So in that case it is unnecessary to delay the proceedings for approval of the composition until all the trustee's accounts have been investigated. And indeed it would hardly be practicable to do so, for the first thing the trustee does is to write to all the debtors of the bankrupt to make payment of their accounts, and that is a process which takes time, while the bankrupt may be in a position to offer security for a composition long before that process has been carried out.

Now under section 141 certain preliminary proceedings are provided for. The Commissioners have to audit the trustee's accounts in so far as complete at that date, ascertain the balance due by him, and fix his remuneration, which has to be provided by the bankrupt, and this is subject to review if complained of by the trustee, the bankrupt, or any of the creditors. But it is obvious that questions of accounting may still remain between the bankrupt and the trustee, even though the composition has been approved of. And therefore I think that the procedure for approval of the composition does not give the bankrupt all the accounting to which he is entitled, viz., an accounting for the period of the trustee's administration subsequent to the approval of the composition. I note that by the provision in section 142 the trustee is not to be called on to account for everything—the expenses, for instance, have been already provided for in the previous section. What he is to account for is his "intrusions," and it is clear that although a composition has been agreed to, that does not affect his intrusions with the estate. And so I think that section 142 is a very necessary section, for it has this object, that it makes it necessary for the trustee to account to the bankrupt for all the money that he has ingathered for his estate. In short, section 142 provides for his discharge *quoad* the bankrupt, his discharge *quoad* the creditors having been provided for in the preceding section.

That was substantially the argument of Mr Blackburn, and I agree with all that Lord Kinnear has said with regard to the audit by the Commissioners

and the impossibility of reading the statute as meaning that the trustee is June 6, 1908. to be called on to account a second time for the figures in his accounts that have been already investigated. There is no suggestion here that the trustee Hemming v. Galbraith. has failed to account for his intromissions. The only questions that are raised are as to postages, copying expenses, and fees to the valuator and law-agent. All these matters have already been the subject of investigation. I therefore agree that no relevant case has been stated for the appellant. Lord M'Laren.

LORD MACKENZIE.—I am of opinion that the pursuer has failed to state a relevant case. I do not think that the effect of the 142d section of the Bankruptcy Act is to allow the bankrupt to ask for an accounting from the trustee in regard to matters that have already been adjudicated upon under section 141. To make a relevant case it would be necessary for the pursuer to aver that there were items which had not been dealt with under section 141, and I am unable to find such averments here. Therefore I think the opinion of the Sheriff is right.

The **LORD PRESIDENT**, who was absent at the hearing, delivered no opinion.

LORD PEARSON was absent.

THE COURT refused the appeal, affirmed the interlocutor of the Sheriff, and of new dismissed the action.

J. M. GLASS, Solicitor—WILLIAM GEDDES, Solicitor—Agents.

GEORGE LEE, Applicant (Appellant).—*Dickson, K.C.—Moncrieff.* No. 132.
WILLIAM BAIRD & COMPANY, LIMITED, Respondents.—*Hunter, K.C.—*
Carmont. June 6, 1908.

Master and Servant—Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), First Schedule (1) (b)—Incapacity resulting from injury—Injured workman suffering from disease—Incapacity contributed to by disease.—A miner, whose right eye was sound, but whose left eye was affected by disease, was able to work under ground. In the course of his employment he met with an accident to his sound eye which so injured it as to render it of little use. Owing to the condition of the diseased eye he was thereafter unable to resume his work under ground. It was proved that the condition of the diseased eye was neither caused nor aggravated by the accident. Lee v. William Baird & Co., Limited.

Held that the workman was suffering from incapacity resulting from the accident.

GEORGE LEE, miner, Blantyre, having claimed compensation under the Workmen's Compensation Act, 1897, from his employers, William Baird & Company, Limited, coalmasters, Blantyre, the matter was referred to the arbitration of the Sheriff-substitute of Lanarkshire at Hamilton (Thomson), who dismissed the application, and at the request of the applicant stated a case for appeal. 1st DIVISION. Sheriff of Lanarkshire.

The case set forth :—"The following facts were admitted or proved—(1) The appellant on 10th April 1907, in the course of his employment as a miner in the Priory Pit No. 4, Blantyre, belonging to the respondents, received an injury to his right eye, which injury (at least until an operation is performed) renders that eye of little use; (2) that the left eye was not affected by the accident, and is (save for

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nystagmus) quite healthy and in such a condition as would permit of appellant working as before the accident; (3) that there is now, however, a degree of nystagmus which prevents him resuming his former work under ground, although it need not prevent his working above ground; (4) that no question was raised on record that the appellant at the time of the accident was suffering from nystagmus in the left eye, and that during the proof and in the course of the hearing on evidence no point was made that at the time of the accident the left eye was so affected by nystagmus as to impair its usefulness for his work, the sole question raised and debated being whether the nystagmus as at present existing was due to or was aggravated by the accident; (5) that it is proved that at the time of the accident nystagmus to a slight extent was present in the left eye; (6) that there is no proof that it then existed to such an extent as to prevent or even impede the appellant in his work as a miner; (7) that it is proved that the nystagmus was neither caused nor even aggravated by the accident; (8) that it is not proved whether nystagmus when it once exists has (like, *e.g.*, cataract) a tendency to increase, or whether (like, *e.g.*, inflammation) it may disappear and rise again independently; (9) that the appellant was paid compensation at the rate of 11s. 6d. per week from a fortnight after the date of the accident till and including 25th November 1907, when the respondents stopped payment; (10) that by that date he had recovered from the immediate effects of the accident to his right eye, in so far as recovery (without an operation) is possible, and that if his left eye had not been affected by nystagmus to the extent to which it then was he might have resumed his former occupation; (11) that notwithstanding the present condition of his eyesight he is fit for work as a miner above ground but not under ground.

"Upon a consideration of the proof I found that the appellant had recovered as far as he ever would (without an operation) from the effects of the accident by 25th November 1907, and that after said date he was not, and that he is not now, prevented by or through the accident from resuming his former employment, and I dismissed the petition."

The question of law for the opinion of the Court was,—“Whether upon the facts as proved the appellant is entitled to have his compensation in respect of said accident under the Workmen’s Compensation Act, 1897, continued?”

The case was heard on 27th May 1908.

Argued for the appellant;—The workman had formerly a good eye and a bad eye. He had now lost the sight of the good eye, and found that he was incapable, with the bad eye only, of doing the work he formerly could do when he had both eyes. These facts were sufficient to entitle him to compensation.* The arbitrator was wrong in seeking to put on the workman the *onus* of proving that, at the time of the accident, the diseased eye was in such a state that he could not then have worked under ground without the assistance of the good eye.

Argued for the respondents;—This case must be taken on the

* The Workmen’s Compensation Act, 1897 (60 and 61 Vict. cap. 37), provides for payment of compensation to an injured workman, First Schedule, sec. (1), subsec. (6),—“Where total or partial incapacity for work results from the injury . . .”

facts found proved by the arbitrator. All that the arbitrator had found was that the workman was prevented from pursuing his former occupation owing to the diseased state of his left eye, and that that state was not caused or aggravated by the accident. The respondents, therefore, not being responsible for the diseased state of that eye, were not liable in compensation. If the arbitrator had found that, at the time of the accident, the workman had been dependent on his right eye for earning his wages, the case might have been different, but there was no such finding. On such facts there was sufficient evidence to justify the arbitrator in arriving at the conclusion at which he had arrived, and that being so, his decision should not be interfered with.¹

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At advising, on 6th June 1908,—

LORD MACKENZIE.—This is an appeal in an arbitration under the Workmen's Compensation Act of 1897, in which the appellant asked that the respondents should be found liable to pay to him weekly compensation. The accident happened on 10th April 1907, and the appellant was paid compensation at the rate of 11s. 6d. per week from a fortnight after the date of the accident till and including 25th November 1907. The finding of the Sheriff-substitute is to the effect that by the 25th November the appellant was not, and was not at the date when the case was before him, prevented by or through the accident from resuming his former employment. The question is whether that finding is correct or not.

Now, the first matter that strikes one in examining the grounds upon which that conclusion is reached is the finding of the Sheriff-substitute under the 11th head, that the appellant is no longer fit for work under ground. It appears from a previous finding that before the accident he was fit for work under ground. Thus there is that difference in his capacity at the present time as compared with his capacity at the date of the accident. There is no doubt that partial incapacity does exist, and the question is whether, to use the words of the first schedule of the Act, that results from the injury that he sustained in consequence of the accident. The nature of the injury which he sustained was an injury to the right eye. This is the case of a man who at the time of the accident had one sound eye, and one eye which was affected by an infirmity—nystagmus. He was, therefore, when the accident happened to him incapacitated to the extent of having one eye that was not sound. In his fifth and sixth findings, the Sheriff-substitute holds it proved that at the time of the accident nystagmus to a slight extent was present in the left eye, but that there is no proof that it then existed to such an extent as to prevent or even impede the appellant in his work as a miner. So that the existing infirmity at the time of the accident did not incapacitate the man, as at that date he was fit to work below as well as above ground. Now, he is not able to work under ground. The finding which is important is the finding under head 1, because the Sheriff-substitute finds that the injury to the right eye renders that eye of little use. That is the result of the accident. He then goes on to say in his second and third findings that the left eye was not affected by the accident, and is (save for nystagmus) quite healthy, and in such a condition as

¹ Bist v. London and South-Western Railway, [1907] A. C. 209.

June 6, 1908. would permit of the appellant working as before the accident, and that there is now, however, a degree of nystagmus which prevents him resuming his former work under ground, although it need not prevent his working above ground. If it had been the case that the right eye had recovered so as to be as good as it was before the accident, I think there would have been ground for drawing the inference that, if the appellant is now suffering from incapacity, the incapacity must be traceable to the infirmity in the left eye. But there is no finding by the Sheriff-substitute that the infirmity in the left eye would have prevented the appellant from working below ground if the right eye had been sound. It is not, in my opinion, quite clear from the statement of the case whether the nystagmus in the left eye is to be regarded as having progressed, as having become distinctly worse, since the date of the accident, but in the view I take I do not think that is material. Whether the nystagmus was progressive or not, as I read the finding of the Sheriff-substitute, there was and is an injury to the right eye which renders that eye of little use, and that, coupled with the infirmity in the left eye, results in incapacity which unfits the appellant from working under ground.

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Lord Mac-
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It is the law that if a man who is already afflicted with an infirmity is injured by an accident and thereby incapacitated from carrying on the work which he was previously fit to do, then that is an injury which results from the accident, even though the accident would not have incapacitated him, had he been otherwise sound. The case may be figured of an injury to a man who to begin with has only one eye. That renders him more liable to be disabled, but if an accident happens, and if there is injury to the sound eye, those responsible for the accident will be liable for the consequences, although, if he had the other eye the result would not have been the same. In the same way it is obvious that if a man with a lame leg receives an injury to the other leg the injury would have very much more serious consequences. Accordingly I am unable to agree with the view of the learned Sheriff-substitute upon the facts as stated in the case. It appears to me that this is the case of a man whose right eye has been rendered of little use in consequence of the accident, and that the result of that, coupled with his previous infirmity, is to render him partially incapacitated for work; and accordingly he is still in a state of partial incapacity in the sense of the statute, and that partial incapacity renders the employers liable to make compensation.

As regards the question of law put to us I would suggest that in the circumstances of the case a direct answer should not be returned to it. The question put is:—"Whether upon the facts as proved the appellant is entitled to have his compensation in respect of said accident under the Workmen's Compensation Act, 1897, continued?" If a direct affirmative were returned to that question, it might to a certain extent tie the hands of parties if they went back to the Sheriff-substitute and desired a review of the amount. It appears to me that we should find that the appellant is still suffering from partial incapacity for work, which is the result of the injury caused him by the accident.

LORD M'LAREN.—Long experience in judicial work makes one very

tolerant of differences of opinion, and therefore I approach this case in the belief that things which appear clear and important to me must have seemed otherwise to the learned Sheriff-substitute, although it is difficult to see how, upon the facts as he has found them, he arrived at the conclusion to which he has come.

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The case stated shortly comes to this: That before the accident this miner had two serviceable eyes. One of them was slightly defective because he had begun to have a disease known as nystagmus. That, as explained to us, is a trembling of the eyeball which interferes with distinct vision. The other eye was perfectly sound. The condition of the man now is that neither of his eyes is serviceable. The one that was formerly slightly affected by nystagmus is now so much affected by it that the man is unable to make any use of the eye at all. His other eye has also become unserviceable in consequence of the accident which happened to him in the pursuit of his employment. Natural causes connected with the nature of the work in which a miner is engaged may account for the disabled state of the left eye; but I see nothing in the facts to account for the disabled condition of the right eye except the accident. It is plainly found that the eye was injured by the accident, and that he is only so far recovered, and is unable to work under ground.

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In these circumstances it seems to me quite clear that one of the results of the accident is that the man is no longer able to follow his pursuit as a miner. It is not proved that if he had been fortunate enough to escape the accident, he would have been disabled from working under ground. He would have had one eye in perfect order, and, although the other one has through lapse of time become more and more affected with nystagmus, we do not know that, barring the accident, he would not have been able to get on quite well with a sound right eye. I think, therefore, that this is a case for compensation, but as it is found that the workman is able for lighter and perhaps less highly paid work above ground, the Sheriff-substitute will take this into account in fixing the amount of compensation payable. I therefore agree with Lord Mackenzie that the case should be remitted to the Sheriff.

LORD KINNAR.—I agree. We must take the Sheriff-substitute's findings in fact as he gives them. We cannot review his determination upon the facts at all. But taking these specific facts as he finds them, we have to consider whether he is justified in saying that they support the inference that this man's incapacity resulting from the accident has ceased, and that he is now capable of earning his former wages. I think it is quite clear upon the Sheriff's own statement that that is a finding that cannot be supported. The Sheriff begins by finding as matter of fact that the appellant "received an injury to his right eye, which injury (at least until an operation is performed) renders that eye of little use." Therefore he starts by saying that the man who had a good eye before his injury has now an eye so affected that it is of little use. That is a finding in the present tense. Then he goes on to say that the accident did not affect the left eye, which, however, had previously been affected by the disease called nystagmus, and that before the accident the man was able to work as a miner under ground.

June 6, 1908. If he had gone on to find that the right eye was now perfectly restored, and that the left eye had on the contrary become so far deteriorated in consequence of some other cause than the accident that he could no longer work under ground in consequence not of the condition of his right eye, but of the condition of the left eye alone, that might have raised the question, which the Sheriff seems to have considered and decided, as to whether the present incapacity of the man was really owing to the accident or was owing to the disease which had no connection with the accident. But then he finds nothing of that kind.

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Lord Kinnear.

He finds that the left eye is quite healthy, and is in such a condition as would permit of the appellant working as before the accident, except for the nystagmus. He does not distinctly state whether the nystagmus is now so much worse that the man could not have worked as before, even if the right eye had not been injured; but he finds it proved that the nystagmus was not caused nor even aggravated by the accident. Then he gives the present position, repeats the finding with which he started, and says that by the 25th of November 1907, when the respondents stopped his allowance, he had recovered from the immediate effects of the accident to his right eye, so far as recovery (without an operation) is possible, and that then he might have resumed his former occupation if his left eye had not been affected by nystagmus to the extent to which it then was. That is a finding that the man has not completely recovered. He has recovered only in so far as it is possible to recover without an operation. We are not told whether it is probable that the operation would result in his complete recovery, or whether it is wise to submit to an operation. All that we know is that the man has not yet completely recovered, and that according to the Sheriff-substitute there may be a possibility that he would recover more completely as the result of an operation which has not been performed. That seems to me a finding in fact that the man's eye has been injured by an accident, and that it has not yet recovered. I cannot reconcile that with a finding that the man has been restored to the same condition, with the same power of work, as before the accident. On the Sheriff's statement therefore I am of opinion with your Lordships that it is impossible to accept a general finding that the man is now in such a condition that we can say he is not prevented by or through the accident from resuming his former employment, which the Sheriff says he is now unfit for.

With reference to the form of the answer, I agree with Lord Mackenzie that we ought to make no finding which should preclude the Sheriff from entertaining and disposing of the question of the exact amount of compensation which in the present circumstances should be allowed to the man. That must be left to him.

The LORD PRESIDENT having been absent at the hearing delivered no opinion.

LORD PEARSON was absent

THE COURT pronounced this interlocutor:—"Find that the appellant is still prevented by the results of the injuries caused by

the accident mentioned in the case from resuming his former employment: Recall the determination of the Sheriff-substitute as arbitrator appealed against, and remit the cause to him to proceed as accords."

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William Baird
& Co.,
Limited.

SIMPSON & MARWICK, W.S.—W. & J. BURNES, W.S.—Agents.

A. D. M. BLACK AND OTHERS (Eden Colville's Trustees), Pursuers and Real Raisers.—*Maitland*. No. 133.

MISS KATHLEEN MARY ISABEL MARINDIN, Defender (Reclaimers).—*Blackburn, K.C.—Leadbetter*. June 6, 1908.

ARTHUR HENRY MARINDIN, Claimant.—*Macphail*.

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DAME FRANCES ELINOR COLVILLE AND OTHERS (Sir James Colville's Trustees), Claimants (Respondents).—*D.-F. Campbell—Lord Kinross*.

MISS EDITH MARY MARINDIN AND OTHERS, Claimants.—*M'Lennan, K.C.—Mercer*.

Discharge—Confusio—Heritable Bond—Bond over Entailed Lands—Defective Entail—Acquisition of Bond by Heir of Entail in Possession.—The heir in possession of certain lands under a deed of entail, which was defective in the irritant clauses, died in ignorance of this fact and without evacuating the destination. While in possession of the lands he acquired right to a bond over the lands by succession *ab intestato* to the creditor in the bond.

Held that the bond was not extinguished *confusione* in the person of the heir, in respect that he possessed the lands and the bond under different destinations, and that this was not affected by the invalidity of the entail, as the tailzied destination had not been evacuated by him.

Succession—Destination—Liferent and Fee—Fiduciary Fee.—The creditor in a heritable bond bequeathed it by direct disposition to certain persons in liferent, and in fee to the heir of entail who might be in possession of certain lands at the expiry of the liferents.

Opinion (per Lord President) that there was no effectual destination of the fee, and that the purpose of the testator could only have been achieved by the interposition of a trust.

Per Lord President,—"I have never yet heard—and I do not think we ought to extend the doctrine—of the doctrine of a fiduciary fee for somebody who is neither a child nor an heir in any sense of the person in whom the fiduciary fee is created."

A. D. M. BLACK, W.S., Edinburgh, and others, trustees acting under the trust-disposition and settlement of Eden Colville, of Craigflower, Fife, raised this action of multiplepounding to determine the rights of parties in a sum of £4500 contained in a bond and disposition in security, dated 17th May 1830, over the lands of Muirside, of which, at his death, Eden Colville was the heritable proprietor.

1st DIVISION.
Lord Dundas.

The fund *in medio* was the said bond and disposition in security.

The following narrative of the facts which gave rise to the action is taken from the opinion of the Lord President:—

"In 1830 John Blackburn, of Killearn, lent a sum of £4500 to Andrew Colville, of Ochiltree, who in security of that sum conveyed to John Blackburn certain lands called Muirside. Subsequently John Blackburn assigned that bond and disposition in security to Miss Margaret Blackburn.

"In 1833 Andrew Colville executed an entail of the lands of Muir-

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side on the same series of heirs as those called in the destination of certain other lands of Crombie and Craigflower, which had already been entailed.

"In 1841 Miss Margaret Blackburn, by disposition, assignation, and settlement disposed the said bond and disposition in security in favour of her grandnieces, nine in number, all being daughters of Andrew Colville, in liferent equally among them, and to the survivors of them in liferent during all the days of their lifetime and remaining unmarried, for their liferent use, and after the marriage or death of all of them, then to and in favour of the heir of entail who might be in possession of the estate of Crombie and Craigflower in fee.

"These nine ladies lived for a considerable time, and the last of them died unmarried in 1905, and thereby for the first time the fee of the bond opened for behoof of whomever it might concern. Miss Margaret Blackburn herself had died in 1842, and Andrew Colville, who executed the entail of the lands of Muirside, died in 1856. He was succeeded in the entailed lands by Sir James Colville, who died in 1880. Sir James Colville was succeeded by his brother Eden Colville, and in 1881 Eden Colville disentailed these lands, having discovered that there was no proper irritant clause.¹ Having done so he evacuated the destination of the entailed lands by means of a settlement, and, he himself dying in 1893, his trustees took up the lands under the disposition contained in his settlement. By his settlement Miss Kathleen Marindin is entitled to the whole produce of the lands."

Claims were lodged for (1) Captain Arthur Marindin, who would have been heir of entail in possession of the lands of Crombie and Craigflower had the entail not been broken; (2) the trustees acting under the trust-disposition and settlement of Sir James Colville; and (3) Miss Edith Marindin and others, the heirs *in mobilibus* of Miss Blackburn.

The claimant Captain Marindin stated that though the result of supervening legislation and of the proceedings taken by Eden Colville had been to deprive him of his right to the lands of Crombie and Craigflower, it had in no way rendered unintelligible the words employed by the testatrix to designate him as the person in whom she intended the fee of the bond to vest on the expiry of the liferents.

He claimed the whole fund *in medio*.

He pleaded;—(2) This claimant being the person truly designated by the testatrix as entitled to the fee of the said bond, ought to be ranked and preferred in terms of his claim.

The claimants Sir James Colville's trustees stated that in the circumstances which had arisen there was now no person in existence answering to the description of heir of entail in possession of the estates of Crombie and Craigflower; that the destination had accordingly failed, and that the bond had become intestate heritable succession of Miss Blackburn. They further maintained that Miss Blackburn's heir-at-law at her death was Andrew Colville, who had made up no title to the bond; that Andrew Colville was survived by his eldest son Sir James Colville, who then became Miss Blackburn's heir-at-law, and that in virtue of section 9 of the Conveyancing Act, 1874, a personal right in the bond had vested in Sir James Colville,

¹ Colville v. Marindin, July 12, 1881, 8 R. 937.

and had passed to them under and in terms of his trust-disposition June 6, 1908. and settlement.

They claimed the whole fund *in medio*.

They pleaded;—(1) In the circumstances that have arisen the destination of the said bond for £4500 contained in the disposition and assignation and settlement of Miss Margaret Blackburn has failed, and the bond falls to be dealt with as intestate succession. (2) The said bond was heritable as regards succession at the date of the death of the said Miss Blackburn, and the right thereto eventually vested in the said Sir James William Colville, and was carried by his trust-disposition and settlement.

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The claimants Miss Edith Marindin and others concurred with the preceding claimants that the bond fell to be dealt with as intestate succession of Miss Blackburn. But they maintained that, under section 117 of the Titles to Land Consolidation Act, 1868, it was moveable and not heritable *quoad* her succession, and accordingly belonged to the claimants as the next of kin and representatives *in mobilibus* of the testatrix.

They claimed the whole fund *in medio*.

They pleaded;—(1) The testator having postponed vesting of the fee of the fund *in medio* until the termination of the liferent, and the destination having then failed, the claimants, as her next of kin and representatives *in mobilibus*, are entitled to be ranked and preferred to said fund in terms of their claim. (2) In the circumstances condescended on the succession to the said bond and disposition in security being intestate and moveable, the claimants are entitled to the fund *in medio*.

Objections to the fund *in medio* were lodged by Miss Kathleen Marindin, who was the person entitled to the whole free income of Eden Colville's estate, including the lands of Muirside.

The objector stated :—(Cond. 3) "The right to the fee of the said principal sum of £4500 being undisposed of, vested as at Miss Blackburn's death in 1842 in Andrew Wedderburn Colville, her heir-at-law; but as he died in 1856 without making up a title thereto, the right to the said fee then vested in Sir James William Colville, her next heir-at-law. Sir James William Colville being alive at the passing of the Conveyancing Act of 1874, a personal right to the said fee vested in him at that date in virtue of the provisions of that statute, and in particular of section 9 thereof." (Cond. 4) "In 1874 Sir James William Colville was in possession of the lands of Muirside, over which the said bond was secured, his right thereto being *ex facie* as heir of entail in possession. Owing to the defects in the deed of entail of the said lands, all the prohibitions contained in the said deed of entail were invalid as from and after the date of the Act 11 and 12 Vict. cap. 36, and were not binding on the said Sir James William Colville. Sir James William Colville was, therefore, from the date of his succession to the said lands in 1856 until his death *de facto* proprietor in fee-simple of the said lands." (Cond. 5) "Sir James William Colville being in 1874 proprietor in fee-simple of the lands of Muirside, and being at the same time vested in the fee of the heritable debt for £4500 affecting the said lands, the said debt, *quoad* the fee thereof, was extinguished *confusione* in his person. On the death of the last holder of a liferent interest in the said debt on 2d August 1905 the said heritable debt was extinguished *quoad* the liferent also. This defender therefore objects to the condescendence of

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the fund *in medio* in respect that it sets forth that the right to the fee of the principal sum of £4500 has emerged by the death of the last survivor of the liferenters interested therein. No such right to the fee has emerged, the said heritable debt having been totally extinguished."

The objector pleaded;—(1) The action is incompetent. (2) There being no double distress, the action should be dismissed. (3) The liferent interest in the bond for £4500 condescended on having been extinguished by the death of the last liferenter, and the fee thereof having been extinguished *confusione* in the person of the late Sir William Colville, there is no fund in the hands of the pursuers and real raisers with regard to which any questions have arisen as to the person or persons entitled thereto. (4) There being no fund in the hand of the real raisers as to which competition has arisen, the claims lodged or to be lodged by parties claiming right thereto should be repelled.

On 25th May 1907 the Lord Ordinary (Dundas) pronounced this interlocutor:—"The Lord Ordinary, having considered the cause, ranks and prefers the claimants Dame Frances Elinor Colville and others, as trustees for the deceased Sir James William Colville, to the whole fund *in medio*, in terms of their claim, No. 17 of process, and ordains them to make up and complete, *habili modo*, a title to, and thereafter execute and deliver to the pursuers a valid and proper discharge of, the bond and disposition in security libelled, as concluded for in the summons, and decerns: Repels the claims of the whole other competing claimants, and decerns." *

* "OPINION.—(After narrating the facts)—It will be convenient to consider first the claim No. 15 of process, for Captain Arthur Henry Marindin, the person who, but for the disentail of the estates of Crombie and Craighflower, and the subsequent evacuation of the tailzied destination, would have been the heir of entail in possession at the date of the death of the last liferentrix. I am of opinion that this claim is ill founded, and must be repelled. It seems to me impossible, as matter of construction, to hold that Captain Marindin was or is, 'after the marriage or death of all of them' (i.e., the liferentrices) ' . . . the heir of entail . . . in possession of the estate of Crombie and Craighflower . . . I think that possession of the entailed estate was a condition of the succession. I should have reached this conclusion apart from authority, but such aid as may be derived from reported cases seems to me to strengthen the view which I take. Thus in *Inglis v. Gillanders* (1894, 22 R. 266, aff. 1895, *ibid.* (H. L.) 51), the portion of the destination specially considered was 'to the heir in possession of Highfield under the entail thereof for the time, and' (i.e., whom failing) 'to the other heirs-substitute in said entail in the order set down in said entail successively.' Highfield had been disentailed, and the tailzied destination evacuated. It was held, in regard to the 'first branch' above quoted, that (in the words of Lord Watson, 22 R. (H. L.), at p. 55), 'it is obvious that, since the disentail of Highfield, the substitution has become void, because there can be no heir answering the description.' The 'second branch,' however, was held to import no condition of possession; all that was requisite being the character of an heir-substitute designated in the deed of entail. The first branch of the destination in that case appears to me to bear a very strong resemblance to that now under consideration. In the immediately succeeding case of *Schank* (1895, 22 R. 845), the words were 'the heirs of entail who may in succession and for the time be in possession, or have right to be in possession, of the entailed estate of X under and in virtue of the deed of entail.' The ground of judgment was thus summarised by Lord Trayner,—'It is the essential quality of the

The claimants Captain Marindin and Miss Edith Marindin and others acquiesced in the judgment of the Lord Ordinary. June 6, 1908.

Miss Kathleen Marindin reclaimed.

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The case was argued before the First Division on 5th and 6th February 1908.

Argued for the reclaimer;—(1) Miss Blackburn never disposed of the fee of the bond. Her attempt to do so by giving it to the heir of entail in possession of the lands of Crombie at the death of the last liferentrix effected nothing, for it left the fee *in pendente* from the date of her death until the date when the succession opened. The idea of a fiduciary fee in the liferentrices for behoof of the person ultimately found entitled to the bond was inadmissible, because that person stood in no fiduciary relationship to the liferentrices, and the doctrine of a fiduciary fee had never been extended beyond the case where the ultimate fiar was a child, or at least an heir, of the fiduciary fiar.

person claiming the liferent that he shall be in possession or be entitled to the possession of the entailed lands. The defender does not, and no other person now can, possess that quality, for the entail is no longer in existence.' The recent decision in *Mackenzie's Trustees* (1907, S. C. 139), a complicated case, involving scrutiny of a variety of documents, seems to have turned ultimately upon a differentiation of the phrase, 'the heir entitled to succeed under the said deed of entail'—occurring in a codicil—from the language of the testator's principal deed, which was 'the heir succeeding to said estates under the said deed of entail.' I was also referred to, but need not comment upon, the cases of *Fenton Livingstone* (1899, 1 F. 831) and *Davidson* (1906, 14 S. L. T. 337). For the reasons which I have stated, I am of opinion that the claim for Captain Marindin must be repelled. At the date of the death of the last surviving liferentrix, neither he nor anyone else could fulfil the condition—upon which, in my judgment, the right of succession depended—of being heir of entail in possession of Crombie and Craighflower.

"If this view is correct, it seems to follow that intestacy resulted. But a controversy is raised between the parties who claim to represent, on the one hand, Miss Blackburn's heir-at-law, and on the other hand, her heirs *in mobilibus*. The first of these claims is made by the trustees of Sir James William Colville. They state that Miss Blackburn's heir in heritage at her decease was her nephew Andrew Wedderburn Colville, who died in 1856, without having made up a title to the bond. On his death the right to make up title thereto passed to his son, Sir James William Colville, who survived until 1880. His trustees maintain that, in virtue of the Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. c. 94), section 9, a personal right to the bond vested in Sir James, and passes upon his death to them, under and in terms of his trust-disposition and settlement. On the other hand, the fund *in medio* is claimed by the next of kin and representatives *in mobilibus* of Miss Blackburn. Their plea in law is that 'the testatrix having postponed vesting of the fund *in medio* until the termination of the liferent, and the destination having then failed, the claimants, as her next of kin and heirs *in mobilibus*, are entitled to be ranked and preferred to said fund in terms of their claim.' Of the opposing contentions thus raised, I prefer the former. It is, I apprehend, settled law—at all events since the decision in *Lord v. Colvin* (1865, 3 Macph. 1083)—that in a case, as this is, of resulting intestacy, the heir must be looked for as at the time of the testator's death, and not as at the date when it became certain that none of the contingencies could happen by the occurrence of which intestacy would have been prevented. Nor do I see any reason to doubt that the quality and character of the succession must be ascertained as at the date of the death of the testatrix. This view appears to me to be in accordance with

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Such a destination of the fee could only have been effectually created by means of a trust, and Miss Blackburn had failed by attempting to create it by means of a direct disposition. In any event, as now appeared, there had been no effectual destination of the fee, as there was no person answering the description of "heir of entail" when the succession opened. Accordingly, at Miss Blackburn's death, the fee of the bond passed to her heir-at-law, Andrew Colville, and after him to Sir James Colville, in whom a personal right vested by the operation of section 9 of the Conveyancing Act, 1874.¹ Sir James Colville thus became *pleno jure* creditor in the fee of the bond, and it was immaterial that he was ignorant of his rights. He could have discharged the bond—at least so far as his interest, *i.e.*, the fee, was concerned. He could have assigned it—and indeed it was the basis of the respondents' claim that by his will he did assign it to them. (2) Sir James Colville, as proprietor of the lands of Muirside, was also

the language of section 117 of the Titles to Land Consolidation (Scotland) Act, 1868 (31 and 32 Vict. cap. 101), and the cases of *Brown* (1870, 8 Macph. 439), and *Cunningham* (1889, 17 R. 218). If that is so, I take it that the right to make up title to the bond, which was heritable at Miss Blackburn's death, passed to her heir-at-law; and that—unless the argument for Miss Kathleen Marindin, which I must presently notice, is well founded—the fee of the money is now vested in Sir James Colville's trustees. Counsel for the next of kin referred me to a great number of authorities, amongst the best known of which are *Ferguson* (1875, 2 R. 627), *Maule* (1876, 3 R. 831), *Cumstie* (1876, 3 R. 921), and *Tristram* (1894, 22 R. 121). It is perhaps sufficient to say that none of these cases, nor the doctrine of fiduciary fee with which they are mainly concerned, appears to me to have any application to the present case; and that, even upon a contrary assumption, I do not understand how these claimants could take benefit from the application of the doctrine referred to. Subject, therefore, to the argument next to be considered, Sir James Colville's trustees are, in my opinion, entitled to prevail in the competition.

"I must now deal with the views submitted on behalf of Miss Kathleen Marindin. These are, as I shall afterwards point out, introduced into the case in a very singular manner; but they were made the subject of an able and earnest debate, which deserves attention, and is not unattended with difficulty. Miss Marindin is the person presently entitled to the free annual income of the estate of the late Eden Colville held by his trustees, the pursuers and real raisers, which includes the lands of Muirside. She has therefore an interest to maintain, as she does, that the bond in question has been extinguished *confusione*. The theory of her contention is that, on the death of the last liferentrix, and the failure of a fiar, the bequest fell into intestacy of Miss Blackburn; that in 1874, when the Conveyancing Act, above referred to, became law, the rights of debtor and creditor respectively in the said bond concurred in the person of Sir James Colville; and that confusion accordingly operated, at all events so as to extinguish the fee of the £4500 debt. As regards the 'debtor' side of the matter, it is pointed out (I think fairly enough) that, although in 1874 the entail of Muirside subsisted, and was not known to be invalid, it was truly so from the passing, and under the operation, of the Rutherfurd Act, particularly section 43 thereof, and that Sir James was, therefore, from his succession in 1856 onwards *de facto* proprietor in fee-simple of the lands. When, however, one comes to consider Sir James Colville's position as creditor in the bond, the matter becomes more difficult. It is not easy to affirm that he was in the full right of credit, looking to the active subsistence of the liferents,

¹ 37 and 38 Vict. cap. 94.

debtor in the bond. Although nominally possessing these lands as heir of entail in possession, he was in reality proprietor in fee-simple. The entail being ineffective,¹ the estate was, from the date of the Rutherfurd Act in 1848, an estate in fee-simple in the person of the heir of entail in possession,² who could have alienated the estate or evacuated the tailzied destination without challenge. (3) The same person having thus become both creditor and debtor, the bond was extinguished *confusione*,³ at least *quoad* the fee thereof.⁴

Argued for the respondents (Sir James Colville's trustees);—In order that the reclamer should succeed it was necessary for her to shew that every right and obligation under the bond, both of creditor and debtor, was united in the person of Sir James Colville during his lifetime. (1) This was obviously not true with respect to the annual produce of the sum due under the bond. That belonged to the liferentrics, and to that extent they, and not Sir James Colville, were

and to the fact that, at their termination, there might have been an heir of entail in possession of Crombie and Craigflower, other than Sir James himself. I know of no authority which governs this rather perplexing state of matters. It seems to me to be by no means clear that a right of credit of so contingent a kind is sufficient to invest its temporary holder with the character of creditor in a question of confusion. But however that may be, I do not think, regarding the matter upon principle, that it would be possible to hold that the fee of this debt could be extinguished *confusione* in 1874 consistently with the right of the liferentrics to draw interest upon it, as they in fact did, for thirty years thereafter. It was maintained that Miss Blackburn could not legally or effectually make her bequest in the way she did; and that the liferentrics, in spite of their infestments, had really no right to the interest of the money, at all events after 1874, when the fee was, according to the argument, extinguished by confusion. But these views, which were not supported by reference to authority, appear to me to be unsound. Miss Blackburn's mode of destination was unusual and inconvenient; but I do not think that it was illegal or ineffectual. I was referred to the case of *Love* (1863, 2 Macph. 22), and especially to certain *dicta* therein. Lord Neaves said (p. 31),—'When any one is *pleno jure* the ultimate debtor and creditor in the same debt without relief, that situation in general amounts to confusion, and extinguishes the debt. It may be that other parties are interested in the debt, as when an heirportioner, being the joint creditor in an heritable debt, succeeds as heir to the debtor, or *vice versa*. The result in that case is that the right is *pro rata* extinguished. It is difficult to see why a similar rule should not apply to a case of liferent and fee.' The Lord Justice-Clerk (Inglis) at p. 32 added, —'I participate strongly in the doubts suggested by Lord Neaves whether the right to this third' (of the bond) 'was not extinguished *confusione*.' I fully acknowledge the great weight which must attach to any words which fell from these eminent Judges. The *dicta*, however, were purely *obiter*, and were doubted by Lords Cowan and Benholme (p. 30). Further, it is permissible to observe that the illustration of joint interest suggested by

¹ Colville v. Marindin, July 12, 1881, 8 R. 937.

² Urquhart v. Urquhart, Feb. 20, 1851, 13 D. 742; Russell v. Russell, Dec. 7, 1852, 15 D. 192, *per* Lord Wood, Ordinary, at p. 194; Scott v. Scott, Dec. 6, 1855, 18 D. 168; Entail Amendment Act, 1848 (11 and 12 Vict. cap. 36), sec. 43.

³ Murray v. Parlane's Trustee, Dec. 18, 1890, 18 R. 287; Johnston v. Johnston, July 2, 1897, M. 3042.

⁴ Love v. Storie, Nov. 6, 1863, 2 Macph. 22, *per* Lord Neaves, at p. 31, and Lord Justice-Clerk Inglis, at p. 32.

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the true creditors. He could not have given a full discharge of the bond, or could only have done so after setting aside a sum to satisfy the liferent interests. (2) Even with respect to the capital, there was a contingent interest during Sir James Colville's lifetime which prevented the fee from vesting in him wholly, namely, the interest of the person who might be heir of entail in possession when the liferent interests came to an end.¹ For at that date the entail had not been broken, and if it had never been broken, and if on the death of the last liferentrix the heir then in possession had come forward, there could have been no answer to his claim on the bond. He would have been entitled to it as the person indicated under the destination in Miss Blackburn's settlement, a fiduciary fee for his behoof having vested in the liferentices at her death. This was admittedly an extension of the doctrine of fiduciary fee, but there was no reason why the doctrine should be confined to cases where the fiduciary fiar stood *in loco parentis* to the ultimate fiar.² This fiduciary fee continued to exist at least down to the date at which it became apparent that the destination would be inoperative, namely, the date when the entail was broken, a year after Sir James Colville died. During his lifetime accordingly Sir James Colville had at most a contingent right of fee in the bond.

At advising on 6th June 1908,—

LORD PRESIDENT.—(After the narrative of the facts, quoted *supra*)—The competition that has arisen is as to who is in right of the fee of this bond which was set free by the death of the liferentrix in 1905. Up to that time, of course, interest on the bond had been duly paid by the proprietor of the lands for the time being to the various liferentices in succession. One claimant in the multiplepounding originally was the person alleging himself to be the person to whom the fee was primarily destined—namely, the heir of entail who might be in possession of the estate of Crombie and Craigflower at the expiry of the liferent. The Lord Ordinary has found that there was in truth no such person, and that part of his judgment has not been reclaimed against.

Lord Neaves appears to be very different in its nature from that of liferent and fee, and that his Lordship does not explain the effect of the application of the doctrine of *confusio* to the right of the liferenter. If the obligation for the payment of the principal has been finally extinguished, it is hard to see how the right of the liferenter, duly infest, could possibly continue to subsist. It may also be noted that though the facts in *Love v. Storie* are not very clear from the report, there was in that case an existing fiar, definitely named, which so far distinguishes it from the present case. Upon the best consideration which I am able to give to the argument for Miss Marindin, I am of opinion that it fails, because it appears to me that her counsel cannot successfully maintain that Sir James Colville was, in Lord Neaves' words, '*pleno jure*, the ultimate debtor and creditor' in the debt in question. In my judgment, therefore, the claim of Sir James Colville's trustees must be sustained, subject, of course, to their granting a valid discharge in favour of the real raisers. . . ."

¹ *Fleming v. Imrie*, Feb. 11, 1868, 6 Macph. 363, *per* Lord Justice-Clerk Patten, at p. 367.

² *Frog's Creditors v. His Children*, Nov. 25, 1735, Ross, L. C., 3 L. R. 602; *Newlands v. Newlands' Creditors*, Feb. 7, 1794, Ross, L. C., 3 L. R. 634; *Allardice v. Allardice*, March 6, 1795, Ross, L. C., 3 L. R. 655; *Ferguson v. Ferguson*, March 19, 1875, 2 R. 627; *Cumstie v. Cumstie's Trustees*, June 30, 1876, 3 R. 921.

But the competition before us is between the trustees of Sir James Col- June 6, 1908.
vile and Miss Marindin, who does not directly compete for the bond, ^{Colville's}
because she does not say it belongs to her, but, I think logically enough, ^{Trustees v.}
objects to the condescendence of the fund *in medio*, because she says that ^{Marindin.}
the bond is not an existing burden upon the estates. Of course, it is her ^{Ld. President.}
interest to say so, because as she has the whole produce of the estates
under the trust-disposition and settlement of Eden Colville, she would in
that case get the whole produce unburdened by an existing bond.

In order to solve this matter it is necessary now to consider exactly what
happened when Miss Margaret Blackburn made this settlement of the bond.
I am bound to say that I think Miss Margaret Blackburn attempted an
impossibility in conveyancing. She, being in right of the bond and dis-
position in security, disposed that bond and disposition in security in
favour of a certain number of unmarried liferentrics who were alive. That,
of course, was quite good. But then she proceeded to dispose of the fee to
a person unknown, who might or might not be in existence—namely, the
person who at the expiry of these liferents would possess the character of
heir of entail under a certain entail—and she did that by means of a direct
conveyance without the interposition of a trust. As I say, I think that is
a conveyancing impossibility. We are all familiar with the case of *Frog's*
Creditors,¹ and it has again and again been said that the principle of *Frog's*
*Creditors*¹ would not be extended. *Frog's Creditors*¹ decided that a dis-
position to a parent in liferent and children in fee will be construed as a
fee in the parent, and in the subsequent case of *Newlands*² there is intro-
duced a fiduciary fee in the parent where the liferent is a liferent alienary.
There was a difference of judicial opinion, with very high authorities on
both sides, in *Cumstie's Trustees*,³ but I will be content to take the result
of what was arrived at in *Cumstie's Trustees*,³ namely, that you could have
a fiduciary fee for heirs whomsoever; but I have never yet heard—and I
do not think we ought to extend the doctrine—of the doctrine of a fiduciary
fee for somebody who is neither a child nor an heir in any sense of the
person in whom the fiduciary fee is created. Accordingly, I think that
what Miss Blackburn wanted to do, if it could be done effectually, could
only have been done by the interposition of a trust.

But, although I have thought it necessary to say so, it really does not
matter whether this view is correct or not, because the same practical result
is reached in another way—and is indeed a direct corollary of the finding of
the Lord Ordinary that the destination to the heir who shall be in posses-
sion of the estate of Crombie and Craigflower, taking effect as it does when
there is no longer an entailed estate of Crombie and Craigflower, is equiva-
lent to no destination—the result, namely, that the fee of this bond was
not effectually given to anybody, and accordingly it remained in the
hereditas jacens of, or with the heirs of, Miss Blackburn. Who were
the heirs of Miss Blackburn in 1842? Her heir at that time was Andrew
Colville. Andrew Colville as a matter of fact never made up a title to
this bond, and accordingly, as the law then stood, no right ever vested
in him, because he did not connect himself by service. He was suc-

¹ Ross, L. C., 3 L. R. 602² Ross, L. C., 3 L. R., 634.³ 3 R. 921.

June 6, 1908. Colville's Trustees v. Marindin. succeeded by Sir James Colville, who in the same way would have had right to make up a title to the bond. But the same effect in law as had happened with Andrew Colville did not exactly happen with Sir James Colville, because Sir James Colville survived the Conveyancing Act of 1874. As
 Ld. President. your Lordships very well know, the Conveyancing Act of 1874 altered the old law in this particular, and gave persons in the position of Sir James a good personal right without service. Accordingly, by the fact that he had the character of heir to Miss Blackburn and the operation of the Conveyancing Act of 1874, Sir James had a good personal right to the bond for the £4500.

That personal right, if it continued to exist, was necessarily transferred by his trust-disposition and settlement to his trustees. But then Miss Marindin makes this answer. She says:—"Yes, it would have been transferred, but in the meantime as you, Sir James, were heir of entail in possession under a bad entail, and as such were debtor in the bond because you possessed the lands of Muirside, confusion took place, and the fee of the bond was once and for all wiped out." I do not think that that took place, and I think the matter is quite clearly explained by Mr Erskine, and really settled by a couple of authorities. Mr Erskine treating of confusion in section 27, Book 3, Title 4, says:—"Confusio hath not always the effect of a total and perpetual extinction of a debt or right. Sometimes it produces only a temporary suspension of it, while the debtor and creditor continue one and the same person, or while the same person is entitled to the succession of the two several rights, from the different destination of which the *confusio* flows. But when the succession of these rights happens again to divide in two the obligation or right which lay for a while sunk or dormant *confusione* revives and recovers its first force." In support of these propositions he quotes two cases, both of which seem to me satisfactorily to determine this matter. The first is the case of *Gordon*¹ in Morison, 11,164. The rubric of that case is:—"A creditor in debts affecting an entailed estate succeeding as heir of entail in that estate the debts are not extinguished *confusione*." The circumstances of that case are rather involved, and I do not take up your Lordship's time by going through them, because I can do so more clearly in the other case which he quotes. The case is that of *Irvine*² in Morison, 3042:—"In the year 1683 Alexander Irvine of Drum made a tailzie of his estate in favour of himself and the heirs-male of his body, which failing, to certain other heirs-male named. In the year 1687 the said Alexander Irvine executed a bond of provision for the sum of £80,000 Scots to his second son Charles, and the heirs-male of his body, which failing, to the other heirs-male of the persons nominated and designed by him to succeed in his lands and heritages. The heirs-male of the entailer's body having failed, the succession, both of the entailed estate and of the bond, devolved upon Alexander Irvine, of Murthill, who was accordingly served heir of tailzie to the said estate, but did not expedite any service to the said bond of provision. After his decease his son and apparent heir granted a bond for £10,000 sterling to a trustee, who there-

¹ *Gordon v. Maitland*, Dec. 1, 1757, M. 11,161, at p. 11,164.

² *Cuming v. Irvine*, Jan. 4, 1726, M. 3042.

upon charged him to enter heir of provision to Charles, in order to make up a title by adjudication to the £80,000 bond; and having thus established the bond in his person he again charged the apparent heir of tailzie in the estate of Drum, and obtained an adjudication against the estate for the said debt of £80,000. In a process at the trustee's instance against the heirs of entail concluding that the bond of £80,000 Scots was a subsisting debt and did effectually burden the entailed estate of Drum, the Lords found that the heir-male of Murthill being served heir to the estate of Drum, his service did not state him in the right to the £80,000 bond so as to operate a confusion in his person; and that this Drum being charged to enter heir in special to Charles and adjudication having thereon followed, did not operate a confusion of debtor and creditor in Drum's person; and therefore found that the said bond of provision is not extinguished, but is still a subsisting debt upon the estate of Drum."

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That, I think, brings out perfectly clearly that Mr Erskine's doctrine is quite right; whether confusion will take place or not depends upon the identity of the destination. For if *confusio* took place automatically the moment that there was a *concursum* debtor and creditor in the same person then there must have been *confusio* the moment that the heir of entail entered as heir of provision to the £80,000 bond. Here obviously, there was no identity of destination, because on the creditor's side of the bond the destination was to a series of heirs of Miss Margaret Blackburn, while on the debtor's side of the bond the destination was to a series of heirs of tailzie in a certain estate of land. Although it is quite true, as we now know, that these lands, being held under a bad entail, were held in fee-simple, yet it is trite law that until the destination is evacuated the destination goes on. It seems to me, therefore, there never was *ipso jure* confusion, which alone would be useful for Miss Marindin's argument, because there is the necessary splitting again by the operation of Sir James's disposition and settlement. Although on a somewhat different line of reasoning, I have come to the conclusion that the Lord Ordinary's judgment is quite right, and ought to be affirmed.

LORD M'LAREN.—I am of the same opinion, on the same grounds.

LORD KINNAR.—I also agree with your Lordship, for the same reasons.

LORD PEARSON was absent.

THE COURT adhered.

MACKENZIE & BLACK, W.S.—MURRAY, BEITH, & MURRAY, W.S.—
HOB. J. M. BALFOUR, W.S.—DAVID CAMPBELL, S.S.C.—Agents.

J. M. & J. H. ROBERTSON AND OTHERS, Pursuers (Respondents).— No. 134.
Wark—T. G. Robertson.

BEATSON, M'LEOD, & COMPANY, LIMITED, Defenders (Reclaimers).— June 6, 1908.
Morison, K.C.—Mair.

Agent and Principal—Liability of Principal to third parties—Special Agency—Company Promotion—Agent employed for amalgamation of companies—Power to involve principal's credit for law-agent's account.—A company employed a chartered accountant to carry through an amalgamation of

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June 6, 1908. their company with another, and subsequently paid him £200 to cover his charges, expenses, and outlays. Without special instructions from the principals, and without their knowledge, he employed a firm of law-agents to prepare a certain deed, and informed them that it was on his principals' behalf. On his failing to pay the law-agents' account, they brought an action against the principals for the amount of that account. The defenders denied having employed the pursuers.

Held that the agent had no authority from the defenders to employ the pursuers, and defenders *assolized*.

1st DIVISION. ON 29th January 1907 Messrs J. M. & J. H. Robertson, writers, Glasgow, and the individual partners thereof, brought an action against Messrs Beatson, M'Leod, & Company, Limited, wine merchants, Kirkcaldy, concluding for payment of (first) the sum of £19, 12s. 2d., and (second) the sum of £11, 1s. 1d., being the amount of their business account for work done in connection with the amalgamation of the defenders' firm with the firm of John Taylor & Company, Limited, wine merchants, Glasgow.

The pursuers averred:—"In or prior to the month of July 1902 the defenders agreed to acquire the business of John Taylor & Company, Glasgow, Limited. The negotiations were conducted by J. Moore Fulton, C.A., Glasgow, and through him the pursuers were employed to prepare the necessary agreement on behalf of both parties. Said agreement was in the knowledge of the defenders duly prepared by the pursuers, and was executed on 22d and 23d July 1902. A copy of the said agreement is produced. It provides that the whole expenses in connection with the preparation and implementation of the agreement should be borne by the defenders, and under it Mr Fulton was appointed liquidator for the winding-up of the said John Taylor & Company, Glasgow, Limited. The pursuers' business account in connection with the matter amounted to £30, 13s. 3d., of which £19, 12s. 2d. were their fees, being the sum first sued for, and £11, 1s. 1d. were outlays, being the sum second concluded for."

In answer the defenders averred:—"In June or July 1902 a proposal was made to the defenders by Mr J. Moore Fulton, C.A., Glasgow, to ascertain if the defenders' company would take over the business of John Taylor & Company, Glasgow, Limited. The defenders agreed to the proposals which were made, and Mr Fulton carried through the amalgamation. To remunerate Mr Fulton for his trouble in carrying out the said amalgamation the defenders agreed to pay him a fee of £200 to cover all charges, expenses, and outlays against them in connection with the said amalgamation. The defenders never employed the pursuers to do any legal work in connection with the said amalgamation or on their behalf, and the whole of the legal work charged for in said business account was performed by the pursuers without any instructions from the defenders. It was only on 25th April 1905 that the defenders learnt for the first time that the foresaid agreement had been prepared by the pursuers."

The pursuers pleaded, *inter alia*;—(1) The defenders having employed the pursuers to do the work and make the outlays charged for, decree should be granted in terms of the conclusions of the summons.

The defenders pleaded;—(3) The defenders never having employed pursuers to do the work or make the disbursements charged for, *et separatim*, the pursuers having no *jus quæsitum* in respect of said

agreement to make defenders liable for said sums, decree of absolvitor June 6, 1908. should be pronounced.

A proof was allowed and led. The import of the evidence, so far as bearing on the decision, will be found set forth in the opinions of the Lord Ordinary and of the Lord President.

On 6th June 1907 the Lord Ordinary (Johnston) pronounced an interlocutor decerning against the defenders for the amounts sued for.*

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* "OPINION.—I do not think it necessary that I should take time to consider this case, because it appears to me to be a fairly simple one. I agree with counsel on both sides in regretting the necessity that has caused it, because it is clear that one or other of the parties to it must suffer for what I cannot characterise as other than the fraud of the agent who came between them. Mr Fulton's position it is hardly possible to understand. But that he has defrauded one or both of the parties is perfectly clear. That leaves it, therefore, necessary to determine the legal rights of the parties irrespective of any question of hardship, because hardship must fall on one or other of them.

"The circumstances out of which the case arose are these: Messrs Beatson, M'Leod, & Company, of Kirkcaldy, are wine merchants, carrying on a limited liability business in Kirkcaldy. Mr Fulton was their auditor. Messrs John Taylor & Company, also a limited company, and carrying on a business something of the same character in Glasgow, were, apparently, not very prosperous; and, inasmuch as Mr Fulton was also their auditor, and, therefore, knew the circumstances of both businesses, he, very likely in concert with the managing director of Taylor & Company, brought before Beatson, M'Leod, & Company, a proposal that they should acquire the business of Taylor & Company. That resulted in certain negotiations, the details of which are not very clearly proved or necessary to be proved, but they ended in heads of an agreement being adjusted, which are No. 16 of process. These are not dated, but we are told that they were prepared by Mr Fulton, in conjunction with the managing director of Taylor & Company, and that they embody the heads on which the managing parties in both these Companies were prepared to entertain the suggested acquisition, which resulted, in course, in the amalgamation of the two Companies. These two Companies were both private limited Companies, and I think it is pretty clearly to be inferred that the real interest in them was in the managing officials. Matters having got this length, it is admitted by Mr Beatson that this is what ensued: Mr Fulton as, whatever you like to call him, general agent, or middleman, or broker, who brought the parties together, who had been a party to the adjusting of the above-mentioned heads of agreement, was told to carry through the amalgamation, and he did so. He became, as it seems to me, the general agent of both these limited Companies, and he occupied what I may call, to borrow a phrase from conveyancing, the position of a general special agent. He had a special mandate to carry through this particular piece of business, which was the amalgamation of these two small private limited Companies, but he had a general mandate to do what was necessary for the purpose.

"Now, if it had not been for a term in the agreement, I think that Messrs Robertson, who did some work under Mr Fulton's employment, would have had to sue both parties to the amalgamation. But I think I have already said that the Court never favours circuitry in litigation, and that inasmuch as Messrs Beatson, M'Leod, & Company have, by a term of the agreement, undertaken to pay the whole expenses of the amalgamation, it is quite proper to allow the action to proceed against Messrs Beatson, M'Leod, & Company alone, without calling Messrs Taylor & Company, to whom they are liable in relief.

"Now, the position of an agent who is appointed for a special purpose,

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The defenders reclaimed, and the case was heard on 19th February 1908.

Argued for the defenders and reclaimers;—Fulton had not transacted here as the agent of the defenders. He had been employed to do certain work himself, and his contract with the defenders was one of "hire," not of "mandate." There was no proof that he had received any special authority to employ a law-agent, nor could such authority be implied from his relationship with the defenders. Even if he were in any sense an agent he was certainly not a general agent.¹ Even a general agent had no implied authority to pledge his principal's credit to a law-agent. If he were a special agent it was for company promotion only, and that did not cover an implied authority to employ law-agents at his principal's expense.

Argued for pursuers and respondents;—(1) The nature of Fulton's employment was such as to imply authority to bind his principals

without terms or conditions qualifying the appointment, appears to me to be perfectly soundly stated in 'Evans on Principal and Agent,' in the passage which was referred to. I think, unless there is any special restriction in his appointment, that he has the powers necessarily incident to proper performance of the business that is confided to him, and, as Mr Evans says, 'Amongst such powers are those which enable the agent to employ all the necessary and usual means of executing the principal authority with effect.' Now, I ask first, what was the thing he was set to do? To carry out the amalgamation of the two Companies. That is not just such a simple thing as Mr Beatson, the managing director of one of these Companies, seems to have thought. First of all, in ordinary practice, and, I think, necessary practice, when you are dealing with companies, one of which is to be wound up and the other has to issue shares in payment to the first and so on, a formal written agreement is required. I do not see how the transaction can be carried out otherwise. *Inter alia*, I do not see how the proper stamp-duty can be adjusted. And, moreover, it involves the keeping the two Companies straight in matters of company law in carrying out the details of such a transaction. I do not think there can be a better example of the necessity than the way in which the managers of Messrs Beatson, M'Leod, & Company, have carried through this matter, so far as they acted by themselves and without taking proper advice. The resolutions which they proposed to their shareholders are totally inconsistent with the situation which they were attempting to create, and shew that they were ignorant of the methods of company amalgamation, and lead to the conclusion that they would have done well to have put themselves more instead of less under legal guidance.

"Mr Beatson's position as secretary would warrant one to suppose that he was sufficiently familiar with company law to enable him to carry through such a matter. But it is quite evident that, in a small company such as this, the secretary and managing director may be a practical man, carrying on the business efficiently, and yet knowing little or nothing about company law. Accordingly, there is a discrepancy between the draft heads of agreement, No. 16 of process, the final agreement of which No. 6 is a copy, and the resolutions of the Company, which ought to have been resolutions approving of a provisional agreement, but which, instead of that, are resolutions offering the terms contained in an agreement which the directors had already signed on the same day as a final agreement.

"Well, now, if it was natural and proper that a written agreement should be entered into, and that what had to be done in fulfilment of that agreement should be carried out in proper formal order, is it the business of the

¹ Evans on Principal and Agent, p. 122.

for this account. He was employed in company promotion, which June 6, 1908.
involved, or might involve, the necessity of legal assistance, and not J. M. & J. H.
being a law-agent himself he necessarily had implied authority to Robertson v.
employ a law-agent if required. His employment covered an implied Beatson,
mandate to do all that was reasonable and necessary to carry through M'Leod, &
the amalgamation.¹ It was a case of an agent acting for a disclosed Co., Limited.
principal within the scope of his authority. (2) In any event, the
defenders had adopted the employment of the pursuers by making
use of the agreement prepared by them and bearing their name. By
adoption any deficiency in the original authority of the agent was
made good.²

At advising on 6th June 1908,—

LORD PRESIDENT.—This is an action by a firm of Glasgow solicitors against
a business firm, Beatson, M'Leod, & Company, Limited, for a law account

company promoter—if you choose to call him so—to carry it through at his
own hand, without any legal advice? I think it is not. I think that what
was committed to him in the carrying out of this amalgamation justified and
necessitated that, at the proper point, he should take the proper assistance.
I think that in applying to Messrs Robertson's firm he did nothing it was
outwith his duty to do, and that if, in carrying out the amalgamation he
had—either in the agreement or in the necessary subsequent steps—made
mistakes, he would have been responsible for not having got the proper
advice. Messrs Robertson's position is perfectly above board in this matter.
Mr Fulton applied to them, first of all, to put the heads of agreement into
a draft agreement; and, further, to put the adjusted draft into an extended
agreement, which they did; and, moreover, to attend to the matter of the
stamp-duty. I do not think that a company promoter would be justified in
adjusting the stamp-duty on the transfer of its business by one company to
another without legal advice. That is perhaps the most important matter
that Mr G. W. T. Robertson, of the firm of Messrs J. M. & J. H. Robertson,
had to do. But I should gather that he had further to give Mr Fulton, if I
may judge of his capacity from his appearance in the box—a good deal of
further assistance.

“Now, Mr Fulton undoubtedly employed him. Mr Fulton's shifty con-
duct afterwards may lead to surmising as to what was in Mr Fulton's mind
when he did so. But if the mandate to employ was given him, the shifty
nature of Mr Fulton's mind can in no way affect the rights of the person
employed. The person employed did the work, and the work done was
brought under the notice of Messrs Beatson, M'Leod, & Company, because
it is impossible for Mr Beatson to say that the agreement—of which a copy
is No. 6 of process—bearing Messrs Robertson's name, and accompanied by
the usual schedule for execution, was so like the draft heads of agreement that
he could suppose that the one was just a transcript of the other. There are
changes; and, although it was not a difficult deed to draw, it is a deed
which is put into legal form, and there is a considerable difference between
it and the draft heads. The deed is signed, and the deed is acted upon, and
it has been so adopted that, at the present moment, it must be taken to be
a binding agreement between the two companies.

“If that is the case, then let us look at Mr Fulton's conduct subsequently.
After a bit, he gets £200 to cover his charges, expenses, and outlays. That
£200 unquestionably covered Messrs Robertson's account. But, then, that
is behind the back of Messrs Robertson, and the fact that Mr Fulton has

¹ Bell's Prin. 225; Black v. Cornelius, Jan. 24, 1879, 6 R. 581; Robertson v. Foulds, Feb. 9, 1860, 22 D. 714.

² Bell's Prin. 539; Robertson v. Foulds, 22 D. 714.

June 6, 1908. of £33; and it is a case in which it is impossible not to let drop some unavailing judicial regrets that—I will not say the time of the Court has been taken up—but that so much expense should be wasted in such a case. The truth of the matter is that the person who is really due this £33 is not the defender, while on the other hand, the pursuers are entitled to their money. The real debtor, who is a certain gentleman whom we have not before us, has long ago been paid the money which ought to have been paid over by him to the pursuers. Therefore, it being one of these unfortunate cases where a loss has got to be put upon innocent persons, one cannot help regretting that it did not occur to some one that the apportionment of £16, 10s. to each of the parties would have saved a great deal of money in the long run. But thus is the law enriched, and the reporters are saved from idleness.

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The decision of the case will depend upon whether there was or was not employment. It had its origin in the fact that Beatson, M'Leod, & Company, Limited, wished to effect an amalgamation with a firm called Taylor & Company, and in order to bring about this amalgamation they employed a person of the name of Fulton, who professed himself skilled in those things. The amalgamation was brought about, and in the course of dealing with it Fulton, who did not think himself equal to drawing one of the deeds which was necessary, went to the present pursuers, Messrs Robertson, writers, Glasgow, and there is no question that Messrs Robertson executed the work in perfect good faith, and with perfect ability and skill; the question is on whose credit did they do it? There is not practically

himself been paid, and has to a certain extent misapplied the payment to him in respect that he has not used it to pay charges in connection with this amalgamation, does not in any way preclude Messrs Robertson from going direct to the disclosed principal with their accounts. It appears to me Mr Fulton began by deceiving Messrs Robertson by leading them to assume that the amalgamation was hanging fire, and that the agreement, although signed, was not being carried through; and then, taking advantage of this deception to lead them to offer to take their mere outlays; and then when they had done so, he went to Messrs Beatson, M'Leod, & Company and got from them a cheque to pay Messrs Robertson's outlays, which cheque he never transmitted to Messrs Robertson, but appropriated to his own use. Messrs Robertson have stood for four or five years without obtaining any remuneration for their services, and it seems to me that, in such circumstances, they are entitled to go for payment of their accounts direct against Mr Fulton's principals.

"It is to be regretted that Messrs Beatson, M'Leod, & Company should be called upon to pay, if I may say so, three times over. They have already paid £200, which ought to have covered this claim; they have paid the ten guineas which was remitted by them for the purpose of paying Messrs Robertson's outlays, and they have now to pay again their whole account. But, I am afraid, the results of Mr Fulton's fraud must fall somewhere, and, in my opinion, the law requires that they should fall upon Messrs Beatson, M'Leod, & Company.

"In the matter of expenses, of course, Messrs Robertson must have their expenses. I admit they were quite entitled to come here for judgment; but I think that the case was one which might have properly been disposed of otherwise, and when I see the account of their expenses as taxed, I may consider it proper to make some modification. I shall find them entitled to expenses as taxed, reserving the question of modification."

any doubt about this. One might take it either from the testimony of the June 8, 1908. one side or the other. So far as the pursuers are concerned, Mr Robertson, J. M. & J. H. the pursuer himself, says,—“I never heard of Beatson, M'Leod, & Com- Robertson v. pany, Limited, or Taylor & Company, before the date Fulton came and told Beatson, me to do the work. I have never met any of the directors of Beatson, M'Leod, & Co., Limited. M'Leod, & Company, Limited.” Of course I entirely believe Mr Robertson Ld. President. that Fulton told him that he was to do the work for Beatson, M'Leod, & Company, Limited; but then, of course, that does not prove authority. In the same way, if you take the testimony of Mr Beatson, the defender, he says Mr Fulton never told him that he was going to employ a firm of lawyers in Glasgow. “I never heard that a firm of lawyers had been instructed till some years afterwards, and I never knew there was such a firm.”

The Lord Ordinary has found the defenders liable although he agrees that Fulton had long ago been paid, because he considered that he had the power to do such things as were necessary for his agency. As regards that general proposition there is no doubt; but I do not think that the business of arranging an amalgamation of companies or company promoting is so well defined that it necessarily carries with it a right to involve the principal's credit with a law-agent. I think that such a business must be on very much more regularly known lines to admit of any such general proposition. The sort of class of case where right to employ a law-agent would be necessarily understood is well illustrated by one of those cases which is in the books, where it was held that a person who told an Edinburgh agent to prosecute an appeal before the House of Lords must be presumed to know that the Edinburgh agent could only do it by employing a Parliamentary solicitor; and even although the client had never any direct relations with the Parliamentary solicitor he must pay the Parliamentary solicitor's bill. That I quite understand, because there is only one way of doing that; but when you come to arrange about amalgamations of companies, there are many firms of accountants who do such work who would carry through the whole transaction themselves. There are many persons—I am not going to mention names—who have been before your Lordships in Court who are capable of conducting large amalgamations, and who would never think of employing a law-agent. To say that the defenders were to take the measure of Mr Fulton and to see—as his Lordship said he could see—that that gentleman was not very clever—and that they must necessarily have said to themselves, “we are giving him authority to pledge our credit with any law-agent to whom he chooses to go,” is a proposition which I cannot bring myself to face.

The only other point is that there is written on the back of the deed, in the ordinary way, the name of a solicitor, and that is the solicitor who was employed. That is rather a slender ground for liability. It is rather difficult to be quite certain even that Beatson, M'Leod, & Company, Limited, ever read the name of the solicitor on the back of the deed. Even supposing they did, that did not necessarily shew that they had pledged their credit. According to their idea Fulton was taking a slump payment to see them through, and all I think the name on the back necessarily brought to their minds was that Fulton, for his own purposes, had gone to

June 6, 1908. a law-agent and employed him. That does not seem to put the matter any further. I have come to the conclusion that I cannot agree with the Lord Ordinary, and I think that the pursuers—there is no question that they did the work—ought to have sued the man who directly employed them, and not the present defenders, who never employed them at all.

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LORD M'LAREN.—If this had been the ordinary case of the promotion of a company, the law is perfectly well settled. Wherever, in order to establish a new commercial undertaking, it is necessary that law-agents, engineers, or other experts, should be employed by the promoters, these persons have a claim against the promoters who are liable to them, and against no other person unless that person can be shewn to have taken over the obligation. It is not unusual in such cases that the company undertakes to relieve the promoters of their obligation, and to pay the preliminary expenses. I suppose there are few companies that do not give some undertaking of the kind; but supposing that they do not choose to do it, the experts employed by the promoters have no claim except against the person who employed them. I do not think the principle is varied by the fact that in this case the object proposed was an amalgamation of two existing companies in order to form a third; because the question still remains, who employed this law-agent? I cannot see that he has any claim against either of the companies unless they knew of his employment and sanctioned it, or agreed that the company was to be responsible for his fees. Without entering into the question of whether money was given to Fulton to provide for the payment, it is enough for the decision of this case that no direct employment of the pursuers by either of the companies is made out, and therefore no action can lie against either at the instance of the pursuers.

LORD KINNEAR.—I concur with your Lordships that Mr Fulton had no authority from the defenders to employ the pursuers' firm, and it follows that the pursuers have no action against the defenders.

LORD PEARSON was absent.

THE COURT recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

J. & J. GALLETLY, S.S.C.—JAMES AYTON, S.S.C.—Agents.

No. 135.

MRS DORA ALEXANDER OR FINBURGH, Pursuer (Respondent).—*Dickson, K.C.—Murray.*

June 9, 1908.

MOSS' EMPIRES, LIMITED, Defenders (Reclaimers).—*Hunter, K.C.—Macmillan.*

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DAVID FINBURGH, Pursuer (Respondent).—*Dickson, K.C.—Murray.*
MOSS' EMPIRES, LIMITED, Defenders (Reclaimers).—*Hunter, K.C.—Macmillan.*

Reparation—Slander—Master and Servant—Liability of employer for slander uttered by servant—Company—Malice.—Held that an employer is liable for a verbal slander uttered by his servant in the course of the servant's employment and for the benefit of the employer.

So held where the employer was a limited liability company.

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Principle of *Barwick v. English Joint Stock Bank*, 1867, L. R., 2 Ex. 259, applied.

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Citizens Life Assurance Co. v. Brown, L. R., [1904] A. C., 423, followed.

Reparation—Slander—Privilege—Malice—Issue.—In an action of damages for slander brought by a married woman against a limited liability company as the owners of a theatre, the pursuer averred that while she was witnessing a performance in the defenders' theatre the defenders' servants falsely stated within the hearing of her husband and others that she was a notorious prostitute who had been thrown out of the theatre two weeks previously for being drunk and disorderly, and that she must leave the theatre; and that the statements complained of were made by the defenders' servants in the course of their service and for the defenders' benefit. The pursuer referred for its terms to a bye-law, made under statutory authority, founded on by the defenders which was applicable to the theatre, and which provided that the licensed manager should not permit men or women of bad fame to enter the theatre.

Held (1) (*aff. judgment of Lord Mackenzie*) that the pursuer's averments were relevant, and (2) (*rev. judgment of Lord Mackenzie*) that the occasion was privileged and that malice must be inserted in the issue.

Reparation—Slander—Innuendo—Master and Servant—Liability of master for slander uttered by servant.—In an action of damages for slander brought by a married man against a limited liability company, as the owners of a theatre, the pursuer averred that while he and his wife were witnessing a performance in the defenders' theatre the under-manager falsely stated that the pursuer's wife was a bad character and must leave the theatre, that on the pursuer explaining that the lady was his wife, the under-manager replied that "he had heard that story before," and that the under-manager subsequently falsely stated to the manager of the theatre that the pursuer's wife was a notorious prostitute who had two weeks previously been thrown out of the theatre for being drunk and disorderly. The pursuer further averred that the statements complained of were made of and concerning him, and represented that he was a person of loose and immoral habits and character, that he was associating with a notorious prostitute of drunken and disorderly habits, and was attempting by deliberate falsehood to pass her off as his wife; that the management and conduct of the theatre were left in the hands of the manager and under-manager, and that the statements complained of were made by the under-manager in the course of his employment and for the benefit of the defenders. The pursuer referred to a bye-law, made under statutory authority, which was applicable to the theatre, and which provided that the licensed manager should not permit men or women of bad fame to enter the theatre.

Held (*rev. judgment of Lord Mackenzie*) that the pursuer's averments were irrelevant—*per* Lord Stormonth-Darling and Lord Low, on the ground that it was not relevantly averred that the statements complained of, so far as relating to the husband and not merely to the wife, were uttered by the defenders' servant in the course of his employment; and *per* Lord Ardwall, on the ground that the statements complained of did not constitute a slander on the pursuer.

MRS DORA ALEXANDER OR FINBURGH, wife of and residing with David Finburgh, Maplewell House, New Walk, Leicester, brought an action of damages for slander against Moss' Empires, Limited, owners and managers of the Empire Theatre of Varieties, Sauchiehall Street, Glasgow.

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David Finburgh also brought an action of damages for slander against Moss' Empires, Limited.

Mrs Finburgh averred that in November 1907 she was on a visit to Glasgow with her husband, that on 13th November 1907 she and

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her husband and a party of friends arranged to proceed to the defenders' Empire Theatre, and that in addition to the pursuer and her husband the party consisted of Joseph Lipscher, Paris, and John Franklin, Liverpool.

Mrs Finburgh further averred :—(Cond. 3) " While the party were seated in their box, and shortly after the performance commenced, . . . one of the defenders' attendants in uniform entered the box, scrutinised the occupants, and then left. A few minutes after the defenders' under-manager entered the box accompanied by said attendant. The said under-manager then said, pointing at and referring to the pursuer, ' That woman is a bad character, and must leave this theatre.' The pursuer's husband explained that the pursuer was his wife. The under-manager replied that ' he had heard that story before,' and that the pursuer must leave at once. Said statements were all made in the presence and hearing of the pursuer, her husband, his friends, and the theatre attendants. The pursuer was very much shocked at the charge made against her, and her husband went out of the box and insisted on the defenders' manager being summoned.

. . . The manager questioned the under-manager and the attendant on the subject, and they both stated that the pursuer was a notorious prostitute, and had been thrown out of the theatre two weeks before for being drunk and disorderly. These statements were made in the presence and hearing of the pursuer's husband, the said Joseph Lipscher, and the theatre manager and attendants. On hearing this said statement the manager said to the pursuer's husband, ' That is quite enough, the woman must leave at once,' meaning thereby that the pursuer was a notorious prostitute, and had been thrown out of the theatre two weeks before for being drunk and disorderly, that she was a bad character, and unfit to be allowed to remain in a respectable theatre. The pursuer and her husband and friends thereupon left the theatre. With reference to the explanations in answer it is admitted that the defenders' manager subsequently explained that a mistake had been made, and tendered an apology. *Quoad ultra* the explanations in answer are denied, in so far as not coinciding herewith, under reference to the bye-laws * mentioned for their terms."

(Cond. 4) " The statements above condescended on were made of and concerning the pursuer, and are false and calumnious. . . " (Cond. 5)

" The defenders are a limited company, and the whole management and conduct of the said theatre is entirely left to the said manager, under-manager, and attendants, who are charged by the defenders with the whole conduct of the business. The said false and calumnious statements were of and concerning the pursuer, and were made by the defenders' said manager, under-manager, and attendant in the course of their service with the defenders and for the defenders' benefit, and were made and persisted in most recklessly, pertinaciously, and maliciously."

The defenders referred to the Glasgow Bye-law, No. 25, quoted *infra*, and averred :—(Ans. 3) " . . . The defenders' servants

* By No. 25 of the bye-laws and regulations made by the Magistrates of the city and royal burgh of Glasgow in pursuance of the powers conferred upon them by the Glasgow Police (Further Powers) Act, 1892, and duly confirmed by the Sheriff of Lanarkshire, for the maintenance of order in the theatres in the said city and royal burgh, it is provided, *inter alia*, that the licensed manager shall not, by himself or his servants, knowingly permit or suffer men or women of bad fame, or dissolute boys or girls, to enter any theatre as spectators or in any other capacity.

acted throughout in the *bona fide* exercise of their duty under the said bye-law and with the utmost discretion; and no member of the public present in the theatre was in any way aware of the incident.”

Mr Finburgh in the action at his instance, after setting forth what occurred as averred in the action at the instance of his wife, averred:— (Cond. 4) “The statements above condescended on were false and defamatory of the pursuer as well as of his wife, and falsely and calumniously represented, and were intended to represent, that the pursuer was a person of loose and immoral habits and character, that he was associating with a notorious prostitute of drunken and disorderly habits, and that he was attempting by deliberate falsehood to pass her off as his wife.” He also made averments in similar terms to those contained in article 5 of the condescendence in the action at the instance of his wife.

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The defenders pleaded in both actions;—(1) The pursuer’s averments being irrelevant, and insufficient to support the conclusion of the summons, the action should be dismissed. (2) The defenders not having slandered the pursuer, they should be assoilzied. (4) *Esto* that the servants of the defenders used slanderous expressions towards the pursuer, they acted, in so doing, outwith the scope of their employment as servants of the defenders; and the latter are not responsible therefor. (5) The defenders’ servants having acted *in bona fide* and with probable cause in the discharge of their duty under the bye-laws libelled, and having been privileged in so doing, the defenders should be assoilzied.

On 27th February 1908 the Lord Ordinary (Mackenzie) approved of the following issues:—

In Mrs Finburgh’s action.—“(1) Whether, on or about 13th November 1907, in the Empire Theatre of Varieties, Sauchiehall Street, Glasgow, owned and managed by the defenders, the defenders, by their under-manager, in the presence and hearing of pursuer’s husband, David Finburgh, residing at Maplewell House, New Walk, Leicester, Joseph Lipscher, . . . Paris, and John Franklin, . . . Liverpool, or one or more of them, falsely and calumniously stated of and concerning the pursuer that she was a bad character and must leave the theatre, or used words of like import and effect, to the loss, injury, and damage of the pursuer? (2) Whether, on or about 13th November 1907, in the Empire Theatre of Varieties, Sauchiehall Street, Glasgow, owned and managed by the defenders, the defenders, by their under-manager, and one of their attendants at said theatre, or one or other of them, in the presence and hearing of David Finburgh, residing at Maplewell House, New Walk, Leicester, Joseph Lipscher . . . Paris, or one or other of them, falsely and calumniously stated of and concerning the pursuer that she was a prostitute and had been put out of the theatre shortly before for being drunk and disorderly; whether on hearing said statement the defenders’ manager said ‘That is quite enough, the woman must leave at once,’ or words of like import and effect, and whether the defenders, by their said manager, thereby falsely and calumniously represented, or intended to represent, that the pursuer was a prostitute and unfit to be allowed to remain in a respectable theatre, to the loss, injury, and damage of the pursuer?” *

* “OPINION.—The question raised in this action is whether the defenders, a limited company, are liable for verbal slander alleged to have been uttered in one of their theatres by the under-manager and an attendant in

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In Mr Finburgh's action.—"Whether on or about 13th November 1907, in the Empire Theatre of Varieties, Sauchiehall Street, Glasgow, owned and managed by the defenders, the defenders, by their under-manager, and one of their attendants at said theatre, or one or other of them, falsely and calumniously, in the presence and hearing of the pursuer, his wife, Mrs Dora Alexander or Finburgh, residing at Maplewell House, New Walk, Leicester, Joseph Lipscher . . . Paris, and John Franklin . . . Liverpool, or one or other of them,

the course of their service and for the defenders' benefit. The case therefore raises the point recently discussed in *Nicklas v. The New Popular Café Company, Limited*, 1908, 15 S. L. T. 735. An issue was there refused, because I was of opinion that it could not be said upon the averments that the defenders' servant was acting within the scope of her authority in using the language complained of. In *Eprile v. Caledonian Railway Company*, 6 S. L. T. 65, an issue was refused in similar circumstances by Lord Kincairney.

"I am, however, of opinion that if on record a pursuer sets forth that verbal slander was uttered by the servant of a company in such circumstances as to indicate that *prima facie* the uttering of the slander was an act of the company, he is then entitled to an issue in the form proposed in the present case, viz., whether the defenders by their servant uttered the slander complained of. It will then be for the jury to say whether the act complained of fell within the scope of the servant's employment, or whether it was one for which the defenders are not responsible.

"This conclusion seems to me to follow from what has been decided in Scotland as regards written slander. It has been held in *Ellis v. National Free Labour Association*, 7 F. 629, that the principle laid down by the Privy Council in *Citizens Life Assurance Company v. Brown*, 1904, A. C., 423, applies in Scotland. According to that a servant may write a slander involving liability on his master, just as he may commit any other act on which an action for reparation against his master can be founded. The question in such a case, as is pointed out by the Lord President, is just whether the servant in doing what is complained of was acting within the scope of his employment or not. If this be the question, then I am unable to see, in point of principle, why, if the servant is acting within the scope of his employment, the master should not be equally liable whether the slander be spoken or written. It is true that up to the present no case has occurred in which an issue has been granted in such circumstances. In *Nicklas* I stated I would be slow to grant one, having fully in view what was said in *Agnew v. British Legal Life Assurance Company, Limited*, 8 F. 422, that to open the door to liability for any slanderous language rashly used by anyone in the employment of another, or of a corporation, would be to open the door very wide indeed.

"The safeguard against this, in my opinion, is to make it incumbent upon the pursuer to set forth on record facts from which *prima facie* it may be inferred that the verbal slander complained of is a company act. The question accordingly in the present case is whether this has been done. It is to be observed that the employer who is sought to be made liable is a company, and not an individual. A company can only act and speak through its servants.

"I think the pursuer makes a strong case on her averments, which are these:—She is a married woman, who went with her husband and two friends to the defenders' theatre in Glasgow. A box was paid for and the party had taken their seats, when first a page-boy, and then one of the defenders' attendants in uniform, came and scrutinised them. Shortly afterwards the under-manager, accompanied by the same attendant, entered the box, and said, 'That woman is a bad character, and must leave the

stated that the pursuer's wife was a bad character and must leave the theatre, that she was a prostitute, and that she had been put out of the theatre two weeks before for being drunk and disorderly, or used words of like import and effect; whether the pursuer having explained that the lady was his wife, the defenders' said under-manager stated to the pursuer that he had heard that story before, or used words of like import and effect; and whether the defenders' manager on hearing said statements or some of them said, 'That is quite enough, the

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theatre.' The pursuer's husband explained that she was his wife, when the under-manager replied that 'he had heard that story before,' and that the pursuer must leave at once. Her husband then went out of the box, and insisted on the defenders' manager being summoned. When he came he questioned the under-manager and the attendant. They both stated that the pursuer was a notorious prostitute, and had been thrown out of the theatre two weeks before for being drunk and disorderly. On hearing this statement the manager said to the pursuer's husband, 'That is quite enough; the woman must leave at once.' The pursuer and her husband thereupon left the theatre. These are the pursuer's averments.

"The pursuer then avers in cond. 5 that the defenders are a limited company, and that the whole management and conduct of the theatre is entirely left to the manager, under-manager, and attendants, who are charged by the defenders with the whole conduct of the business; that the statements complained of were made by the defenders' manager, under-manager, and attendant, in the course of their service with the defenders and for the defenders' benefit, and were made and persisted in most recklessly, pertinaciously, and maliciously. I agree with the defenders' counsel that the averments in cond. 5 are not sufficient by themselves to entitle the pursuer to an issue. On a question of relevancy, however, it is permissible to look at the defenders' answer. In ans. 3 they explain that by the bye-laws made by the Magistrates of Glasgow for the maintenance of order in theatres in the city, which apply to the defenders' theatre, it is provided, *inter alia*, 'that the licensed manager shall not, by himself or by his servants, knowingly permit or suffer men or women of bad fame, or dissolute boys or girls, to enter any theatre as spectators or in any other capacity.' Then follows the defenders' explanation of what they say actually occurred, and they aver that 'the defenders' servants acted throughout in the *bona fide* exercise of their duty under the said bye-law, and with the utmost discretion; and no member of the public present in the theatre was in any way aware of the incident.' They no doubt deny that any slander was uttered, and say that if their servants did slander the pursuer, in doing so they acted outwith the scope of their employment.

"In my opinion the record discloses a *prima facie* case that it was the defenders who, by their servants, slandered the pursuer, and that the issues should be allowed in the terms proposed.

"At the discussion of the issues a motion was made by the pursuers' counsel that the case should be tried by a jury upon the record without issues, as though two issues are required there is only one wrong complained of. I think it better that the jury should have the issues. The defenders' counsel contended that if there was to be inquiry it should be by way of proof. The case, however, seems to be one for a jury.

"It was further maintained that the record shewed the case was one of privilege, and that therefore malice should be inserted in the issue. The case of *Buchanan v. Magistrates of Glasgow*, 7 F. 1001, was founded on. That, however, was a different case from the present. I do not consider a case of privilege is disclosed on the record, and am therefore of opinion that malice should not go into the issue.

"I shall accordingly approve of the issues proposed."

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woman must leave at once,' or words of the like import and effect; whether said statements falsely and calumniously represented, and were intended to represent, that the pursuer was associating with a prostitute, and that he was attempting by deliberate falsehood to pass her off as his wife, to the loss, injury, and damage of the pursuer?"*

The defenders reclaimed. The case was argued before the Second Division on 26th and 30th May and 2d June 1908.

Argued for the defenders and reclaimers;—(*Wife's Action*).—While an employer was liable for a libel written by a servant who was acting within the scope of his employment,¹ he was not liable for his servant's verbal slander. The Lord Ordinary seemed to have taken the view that the employer would be liable if special circumstances were averred shewing that the verbal slander was the act of the employer. That view was unworkable. The Court had always refused to allow an issue in actions founded on verbal slander by a servant,² even where the circumstances were such that an issue must have been allowed if the case had been one of libel.³ This distinction between libel and verbal slander was founded on expediency. It was reasonable that an employer should be responsible for a libel written by his servant, because a libel was a deliberate act of which a record remained. It was not reasonable that the employer should be responsible for words rashly uttered by a servant. The doctrine of *Barwick v. English Joint Stock Bank*⁴ was applicable to the case of libel, but it could not be applied to the case of verbal slander. (2) In any view, the occasion was privileged. The defenders owed a duty to the public at common law, and under the Glasgow bye-laws, to keep the theatre clear of undesirable characters. It was in the course of performing that duty that the defenders' employees uttered the words complained of. The case was one of *bona fide* error in the execution of a duty. Accordingly, if an issue were to be allowed at all malice must be inserted.⁵ (*Husband's Action*).—The action at the instance

* "OPINION.—In this case the general question as to the defenders' liability for verbal slander alleged to have been uttered by their servants is the same as that raised in the action at Mrs Finburgh's instance, and the averments are substantially the same. I therefore beg respectfully to refer to my opinion in that case.

"The issue proposed in this case is whether the statements made by the under-manager and attendant (which are set out in the issue) falsely and calumniously represented, and were intended to represent, that the pursuer was associating with a prostitute, and that he was attempting by deliberate falsehood to pass her off as his wife. This appears to me to raise a question of direct not indirect slander. The husband is not seeking damages because of the slander on his wife, but on account of the imputation on his own character.

"This, I think, entitles him to maintain an action, and, for the reasons given in the opinion referred to, I am of opinion he is entitled to sue the defenders.

"I shall accordingly approve of the issue proposed."

¹ *Ellis v. The National Free Labour Association*, 1905, 7 F. 629; *Citizens Life Assurance Company v. Brown*, L. R., [1904] A. C. 423.

² *Eprile v. Caledonian Railway Co.*, 1898, 6 S. L. T. 65; *Agnew v. British Legal Life Assurance Co., Limited*, 1906, 8 F. 422; *Nicklas v. The New Popular Café Co., Limited*, 1908, 15 S. L. T. 735.

³ *Cameron v. Yeats*, 1899, 1 F. 456.

⁴ 1867, L. R., 2 Ex. 259.

⁵ *Buchanan v. Corporation of Glasgow*, 1905, 7 F. 1001.

of the husband was irrelevant. The words complained of were uttered of and concerning the wife, and therefore could not be a slander on the husband. If the wife had been accompanied by a large party of friends, each of them would have been in the same position as the husband, and would have been equally entitled to bring an action against the defenders. Further, if there was a slander, it was not uttered in the course of the employment. The duty of the defenders' servants was to exclude undesirable characters. It was no part of their duty to turn out and slander the friends of undesirable characters.

Argued for the pursuers and respondents ;—(*Wife's Action*).—The maxim *qui facit per alium facit per se* applied to delicts as well as to contracts. An employer was liable for a wrong done by his servant provided the wrong was done in the course of the employment and for the benefit of the employer.¹ It could not be disputed that that principle applied to the case of libel by a servant.² There was no sound reason in principle, and there was no authority, for drawing a distinction between the case of libel and the case of verbal slander. In the cases cited by the defenders³ issues had been refused because the Court held that the slander averred was not uttered by the servant in the course of his employment. These cases were indirect authorities in favour of the pursuer, because, if an employer were not liable for his servant's verbal slander, that would have been a very simple ground of judgment. The Court had refused to adopt that ground of judgment, and the true inference was that it was not well founded in law. While, therefore, there was no case in which an issue had been allowed in respect of verbal slander by a servant, it appeared from the authorities that an action would lie provided it was well averred that in uttering the slander the servant was acting within the scope of his employment. There could be no doubt on that point in the present case. The fact that the defenders were a limited company was immaterial. The theory that a corporation could not be guilty of malice had been exploded.⁴ A company could sue⁴ and be sued⁵ in respect of slander. (2) The occasion was not privileged. While a statement made in the course of executing a duty was privileged, the duty must be a duty owed by the person making the statement to the person to whom the statement was made.⁶ Here the defenders' servants owed a duty to the defenders, but owed no duty to the pursuer. Further, the defenders' case of privilege was founded solely on the Glasgow bye-laws. These bye-laws were averred not by the pursuer but by the defenders. The pursuer's record did not disclose a case of privilege. Accordingly malice ought not to go into the issue. The ques-

¹ Beavan on Negligence, 3d ed., pp. 575, 579, 581; Barwick v. English Joint Stock Bank, 1867, L. R., 2 Ex. 259; Dyer v. Munday, L. R., [1895] 1 Q. B. 742.

² Citizens Life Assurance Co. v. Brown, L. R., [1904] A. C. 423.

³ *Supra*, p. 934, note 2.

⁴ M'Vean & Co. v. Blair, 1801, Hume, 609; Metropolitan Saloon Omnibus Co., Limited, v. Hawkins, 1859, 28 L. J. Ex. 201.

⁵ Gordon v. British and Foreign Metaline Co., 1886, 14 R. 75; British Legal Life Assurance and Loan Co., Limited, v. Pearl Life Assurance Co., Limited, 1887, 14 R. 818.

⁶ Auld v. Shairp, 1875, 2 R. 940, *per* Lord Justice-Clerk Moncreiff, at p. 946.

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tion should be left to be dealt with by the Judge at the trial.¹ *Husband's Action.*—The husband's action was relevant. A company was entitled to sue in respect of slander on its directors.² *A fortiori* a husband was entitled to sue in respect of a slander on his wife—the relation of husband and wife being the most intimate partnership known to the law. But the case did not rest solely on what was said of the wife. On the pursuer explaining that the lady was his wife, the defenders' manager refused to accept that explanation. Taken along with what had previously passed, that was tantamount to accusing the pursuer of having knowingly brought a notorious prostitute into the theatre, and of attempting to prevent her from being turned out by falsely asserting that she was his wife. That was plainly a slander.³ But it was not necessary for the pursuer at the present stage to shew that the words were actually used in that sense. The pursuer was entitled to an issue if the words used were capable of bearing that innuendo.⁴ The question whether the words were actually used in that sense was for the jury. The pursuer's argument did not involve the consequence that a third party in the company of the pursuer and his wife would have been entitled to sue the defenders. Such a third party would not have been in the position of being accused of having attempted to pass a notorious prostitute off as his wife. The essential element in the slander would thus have been wanting. It was clear that the slander was uttered in the course of the employment. In this matter the husband's action was in the same position as the wife's.

Counsel also referred to the undernoted authorities.⁵

At advising on 9th June 1908,—

Wife's Action.

LORD STORMONTH-DARLING.—This case raises in a pure form the general question whether a corporation can ever be liable for oral slander alleged to have been uttered by one of their servants in the course of his service and for their benefit. The novelty of the question consists in this, that so far as can be discovered, no concrete instance of such an action has ever been known either in England or Scotland. While this is so, it is quite settled by the Privy Council case of *Citizens Life Assurance Company, Limited, v. Brown*⁶ that the old legal theory that a corporation as such was incapable of malice is now exploded; and malice, as has been repeatedly laid down both here and in England, is of the essence of slander, whether the occasion be privileged or not. The only difference which the existence of privilege can make is that, if the occasion be *not* privileged, the law presumes malice from the defamatory character of the statement made; and, if it is privileged, the presumption of malice is displaced. It is further settled by the Privy Council case that, in questions where the master is sought to be made

¹ Cooper on Defamation, 2d ed. p. 189; Reid v. Coyle, 1892, 19 R. 775; Smyth v. Mackinnon, 1897, 24 R. 1086.

² North of Scotland Banking Co. v. Duncan, 1857, 19 D. 881.

³ Symmond v. Williamson, 1752, M. 3435.

⁴ Sexton v. Ritchie & Co., 1891, 18 R. (H. L.) 20.

⁵ Reid v. Outram & Co., 1852, 14 D. 577; Shepherd v. Elliot, 1895, 3 S. L. T. 115.

⁶ L. R., [1904] A. C. 423.

liable for written defamation by the servant, the question will depend on June 9, 1908. whether the servant was at the time of the defamation acting in the course of an employment which was authorised, and that even though the servant had no actual authority for the particular act complained of. For the Privy Council expressly approved and adopted (at p. 428) the words of Mr Justice Willes in the well-known case of *Barwick v. English Joint Stock Bank*.¹

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Now, this is the case of a very gross slander—nothing less than the charge, made in the presence of witnesses, against a young married woman of being a prostitute, and that the lady must leave the theatre at once. The pursuer says that this statement, uttered originally by the defenders' under-manager, being protested against by the lady's husband and insisted in by the under-manager, was confirmed in effect by the manager, who said,—“That is quite enough; the woman must leave at once.” It is true that within a short time the slanders were withdrawn and apologised for by the manager, but by that time the slanders had been uttered and repeated. Now, why should there be any difference in law, as respects liability of a master, between words spoken and words written by a servant? I acknowledge that the written words imply more deliberation, and inasmuch as *littera scripta manet*, are capable of more certainty. But that is only a question of evidence. I do not see why, as regards the question as to the servant being within the sphere of his employment, there should be any difference in principle between words spoken and words written, so long as the words proved to have been spoken are clearly slanderous in their nature. I take that to have been implied in the judgment of the Court in *Agnew's case*.² I admit that the Court must be satisfied that the spoken words were really slanderous, and that it may be more difficult, or even impossible, to hold that where the words were casual words, or words used rashly, or in *rixa*. Accordingly it must always require great caution to be exercised before an issue is allowed against an employer for words spoken by an employee. But here it is admitted by the defenders that it was the duty of their servant to exclude what is called “undesirable persons” from the theatre in the discharge of their functions both under the regulations made by the Magistrates of the city of Glasgow, and also (I should think) their duty at common law, for the maintenance of order. The pursuers undertake the *onus* of proving that such was their duty, and the Lord Ordinary by the issue which he has approved has allowed them an opportunity of doing so. I think his Lordship is right.

He is further of opinion that the record does not disclose a case of privilege, and therefore that malice should not be inserted in the issue. I agree that as a matter of ordinary practice malice will be inserted in the issue only where the pursuer's record discloses a case of privilege. But I am of opinion that, fairly read, the pursuer's record does disclose a case of privilege, for she refers for their terms to the bye-laws made by the Magistrates and confirmed by the Sheriff of Lanarkshire; and it is obvious that the whole case will turn on whether the admitted mistake of the theatre servants shewed such recklessness and disregard of consequences as to amount in law to malice. I accordingly think that we should vary the issue allowed by the

¹ 1867, L. R., 2 Exch. 259.

² 8 F. 422.

June 9, 1908. Lord Ordinary by inserting the words "and maliciously" after the word "calumniously" in each of the issues. There is no case, as there was in *Buchanan v. Magistrates of Glasgow*,¹ for requiring a special averment of facts and circumstances inferring malice apart from the circumstances in which the words were used.

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LORD LOW concurred.

LORD ARDWALL.—The defenders maintain that this action should be dismissed as irrelevant in respect that the slander averred was a verbal slander, and that employers are not liable for verbal slanders uttered by those in their employment. In support of this it was pointed out that in no reported case had a master or principal been held liable in damages in respect of the verbal slander of his servant or agent, and that to hold this action relevant would be extending the law of liability for slander to an undesirable and even dangerous extent. The question is accordingly one of general importance.

In the case of the *Citizens Life Assurance Company, Limited, v. Brown*,² in which an assurance company was sued for damages in respect of a slander contained in a circular issued by one of their agents, the jury returned a verdict for the plaintiffs, and the Privy Council declined to disturb their verdict. Accordingly, that case must be taken as settling that there are circumstances in which the principal will be liable for slanders uttered by an agent or servant in the course of his employment.

Now, if this be the case with regard to written slanders, I think there is no sound reason in principle why an employer should not be liable for slander spoken by his agent or servant. But in applying the principle of liability to any particular case, the greatest care must be taken to secure that a principal is not made liable for a slander uttered by a servant or agent unless it be made perfectly clear that the slander was uttered directly in the interests of the master's business and in the course of executing such business, and that the words or some of them complained of in any particular case were not merely the outcome of heated or hasty temper on the part of the servant, or spoken with a view to gratifying his own private spite or malice. As I said in the case of *Agnew v. The British Legal Life Assurance Company, Limited*,³—"I take it to be a sound rule that it is the person who utters or writes the defamatory matter who is alone responsible for it, and that it is only in very special circumstances that the principal may be held responsible for the language of his agent." Accordingly in that case and in the cases of *Nicklas*⁴ and *Eprile*⁵ quoted by the Lord Ordinary in his opinion, the pursuer was refused an issue. And not only must the words of the alleged slander be strictly scrutinised with the view of determining whether the expressions used were such that the principal can in fairness be held responsible for them, but it is incumbent on the pursuer in such action to set forth distinctly and specifically on record facts from which it may be inferred that the verbal slander complained of is a slander that should be held in law to be imputable to the principals so as to

¹ 7 F. 1001.

² [1904] A. C. 423.

³ 8 F. 422, at p. 425.

⁴ 1908, 15 S. L. T. 735.

⁵ 6 S. L. T. 65.

justify the issue that it was a slander uttered by them by or through their June 9, 1908.
servant.

I cannot doubt that the pursuer's record in the present case fulfils all the requirements I have been dealing with. They amount shortly to this, that the pursuer having gone with her husband and two friends to the defenders' theatre in Glasgow, and paid for a box, the defenders' under-manager and afterwards their manager, in the course of their employment, and in the supposed execution of their duty both to their employers and to the public of keeping the theatre free from bad characters, insisted on the pursuer leaving the theatre, on the ground, as they then stated, that the pursuer was a notorious prostitute, and had been thrown out of the theatre two weeks before for being drunk and disorderly. This, of course, arose entirely from a mistake, but two things are undoubted, first, that a very gross slander was uttered, and second, that it was uttered in the course of the slanderers' employment by the defenders, and in pursuance of the duty which they had to perform, and in the performance of which they must be held in law to have been acting with the authority and for the benefit of the defenders. I am accordingly of opinion that the pursuer is entitled to an issue.

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The next question is whether, on the pursuer's record, a case of privilege is disclosed requiring that the pursuer take an issue of malice. I am of opinion that such a case is disclosed. The place where the slander was uttered was a theatre, and under the Act 6 and 7 Victoria, chapter 68, it is provided that it shall not be lawful for any person to have a theatre without procuring a licence from the Lord Chamberlain or the Justices of the Peace, and there are careful provisions for the proper conduct of the theatre. Among others the Justices of the Peace of a district in which a theatre is opened are directed to make suitable rules for ensuring order and decency at the several theatres licensed by them within their jurisdiction, and by the Burgh Police (Scotland) Act, 1892, sections 395 and 396, additional provisions are made for theatres within burgh, and by section 399 the magistrates are empowered to make bye-laws for the suppression of riots and disorderly conduct in theatres, and similar provisions are inserted in the Glasgow Police Act. Now, these two first Acts are public Acts, while with regard to the Glasgow Police Act, which is referred to in answer 3 of the defenders' statement of facts, that also is an Act of which the Court has judicial knowledge, and in common with the other Acts it provides for the enactment of bye-laws for the decent and orderly conduct of theatres and places of public entertainment. I am therefore of opinion that when it is set forth on record by the pursuer that the incident on record happened in the Empire Theatre of Varieties in Sauchiehall Street, Glasgow, and that the expulsion of the pursuer and the giving of the reason for it which constitutes the slander, were the acts of those concerned with the management of the theatre, and were ostensibly and *ex facie* done and uttered for the purpose of preserving decency and order in the theatre, I think that a complete case of privilege is disclosed, and that the words complained of, however slanderous, were uttered by those who had a right and a duty to utter these words, supposing them to have been true. Not having been true, of course it exposes those who uttered them or their principals to an

June 9, 1908. action for slander, but that does not make the occasion less a privileged occasion, and therefore I am of opinion that the pursuer must take an issue of malice.

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The only other question is whether the pursuer is entitled on the record to an issue of malice, and without going into the details of her statements I may say that my opinion is that there are averments charging the defenders' servants with recklessness sufficient, if proved, to entitle a jury to infer malice, and that because it is a rule of law that where statements are made recklessly, without sufficient inquiry, and without ordinary and reasonable regard to the character of others, such words may be held to have been uttered maliciously.

Husband's Action.

LORD STORMONTH-DARLING.—The slander here complained of arises out of the same incident as forms the subject of the action at the instance of the pursuer's wife. So far as the pursuer's averments affect the wife, I do not doubt that the words used were calculated to aggravate the slander against her, and that the mere fact that these words are said to have been addressed to her husband instead of to herself, does not mend matters.

But the pursuer does not innuendo the words as affecting the lady. He complains on his own behalf that what was meant was to accuse him of associating with a prostitute, and that he was guilty of deliberate falsehood by attempting to pass her off as his wife. The Lord Ordinary has held that this entitles him to seek damages, and to seek them from the defenders for the imputation on his own character.

I cannot agree with his Lordship's conclusion. I doubt if the words are a slander at all against the husband; at all events they affected him merely obliquely (so to speak), and the obvious intention of the speaker was incidental to the charge against the wife. But I think more decidedly that the pursuer is not entitled to sue the master in respect of it. It is nowhere admitted by the defenders, as it is in the wife's action, that it was any part of the duty of the servants of the defenders to turn out of the theatre men who were in the company of prostitutes or men who were guilty of deliberate falsehood, and all the averments of the pursuer with regard to the duty of the servants have reference to the lady alone. I think the innuendo is too far-fetched to be reasonably admissible. I am therefore in favour of disallowing the husband's issue and dismissing the action.

LORD LOW concurred.

LORD ARDWALL.—I also am of opinion that the issue in this case should be disallowed.

The averments of the pursuer, though they mix up the accusation made against his wife with the alleged accusation made against him on the part of the defenders' servants, really resolve, when analysed, into two separate and distinct complaints. The one is that his wife was falsely and calumniously described as a woman of bad character. The other is that when he attempted to shield her by saying that she was his wife, he was told in so many words that that was a lie. I can find nothing else in the case, and

the joining together of the two things cannot make the pursuer's case better June 9, 1908.
or worse.

Accordingly, the first question comes to be whether the pursuer is entitled to maintain this action in respect of the slander against his wife. Now, it is said, that by calling his wife a prostitute the defenders' servants impliedly accused him of being an associate of prostitutes. I do not think that this presents a relevant case of slander. The fact that a woman has erroneously been called a prostitute, or that a man has been called a swindler or a thief, will not entitle the relatives or friends of such a person, however near or intimate, to raise actions for slander because forsooth the accusation made against their relative or friend implies that they are the relatives or friends of a person of bad character. In my opinion a person who has uttered a slander is, as a general rule, only liable for the direct damage caused thereby to the person of and concerning whom the slander has been written or uttered, and any damage that may have been caused to other persons through the utterance of such slander is too remote and consequential to infer liability against the alleged slanderer.

Coming to the next alleged slander, I think the pursuer's averments are equally irrelevant. It is not slanderous to say that a person is telling a lie, and it has even been held that to call a person a liar where that expression simply means that he has told a lie does not constitute slander.

I am therefore of opinion that the issue ought to be disallowed, and the action dismissed as irrelevant.

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The LORD JUSTICE-CLERK was absent.

THE COURT pronounced the following interlocutors :—

(*Wife's Action*)—"Recall the . . . interlocutor reclaimed against: Allow the pursuer to alter the issues No. 11 of process by the insertion of the word "maliciously" into both of said issues; and approve of the said issues as thus amended as the issues for the trial of the cause; and remit the same to the . . . Lord Ordinary to proceed therein."

(*Husband's Action*)—"Recall the . . . interlocutor reclaimed against: Dismiss the action; and decern."

DOVE, LOCKHART, & SMART, S.S.C.—MENZIES, BRUCE-LOW, & THOMSON, W.S.—
Agents.

DUNCAN GEDDES, Pursuer (Appellant).—*Blackburn, K.C.*—
J. B. Young.

A. & J. M'LELLAN, Defenders (Respondents).—*M'Clure, K.C.*—
C. H. Brown.

No. 136.

June 10, 1908.

Geddes v. A.
& J. M'Leilan.

Expenses—Jury Trial—Modification—Verdict under £50—Limitation of Expenses recoverable by Pursuer—Certificate entitling Pursuer to recover more than one-half of Expenses—Time to apply for Certificate—Act of Sederunt, 20th March 1907, sec. 8.—The Act of Sederunt, 20th March 1907, sec. 8, enacts that in certain cases a pursuer who recovers by the verdict of a jury a sum less than £50, may not charge more than one-half of his taxed expenses, unless the presiding Judge certifies that he is entitled to recover a larger proportion, not exceeding two-thirds.

June 10, 1908. limits the expenses chargeable by the pursuer, applies only to Court of Session expenses, and not to the expenses in the Sheriff Court.
Gaddes v. A. & J. McLellan.

LORD M'LAREN and LORD KINNEAR were also present.

THE COURT pronounced this interlocutor:—"The Lords apply the verdict found by the jury on the issue in this cause, and in respect thereof decern against the defenders for payment to the pursuer of the sum of £25 sterling: Find the pursuer entitled to his expenses in the Sheriff Court and to one-half of the taxed amount of his expenses in this Court, and remit the account of said expenses to the Auditor to tax and to report."

E. ROLLAND M'NAB, S.S.C.—ALEX. MORISON & Co., W.S.—Agents.

No. 137. THE TRUSTEES OF THE PORT AND HARBOURS OF GREENOCK, Pursuers (Respondents).—*Scott Dickson, K.C.—Macmillan.*

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ANDREW CARMICHAEL (Judicial Factor of the Greenock Harbour Trust), Defender (Reclaimer).—*Clyde, K.C.—Horne.*

Judicial Factor—Powers of Factor—Power to Levy Rates—Greenock Harbour Act, 1880 (43 and 44 Vict. cap. clxx.), sec. 70.—The Port and Harbour of Greenock is under the management of a body of trustees appointed under statutory authority.

The Greenock Harbour Act, 1888, created two classes of Debenture Stocks, "A" and "B," which were declared to be respectively first and second charges on "the undertaking" of the trust.

The Greenock Harbour Act, 1895, sec. 10, enacted that on non-payment of interest, and in certain events, any holder of B Debenture Stock might apply to the Sheriff for the appointment of a judicial factor in manner provided by sec. 70 of the Greenock Harbour Act, 1880.

Sec. 70 of the Greenock Harbour Act, 1880, enacted that the Sheriff may, on application being made, "appoint some person to receive the whole or a competent part of the rates and duties and other revenues of the trust until all the arrears of interest or of principal, as the case may be, then due on the outstanding mortgages, together with all costs, including the charges of receiving the said rates and duties and other revenues, be fully paid."

Held (aff. judgment of Lord Dundas) that a judicial factor appointed under sec. 70 of the Act of 1880 had no power at his own hand to alter the harbour rates fixed by the trustees, his only duty being to receive and to apply them.

Cotton v. Beattie, Dec. 18, 1889, 17 R. 262, followed.

1st DIVISION.
Lord Dundas.

AN action was raised at the instance of the Trustees of the Port and Harbours of Greenock against Andrew Carmichael, shipowner, "judicial factor, appointed by interlocutor of the Sheriff-substitute of Renfrew and Bute at Greenock, of date 5th August 1905, to receive the whole or a competent part of the rates and duties and other revenues of the Greenock Harbour Trust, until all the arrears of interest or of principal, as the case may be, due to the holders of Greenock Harbour B Debenture Stock, together with all costs, including the charges of receiving the said rates and duties and other revenues, be fully paid, as such judicial factor, and also as an individual."

The action concluded for declarator "that the defender, as judicial factor foresaid, has no power to raise or reduce, or in any way vary

the rates and duties fixed by the pursuers for goods shipped or unshipped at any of the works of the pursuers, and in particular, but without prejudice to the foregoing generality, that the defender, as judicial factor foressaid, has no power to raise the rate for sugar shipped into or unshipped from vessels (foreign) at the works of the pursuers from 10d. per ton, being the rate fixed by the pursuers, to 1s. 3d. per ton; and further, that the notice issued by the defender, of which he gave intimation to the pursuers on 29th November 1907, and which notice is in the following terms:—'Greenock Harbour Acts, 1866 to 1895. Notice is hereby given that on and after 1st January 1908 there will be levied, demanded, and taken for sugar shipped into or unshipped from vessels foreign, 1s. 3d. per ton, as provided in Schedule' A 'of the Greenock Harbour Act, 1880. Andrew Carmichael, judicial factor,'—is *ultra vires* of the defender, as judicial factor foressaid, and is illegal, and ought not to receive effect, and that the defender, as judicial factor foressaid, is not entitled to levy, demand, or take rates, duties, or charges in terms of said notice."

There was a corresponding conclusion for interdict which was not insisted on.

The circumstances out of which the action arose were not in dispute, and were as follows:—

The Harbours of Greenock were originally constructed under the authority of a series of Acts of Parliament ending in the year 1817. Thereafter by various local Acts,¹ power was given to the Harbour Trustees to borrow certain sums, and in security therefor to assign "the rates, duties, and other revenues of the Trust, and the works and property of the Trust, payable or belonging to the Trust, and all their right, title, and interest of, in, and to the same." Up till 1888 the Trustees, acting in virtue of their borrowing powers, had borrowed from the public the sum of about £1,500,000, in security of which assignations in the terms above stated were duly given.

In 1888 the revenue of the Trust became insufficient to pay the whole of the interest on the harbour securities, and the Trust having in consequence become insolvent, questions arose between the various secured creditors who had lent money to the Trustees, from time to time. A special case was thereupon brought in the Court of Session for the purpose of determining the rights and priorities of holders of said harbour securities. The decision of the Court² was that certain lenders to the amount of £429,523 had a prior security, and that the other lenders to the amount of £1,103,837 were postponed to the foressaid security holders. As a result of the said decision, and upon a preamble referring to it, the Greenock Harbour Act of 1888³ was passed, by which in lieu of the then existing harbour securities there were created and issued A and B Debenture Stocks, which were declared to be respectively first and second charges "on the undertaking" of the said Trust.⁴

By the Greenock Harbour Act, 1888, it was enacted as follows:—

¹ Greenock Harbour Acts, 1842 (5 Vict. sess. 2, cap. liv.); 1866 (29 and 30 Vict. cap. clvi.); 1872 (35 and 36 Vict. cap. lxxi.); 1880 (43 and 44 Vict. cap. clxx.).

² Greenock Harbour Trustees, Jan. 31, 1888, 15 R. 343.

³ 51 and 52 Vict. cap. cxiii.

⁴ Sections 5 (1) and 6 (1).

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Section 21. "It shall not be competent for the holders of the Harbour Stocks to apply for the appointment of a judicial factor except as provided in the next following section of this Act."

Section 22 of the Act of 1888 was repealed by the Greenock Harbour Act, 1895,¹ which, by section 10 substituted the following enactment in lieu thereof:—"In the event of the Trustees failing at any time to make payment of the interest due at the expiry of any half year, it shall be lawful for any holder of A Debenture Stock, and after the expiration of a period of ten years from the passing of this Act for any holder of B Debenture Stock to apply to the Sheriff for the appointment of a judicial factor in manner provided by section 70 of the Greenock Harbour Act, 1880."

By section 69 of the Greenock Harbour Act of 1880, it was enacted as follows:—"The mortgagees of the Trustees may enforce payment of arrears of interest or principal or principal and interest due on their mortgages by the appointment of a judicial factor."

By section 70 of the Act of 1880 it was enacted as follows:—"Every application for a judicial factor under the provisions of this Act shall be made to the Sheriff, and on any such application the Sheriff may, by order in writing, after hearing the parties, appoint some person to receive the whole or a competent part of the rates and duties and other revenues of the Trust until all the arrears of interest or of principal, as the case may be, then due on the outstanding mortgages, together with all costs, including the charges of receiving the said rates and duties and other revenues, be fully paid. Upon such appointment being made all such rates and duties and other revenues shall be paid to and received by the person so appointed, and the money so received shall be so much money received by or to the use of the mortgagees, and so soon as the full amount of any interest or principal in arrear and costs has been so received the power of such judicial factor shall cease; Provided always that such judicial factor shall distribute among all the mortgagees to whom interest or principal shall be in arrear the rates and duties and other moneys which shall come into his hands, having respect in such distribution to the priorities, if any, of such mortgagees."

The interest payable by the trustees to the holders of the B Debenture Stock having fallen into arrear, certain of the holders of that stock on 7th July 1905 presented a petition in the Sheriff Court at Greenock, craving for the appointment of a judicial factor.

On 5th August 1905 the Sheriff-substitute (Neish) appointed a judicial factor by an interlocutor in these terms:—"Appoints Mr Andrew Carmichael, shipowner, Greenock, as judicial factor, he finding caution before extract in common form, to receive the whole or a competent part of the rates and duties and other revenues of the Greenock Harbour Trust until all the arrears of interest or of principal, as the case may be, due to the petitioners and other holders of Greenock Harbour B Debenture Stock, together with all costs, including the charges of receiving the said rates and duties and other revenues, be fully paid."

By section 5 of the Greenock Harbour Act, 1866, incorporating section 30 of the Harbours, Docks, and Piers Clauses Act, 1847,² the Trustees were empowered "to vary the rates or any of them respectively in such manner as they think expedient," subject to the

¹ 58 and 59 Vict. cap. cv.

² 10 and 11 Vict. cap. 27.

maximum allowed by the special Act. By section 34 and Schedule A of the Greenock Harbour Act, 1880, the maximum rate authorised for sugar shipped into or transhipped from vessels (foreign) was fixed at 1s. 3d. per ton. Under the powers thus conferred on them, the Trustees had, prior to this action, fixed the rate exigible for sugar shipped and unshipped from vessels (foreign) at 10d. per ton.

On 29th November 1907 the judicial factor sent to the Trustees and caused to be advertised in the newspapers, a notice in the following terms:—

“Greenock Harbour Acts, 1866 to 1895.

“Notice is hereby given that on and after 1st January 1908 there will be levied, demanded, and taken for sugar shipped into or unshipped from vessels foreign, 1s. 3d. per ton, as provided in Schedule A of the Greenock Harbour Act, 1880.

AND, CARMICHAEL,

“Judicial Factor.”

Thereupon the Trustees raised this action, to have it declared, as above stated, that the judicial factor had no power to vary the rates, and that the notice in question was *ultra vires*.

The pursuers averred:—“The defender has no power, in virtue of his appointment as judicial factor or of the statutes thereanent, to increase, reduce, or vary in any way the rates fixed by the pursuers for goods shipped or unshipped at the Port and Harbours of Greenock, and the said notice intimated and published by the defender, whereby he purports to increase the existing rate of 10d. per ton for sugar (foreign) to the maximum rate of 1s. 3d. per ton is altogether *ultra vires* of the defender and illegal. The power of increasing, reducing, and varying within the statutory maximum the rates to be levied on goods shipped and unshipped at the Port and Harbours of Greenock has been committed by the Greenock Harbour Acts to the pursuers, and to them alone, and the defender's action in endeavouring to raise the said rate on sugar (foreign) at his own hand, and without the pursuers' sanction, constitutes an unwarranted interference with, and usurpation of, the pursuers' province.”

The defender averred:—“The defender since his appointment has exercised the functions formerly exercised by the Trustees in connection with the receiving of the rates, duties, and revenues of the Trust. It is the duty of the defender, as judicial factor, to levy, demand, and take the whole or a competent part of the rates, duties, and other revenues of the Trust. There is, apart from arrears, an annual deficiency of more than £20,000 in the revenue required to pay the interest due to the bondholders of the Trust, and the defender is bound in the exercise of his duty to obtain the highest revenue obtainable out of the rates which can competently be levied. The rate of 1s. 3d. per ton which he proposes to put upon sugar shipped into or unshipped from vessels (foreign) is the rate authorised by the Greenock Harbour Acts. The defender is consequently entitled to levy that rate, and the Trustees are not entitled to interfere with him in so doing, as they would thereby deprive the bondholders of a material part of their security. The defender has sought, so far as consistent with his duty, to co-operate with the pursuers, and he has induced them to take action which has resulted in considerable reductions in expenditure, and he is of opinion that an increased revenue can be obtained from the undertaking if advantage is taken of the rates authorised by the Act of Parliament. . . . The defender being appointed upon the petition of the bondholders, and for the purpose of obtaining pay-

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ment to them of their just debt, has the duty imposed upon him of obtaining the largest possible revenue from the harbour. The rate which he now proposes to levy on sugar will be a source of increased revenue to the Trust, and it is his duty and his right to secure the benefit of this revenue on behalf of the creditors of the Trust."

The pursuers pleaded;—(1) The defender having no power under the terms of his appointment as judicial factor foresaid, or of the statutes thereanent, to increase, reduce, or in any way vary at his own hand the rates and duties leviable on goods shipped and unshipped at the port and harbours of Greenock, the pursuers are entitled to decree of declarator as concluded for.

The defender pleaded;—(1) The pursuers having no right or interest in the revenues of said trust they are not entitled to sue the present action. (4) The defender having been appointed judicial factor on the undertaking of the trust, and to receive on behalf of the bondholders the rates and duties of said trust, he is entitled to impose the full rates authorised by Act of Parliament.

On 20th February 1908 the Lord Ordinary (Dundas) pronounced this interlocutor:—"Sustains the first plea in law stated by the pursuers: Finds, declares, and decerns that the defender, as judicial factor foresaid, has no power at his own hand to raise or reduce, or in any way vary the rates and duties fixed by the pursuers for goods shipped or unshipped at any of the works of the pursuers, and in particular, but without prejudice to the foregoing generality, that the defender, as judicial factor foresaid, has no power at his own hand to raise the rate for sugar shipped into or unshipped from vessels (foreign) at the works of the pursuers from 10d. per ton, being the rate fixed by the pursuers, to 1s. 3d. per ton; and further, that the notice issued by the defender, of which he gave intimation to the pursuers on 29th November 1907 . . . is *ultra vires* of the defender, as judicial factor foresaid, is illegal, and ought not to receive effect, and that the defender, as judicial factor foresaid, is not entitled to levy, demand, or take rates, duties, or charges in terms of said notice." *

* "OPINION.—(After a narrative of the facts)—At the discussion in the Procedure-roll, the pursuers' counsel maintained that the defender has no right or power, express or implied, to raise or vary this particular rate, or any other of the harbour rates. They urged that we are here dealing with a great public undertaking, incapable of earning profit, and worked for the benefit of the public, to the statutory trustees of which—and to no one else—Parliament has committed the entire management and control of the concern, including expressly power 'to vary the rates . . . in such manner as they think expedient' (Harbour, Docks, and Piers Clauses Act, 1847 (10 and 11 Vict. cap. 27), sec. 30, incorporated in the special Acts); that the constitution of the Trust has been gradually broadened by a series of legislative enactments so as to fairly represent all the public interests associated with the undertaking; and that there is no warrant for permitting the defender, representing as he does one private and limited interest only, to supersede the Trustees to any extent in their management of the concern or to interfere with their discretion as to raising or lowering rates. They further argued that, whatever may have been the nature and extent of the security held by creditors of the Trust under the earlier statutes, holders of debenture stock under the Act of 1888 are merely perpetual annuitants, with no right at all to look to the security of the rates, except in so far as actually imposed by the Trustees from time to time.

"To a considerable part of this argument the defender's counsel took no

The defender reclaimed.

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The case was argued before the First Division on 12th and 13th May 1908.

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Argued for the reclaimer;—In order to understand the position and powers of the judicial factor, it was necessary to go behind section 70 of the Act of 1880, which merely provided the manner in which the factor was to be appointed, and to look at the nature of the B Debentures, and the rights of the debenture-holders. By the Act of 1888 these debentures were declared to be a charge upon “the undertaking,” the form of the charge being that of a perpetual irredeemable annuity. The sole purposes to which the revenues of the Trust could be applied were (1) payment of annuities, (2) maintenance of works, and (3) payment of working expenses,¹ and the term “undertaking” must be held to include not merely the rates actually levied, but also the power to levy the rates. Under the earlier Act² the assign-

exception; and they especially disclaimed any intention or desire on his part to oust the pursuers from their management. They conceded also that, under normal circumstances, it would be for the Trustees, and for them only, to regulate the harbour rates; but they contended that the circumstances here are obviously abnormal, because it had been found necessary to appoint a judicial factor. There is, they urged, no room for doubt as to the object of such an appointment; it is ‘to enforce payment of arrears’; and, in order to this end, ‘the whole or a competent part’ (i.e., a part sufficient for the purpose) ‘of the rates, duties, and other revenues of the trust’ are to be ‘paid to and received by’ the factor; and when the end and object have been attained, and the arrears, &c. have been fully paid up (and only then), his ‘power’ (an effective power successfully wielded) ‘shall cease.’ The defender’s counsel strenuously maintained that, if the pursuers’ arguments were sound, the factor’s appointment could be no better than a farce; because, being appointed at a crisis when the financial position is, from the debenture-holders’ point of view, a very bad one, he is *ex hypothesi* to have no power to alleviate it by raising rates—on the contrary, the sole discretion as to maintaining, or even lowering, the rates is (if the pursuers are right) left with the Trustees, whose interests are adverse to those of the stockholders; and that the result must simply be that an already embarrassed situation would be burdened with the additional cost of a totally useless factory. This, it was urged, could scarcely have been the intention of Parliament; and the Court should, in construing the language of the statutes, endeavour to avoid such a result, especially where the opposite construction does no violence whatever to the words used. The defender’s counsel contended that when Parliament provides—as the means of enforcing a specific purpose—the appointment of a judicial factor, the latter is by plain implication vested (even if such vesting is not expressed in so many words) with such powers, means, and privileges as are necessary for the execution of the duty or the attainment of the object which he was appointed to execute or to effect. In support of the last proposition I was referred to text writers on the construction of statutes—Maxwell, 4th ed., 1905, pp. 534, 536; and Hardcastle, 4th ed., by Craies, p. 108 and p. 229. I think the proposition is sound enough; and it seems to be based upon the doctrine of the Roman law (Dig. ii. 1, 2)—‘Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit.’ The defender’s counsel further argued that the words ‘the whole or a competent part of the rates,’ &c. are not limited to the rates actually levied by the Trustees at any given time; that the statute does not say so; and that the words, fairly construed,

¹ Greenock Harbour Acts, 1866, sec. 74, 1872, sec. 43, and 1880, sec. 80.

² Cf. Greenock Harbour Act, 1872, Sched. 5.

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nation in favour of the lenders—now represented by the debenture-holders—was of the widest description, and included all “right, title, and interest” which the Trustees had in the harbour. On the nature of a rate, reference was made to the Harbours, Docks, and Piers Act, 1847,¹ sections 25, 30, 33, and 47. It was not an unheard of thing to give the creditors of an undertaking—such as a municipality—power to force the governing body to levy rates in order to pay their debts.² Unless the debenture-holders had this power their security was illusory, for there was nothing to prevent the Trustees from fixing the rates merely in the interest of the ratepayers and those using the docks, and not with a view to the legitimate object for which alone a revenue was required, namely, the payment of these annuities. These being the rights of the debenture-holders, Parliament had, by section 10 of the Act of 1895, provided the means by which they could be made effective, namely, by the appointment of a

must include the whole rates (up to the *maxima*) which the Trustees are by their acts authorised to ‘levy, demand, and take.’ The holders of debenture stock, although their position since 1888 was that of perpetual annuitants, are, it was argued, entitled to look to the security of the whole rates authorised by the statute, because their stocks were declared to be respectively ‘the first’ and ‘the second charge on the undertaking’; and the defender’s counsel referred, in this connection, to letters in process which are printed in the appendix.

“I was much impressed at the discussion by the arguments put forward for the defender, which I have endeavoured to summarise, and by the broad common sense which appeared to underlie them. If it could be demonstrated that to deny the judicial factor power to raise rates would be to reduce his office to a nonentity and his functions to mere formalities, one would, I think, be constrained to the conclusion that Parliament, in prescribing the appointment of a factor for the particular object specified, intended to confer, and must be held to have conferred upon him, the power which, on the assumption postulated, would be essential to the explanation of his jurisdiction. But I am not convinced that this assumption, which lies at the root of the defender’s argument, is well founded; and if it fails, I do not think I could construe the statutes as giving the factor implied authority at his own hand to raise or vary this, or any other rate, or to issue such a notice as that quoted in the summons. Now, it seems to me that, apart from so raising rates, there is a good deal that the factor could do towards furthering the object of his appointment. This must, of course, depend upon what the scope of his powers and duties truly is. I was not able to extract from learned counsel upon either side any precise view upon this (to my mind) crucial matter. I have come to the conclusion, upon a careful study of the statutes, that the right of the judicial factor is to receive, if necessary, the whole (*i.e.*, gross) revenues of the undertaking, and to apply them in his discretion towards the extinction of the arrears of interest in the stock. To what extent he may consider it prudent or advisable to exercise his right is another matter; but, if the view which I have indicated is sound, it can hardly be said that the power of the factor, though he may not be able to raise rates at his own hand, is necessarily an unreal or ineffectual one. On the contrary, he would have in his hand a powerful lever. A case to which I was referred at the discussion (*Cotton v. Beattie*, 1889, 17 R. 262), though it does not touch upon the factor’s power to raise or vary rates, seems to me to support the view which I have

¹ 10 and 11 Vict. cap. 27.

² *Cf.* Muirhead on the Burgh Police Acts, p. 673.

judicial factor. Leaving out the reference to section 70 of the Act of June 11, 1908. 1880, which merely dealt with the mode of his appointment, section 10 provided *simpliciter* for the appointment of a judicial factor, *i.e.*, ^{Greenock Harbour Trustees v. Judicial Factor of Greenock Harbour Trust.} a judicial factor with common law powers of management and interference. This was made more evident by the use of the word "enforce" in section 27 of the Act of 1872, repeated in section 69 of the Act of 1880. Even if the powers of the factor fell to be construed with reference to section 70 of the Act of 1880, the claimer's argument held good. "The whole rates" meant the whole rates chargeable, not the whole rates charged, and "a competent part" meant the total amount, subject to the statutory maximum, required to pay the debts. None of the authorities referred to by the Lord Ordinary were in point, and, in particular, *Cotton v. Beattie*¹ was distinguishable. That case decided that, in the circumstances, the factor had no powers of management, whereas in the present case the

just stated. It related to a judicial factor appointed under sections 56 and 57 of the Companies Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 17), the language of which does not appear to differ in any material respect from that under construction in the present case. The Lord President (Ingليس) stated in general terms (p. 268) that 'the duty of the factor so appointed is to procure payment to himself as factor of so much of the tolls and other sums coming into the hands of the company as will enable him to pay the balance of interest due to the mortgagee. . . . Lord M'Laren went pretty fully into the matter, and expressed the opinion (at p. 271) that the factor—though his duties are those not of a manager but of a 'receiver'—'is entitled to go directly to the cashier or officers of the company who levy the tolls, and to receive from them these tolls or other sums of money, and that he is not obliged to go to the directors and take from them what they may please to give him. If he had to go to the directors, the mortgagee might not be in a better position than he was before the application, because they would just say after the appointment, as they had done before, that they were without funds, that all their funds were carried away as fast as they were earned by the necessary outgoings of the company. But, being a judicial factor on the estate, he has direct access to the funds of the company, and it is for the purpose of his having such access that the appointment is made, to enable the mortgagee to enter into possession of the revenues of the company to such extent as shall enable him to pay himself through the factor the interest of his debt.' A little further on, Lord M'Laren explained how, in his view, the relations between the judicial factor and the managing body would work out from a practical point of view, and concluded that 'the judicial factor would decide for himself what portion of the tolls or earnings he would draw, and what he would choose to leave for the purpose of enabling the business to be carried on.' Of course, the concern under consideration in *Cotton's* case was only a tramway company, and not (as here) a great public undertaking. But the opinions expressed have regard to the construction and effect of statutory language substantially identical with that which I am now endeavouring to construe; and to that extent, at least, they seem to me to be in point.

"I ought, at this stage, for the sake of completeness, to note the other cases, Scottish and English, to which I was referred, with such brief comments on them as are necessary. *Haldane's* case (1881, 8 R. 669) was one where a judicial factor had been appointed on the undertaking of a railway company under section 4 of the Railway Companies (Scotland) Act, 1867 (30 and 31 Vict. cap. 126). The Lord President (Ingليس) in the course of

¹ Dec. 18, 1889, 17 R. 262.

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question was as to the amount of the rates which he was entitled to receive. No doubt the claimer's contention involved a certain power of interference on the part of the factor, but some interference was involved in any view, and the only question was one of degree.

Argued for the respondents;—In considering the rights of the B debenture-holders, it was irrelevant to refer to the earlier Acts and to the powers of security-holders under them. These Acts were all replaced by the Act of 1888, by which alone the position of the debenture-holders was regulated. That Act said nothing as to an "assignment," and neither the debenture-holders nor the judicial factor as in their right were in any sense "assignees." The powers of the judicial factor were contained in section 70 of the Act of 1880, which defined him as a person appointed to "receive" the rates. This plainly excluded any power of management, or any power to determine the amount of the rates which should be levied. There

his opinion pointed out that a judicial factor so appointed is really a manager, invested with the charge and management of the undertaking; and dealt—but only incidentally and by way of contrast—with the position of a judicial factor appointed under sections 56 and 57 of the Companies Clauses Consolidation (Scotland) Act, 1845. The judicial factor in that case petitioned the Court for special powers, but the Court refused to grant these, upon the ground that the judicial factor was truly manager of the railway company, and that it was therefore unnecessary to confer any additional powers upon him. *The Edinburgh Northern Tramways Company* (1888, 15 R. 641) was concerned with the appointment of Mr Cotton as judicial factor on the tramway undertaking already referred to, under the sections of the Act of 1845. The Lord President (Inglis) contrasted his position with that of Mr Haldane in the preceding case, and said: 'He is what is called in England a receiver, and, so far as I understand, he was appointed to receive a portion of the income of the company sufficient to pay the overdue interest upon the petitioner's mortgages. That is the whole object and aim of the appointment.' I have already dealt with *Cotton's* case (1889, 17 R. 262), which was the sequel of the case just referred to, and seems to me to be much the most useful of the decisions, Scottish or English, of which I am aware. Coming now to the English cases, I think they require to be approached with considerable caution and reserve by a Scots lawyer. The name 'judicial factor' is unknown in England. They have there 'managers' and 'receivers.' I gather that the latter word is capable of a great variety of significations and applications. I understand that the English Court of Chancery originally had, and since 1873 the High Court of Justice has possessed, power to appoint a receiver wherever the circumstances appeared to the Court to make it expedient to do so. One may refer to *Kerr's Law and Practice* as to Receivers (5th ed. 1905), as illustrative of the different duties and functions which a receiver may in England be appointed to exercise. I have not, I confess, been able to derive much assistance from the authorities which were cited to me. These were *Gardner* (1867, L. R., 2 Chan. 201), the well-known case which immediately preceded, and indeed was the cause of, the railway legislation of that year; *Marshall*, [1895] 2 Ch. 36,—a tramway case, where a receiver was appointed at the instance of debenture-holders, but the appointment of a manager was refused; *In re Manchester and Milford Railway Company*, 1880, 14 Ch. Div. 645,—a case under the English Railway Act of 1867 (30 and 31 Vict. cap. 127), where the import of the words 'the appointment of a receiver or, if necessary, of a manager' was discussed, and explained by the Court of Appeal; *Altree*, 1878, 9 Ch. Div. 337,—referred to only for some observations by James, L. J. (at pp. 348, 350), on the

could be no rate at all until it was levied. When Parliament intended to appoint a factor with powers of management they said so in express terms,¹ and in the present case they had not done so. This became more clear by considering the position of the Trustees. They were a statutory body, representative of all the interests concerned—including the debenture-holders—and entrusted with the duties of management.² One of their most important duties was that of fixing and levying the rates, and it was not to be lightly presumed that this function was intended to be taken from them and given to the judicial factor. The position of a person appointed to receive and distribute revenue had been considered in many cases in England.³ It had also been considered in the case of Acts providing for the appointment of a judicial factor in terms almost identical with sections 69 and 70 of the Greenock Harbour Act, 1880. Thus the powers of a factor under sections 56 and 57 of the Companies Clauses Consolidation (Scotland)

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functions of a receiver; and *Ames v. Trustees of the Birkenhead Docks*, 1855, 20 Beav. 332,—for similar observations by Sir J. Romilly, M. R.

“ I have considered the case before me to the best of my ability, with the aid of the opinions expressed in *Cotton v. Beattie*. As already indicated, I do not think it can be affirmed that power to raise rates is essential to the judicial factor, in order to any effectual exercise of his office. It is not for me to consider whether or not it would have been better that Parliament should have conferred such a power upon him. If such a power is not essential to him, in order to give his office any real significance, it seems to me that the defender's argument loses much of its apparent weight; for, although the possession of a power to raise rates would doubtless enhance the factor's powers, that is not *per se* a warrant for construing the statutes as impliedly conferring it upon him. I cannot assume that the Trustees will act obstinately or unreasonably in their management, or decline absolutely to co-operate with the judicial factor in endeavouring to further the legitimate interests of all concerned. On the other hand, I apprehend that no prudent and reasonable factor would, in the interests of his constituents, seek to reduce the working expenses of the harbour below the minimum at which the docks (his only possible source of revenue) can be efficiently carried on. But down to that limit he can, if the views I have expressed are correct, exercise a vigilant and effective control over expenditure; as indeed I gather from his pleadings he has to some extent already done. It seems to me that much must depend upon the extent to which the judicial factor and the Trustees, as practical men of business, are prepared to set themselves to co-operate in doing the best for all concerned; the factor having, of course, due regard to the legitimate interests of the stockholders, and the Trustees to those of the harbour. I do not prejudge the question whether, under any circumstances, the Court, on competent application by a factor in the defender's position, and on being satisfied that those charged by Parliament with the management of the undertaking were acting unreasonably in refusing to raise a rate or rates, might not find a remedy by granting the factor special power to do so. All that I now

¹ Cf. Greenock Waterworks Act, 1866 (29 and 30 Vict. cap. cccviii.), sec. 93.

² Greenock Harbour Act, 1888, sec. 24.

³ De Winton v. Mayor of Brecon, 1858, 26 Beav. 533; Gardner v. London, Chatham, and Dover Railway Co., 1867, L. R., 2 Ch. 201; Ames v. Trustees of Birkenhead Docks, 1855, 20 Beav. 332; Blaker v. Herts & Essex Waterworks Co., 1889, 41 Ch. D. 399; Marshall v. South Staffordshire Tramways Co., [1895] 2 Ch. 36; *In re Manchester and Milford Railway Co.*, 1880, 14 Ch. D. 645; *Attree v. Hawe*, 1878, 9 Ch. D. 337.

June 11, 1908. Act, 1845,¹ had been considered in *Haldane v. Girvan and Portpatrick Junction Railway Company*,² *Broad v. Edinburgh Northern Tramways Company*,³ and *Cotton v. Beattie*.⁴ The result of these cases was to shew that the position of the factor was that of a receiver, and not of a manager. The advantage to the debenture-holders of having such a factor, and the security which it afforded against improper expenditure of the rates, was explained by Lord M'Laren in *Cotton v. Beattie*.⁴

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At advising,—

LORD PRESIDENT.—The question that is here raised is an important and, in one sense, a novel one, and arises between the Greenock Harbour Trustees and the judicial factor who has been appointed in terms of a statute which I shall presently examine. The question as raised is a simple one, namely, whether the factor can at his own hand and against the wish of the majority of the Trustees alter the rate which is presently charged for sugar entering the Port and Harbour of Greenock, it being of course understood that the rate as altered is within the limits of the Parliamentary powers—of the rates as appended to the Acts.

Now, the judicial factor was appointed upon the petition of certain debenture-holders. The history of the Greenock Harbour was this: After being a harbour which, I suppose, existed in a certain state from time immemorial, it was managed by the Town-Council, and then there was a series of statutes which I need not go through. But the crisis of its fate in latter years came just prior to the year 1888 when it could not pay its way. At that time there were various classes of security-holders. I do not particularise more because it does not matter for the purposes of this case; and these security-holders had had their various rights, so far as priority was concerned, determined in an action in this Court. They were, however, in this unfortunate position that, although their rights of priority had been determined, they were practically powerless as to making their securities available, because the harbour could not be sold, and there was, to say the least of it, not much to take in the way of moveable property. At anyrate, all parties concerned came to Parliament and they got an Act of Parliament called the Greenock Harbour Act of 1888. Now, by that Act of Parliament which as regards the pecuniary obligations of the harbour sweeps away all that went before it, two classes of stock were created, namely, A Debenture Stock and B Debenture Stock. A Debenture Stock, roughly speaking, was intended to represent the liabilities which had been declared to be preferable liabilities by the action to which I have referred; and, accordingly, this debenture stock was to be offered to the parties in right of these preferable mortgages. If they accepted, well and good; if not, they were to be paid

decide is that, in my opinion, the judicial factor was not entitled, at his own hand, to raise the rate, or to issue the notice, of which the pursuers now complain. Decree of declarator must therefore be pronounced; but I think the words 'at his own hand,' which occur in the pursuers' first plea in law, though not in the summons, should be inserted at appropriate places in the interlocutor, in view of possible eventualities in the future."

¹ 8 and 9 Vict. cap. 17.

³ May 19, 1888, 15 R. 641.

² March 18, 1881, 8 R. 669.

⁴ Dec. 18, 1889, 17 R. 262.

in cash. The B Stock, on the other hand, was to be given to those who had securities in whose favour a preference had not been declared, and they were to be compulsorily made to take the B Stock, for the very good reason that there was no money forthcoming and they had better take that than nothing.

The point, I think, which ought to be noted is that whatever may have been the position of the parties historically and whatever may have been their rights in the old time, once the Act of 1888 was passed and the A and B Stock was issued and allotted to the various persons entitled to it, those persons, although in the popular sense of the word you might have called them creditors, were really not creditors at all. They, no doubt, had lent money, but their money did not represent the whole of the undertaking, there was other money there; and they became, as a matter of fact, only shareholders in the undertaking. Now, as a shareholder, of course, at common law you have not any right of diligence against your own company merely because you do not get any dividend upon your shares, or, if you like to put it so, because you do not get any interest for the money which you originally lent and which is now represented by your shares. But, of course, you have other rights and, if you have got nothing and you think that the management might give you something, one right in certain circumstances might conceivably be to get a factor appointed upon the whole property. But this Act of Parliament specially says that that right is not to exist, because in the 21st section, after preventing bondholders from raising actions under certain conditions, it goes on to say,—“Nor shall it be competent for the holders of the Harbour Stocks” (the Harbour Stocks are the A and B Debenture Stocks I have mentioned) “to apply for the appointment of a judicial factor except as provided in the next following section of this Act.” That seems to me a clear provision—with the policy of it I have, of course, nothing to do—but that seems to me to be a clear provision by Parliament, that what I may call the common law rights of these stockholders were gone, and all that they could get is what the next succeeding section of the Act gives them. Accordingly section 22 of the 1888 Act seems to me to be the charter of the bondholders, and that section says this,—“In the event of the Trustees failing at any time to make payment of the interest due at the expiry of any half year, it shall be lawful for any holder of A Debenture Stock, and after the expiration of a period of seven years from the passing of this Act for any holder of B Debenture Stock to apply to the Sheriff for the appointment of a judicial factor in manner provided by section 70 of the Greenock Harbour Act of 1880.” That period of seven years was afterwards extended to ten years by the Greenock Harbour Act, 1895, but the extended period has admittedly now run out, and admittedly the holders of B Debenture Stock, after the expiry of that period, found themselves in the position that they had not got payment of the interest due at the end of the half year, and therefore they were entitled without any question to do what they did—namely, to make an application for a factor in the manner provided by section 70 of the Act of 1880. Well, that of course sends us back to the Act of 1880, and section 70 of that Act says this,—“Every application for a judicial factor under the provisions of this Act shall be made to the Sheriff, and, on any such application, the Sheriff

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June 11, 1908. may, by order in writing after hearing the parties, appoint some person to receive the whole or a competent part of the rates and duties and other revenues of the Trust until all the arrears of interest or of principal, as the case may be, . . . be fully paid."

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It therefore comes to the simple question, What is the position of a judicial factor appointed under section 70? He is a person appointed, and he is to receive the whole or a competent part of the rates and duties and other revenues of the Trust. I think that that question is already determined by authority. This clause—I mean that part of it—is a clause which is not at all new. It is really almost word for word the same as section 57 of the Companies Clauses Act, 1845.¹ We were furnished by the parties with an excerpt in parallel columns of section 57 of the Companies Clauses Act of 1845,¹ section 87 of the Commissioners Clauses Act of 1847,² section 26 of the Companies Clauses Act of 1863,³ and this particular section 70, and when reviewed it is not too much to say that they are practically identical. They are, in my mind, so identical that it makes authority upon the one authority upon the other.

Now, these clauses in the other Acts have already been subjected to judicial decision in both countries. In this country that clause was narrowly considered in the case of *Cotton v. Beattie*,⁴ and in England the clause was considered in the case of *Attree*,⁵ and there was a comment there upon the still older and well-known case of *Gardner v. London, Chatham, and Dover Railway Company*.⁶ The outcome of these decisions was that a person appointed under one of these clauses was not—to use the English phrase—"a manager of the undertaking," or—to use the Scotch phrase—was not "a common law judicial factor," but that he was really a mere receiver of the revenues of the undertaking which he could get, and that accordingly his powers were limited to merely putting into his pocket such money as he could get and paying it out again.

We had a very strenuous argument, and a very weighty argument, from Mr Clyde to endeavour to bring us to the opposite conclusion, but it seems to me that the weak portion of that argument was that it went really to the policy of the statute much more than to what is actually said. All that he urged upon us as to the possibilities of the security-holders being defeated may be very true, but I am afraid the answer is that those who were—I won't say risking their money—but getting what they could get at the time of the unfortunate position of 1888 ought to have taken care that Parliament gave them something more. Mr Clyde's argument really rested upon this: he acknowledged that he could not have any rights other than what the Act of 1888 gave him, but he pointed out that his debenture was to be a second charge, just as the A Debenture was to be a first charge, upon the undertaking; and he said that once his debenture was a charge as upon the undertaking, you must read the expression the factor being appointed to receive a competent part of the tolls as meaning not the tolls actually charged, but the tolls chargeable. I am afraid that same view was tabled

¹ 8 and 9 Vict. cap. 17.

² 26 and 27 Vict. cap. 118.

³ *Attree v. Hawe*, 1877, 9 Ch. D. 337.

⁴ 10 and 11 Vict. cap. 16.

⁵ 1889, 17 R. 262.

⁶ 1866, L. R., 2 Ch. 201.

and rejected in *Cotton's case*,¹ because the Lord President (Ingia) in that case recites the interlocutor upon which the appointment was made, which is in practically the same terms as the interlocutor appointing the judicial factor in this case. I remind your Lordships again that the interlocutor was made in respect of the 56th and 57th sections of the Companies Clauses Act of 1845, which, as I have said, are practically identical with this one. The interlocutor was:—"Appoint Mr Cotton to be interim judicial factor upon the undertaking and property of the company, and to receive the whole or a competent part of the tolls or sums liable in payment of the interest payable on the mortgages mentioned in the petition until the same, with all costs, shall be fully paid." Then his Lordship goes on,—“The criticism made upon this interlocutor is that it should have been confined to an appointment ‘to receive the whole or a competent part of the tolls,’ and so forth, and that there should not have been an appointment of a judicial factor ‘upon the undertaking and property of the company’; but I am not disposed to acquiesce in that criticism at all, because I think the words used are really statutory words, and although it may be that they have led to some misunderstanding as to the proper powers of a judicial factor under that statute, the words, I think, are fully justified.” And then he goes on to decide that Mr Cotton, in that case, had no power as a manager, but only that of a receiver. In other words, it is tantamount to a decision that a factor being a factor upon the undertaking is not inconsistent with the powers of that factor being limited to the mere powers of a receiver, using the word in the narrower sense.

That seems to me practically to decide the whole thing. It is quite true that the body here who have the fixing of the tolls is not the factor, I can quite see that there may be disparity and discommunity of interest. My only answer is, that that is how Parliament has left it. I should be slow to say that there may not be some way or other of restraining the statutory body of trustees if they really acted in *mala fides* to the interests of those who had lent their money to the harbour. I mean, for instance, the case as put to us by way of argument—that our decision would necessarily lead to this, that the Greenock Harbour Trustees might let in the sugar practically for nothing, that is to say, let it in for just that bare amount of charge which would be sufficient to pay the going expenses of the harbour without having any heed to paying any money to the shareholders or creditors—call them what you will—at all. I think that would be a proceeding in bad faith, and, if it could be brought up to that, I think the Court might not be without powers of coercing the Trustees. But that is not the question that is raised in this case. The question that is raised in this case is very well put by the Lord Ordinary in the end of his note, where he shews that all he is deciding is that the judicial factor is not entitled, at his own hand and against the wishes of the Trustees, suddenly to change the rate leviable upon sugar or any other commodity as it comes into the harbour. I ought also to say that I am entirely satisfied with the careful note of the Lord Ordinary, who, I think, has said all that is to be said, and I should not have added the observations that I have except to

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June 11, 1908. indicate that I recognise that the case is a very important one, and that I wish to shew that I have come to the conclusion that I have come to after careful consideration of the matter. The result, in my opinion, is that the judgment of the Lord Ordinary should be affirmed.

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LORD M'LAREN.—If the judicial factor is entitled to raise the rates leviable at the harbour, that can only be on the theory that by his appointment the management of the Trustees is displaced, and their whole power of administration devolved upon the judicial factor; because if the judicial factor can alter the rates leviable on the landing of goods—the most important perhaps of all the powers the Trustees possess—I think it follows that every other power which the Trustees have hitherto exercised may equally be taken out of their hands. Now, it is perfectly clear that such was not the intention of the Legislature in passing this private Act of Parliament. I do not need to consider whether the Court, in the exercise of its ordinary jurisdiction, could have appointed a judicial factor on the undertaking in such terms as would divest the Trustees of their administrative powers. It is quite plain that by the last Greenock Harbour Act the jurisdiction of the Court of Session to appoint a judicial factor is excluded altogether, and that a much more limited power is given to the Sheriff, and only to the Sheriff. That is the power of appointing a judicial factor who is to receive the revenues of the Trust, and out of these to pay the dividends to the holders of the two classes of debenture stock. Now, the difference between the two appointments is perfectly obvious; but the appointment of a factor such as is competent in this case is really the appointment of a person who is to protect the interests of the debenture-holders. He can give them at least this protection, that he would not allow the Trustees to squander the revenue in extravagant management, or to apply the money to new works which would more properly be chargeable against capital. These two protections the debenture-holders undoubtedly have, because the whole revenue comes into the hands of the judicial factor. He, of course, cannot divide the whole of it, otherwise the harbour would come to an end; but it lies with him to assign such sum as he may judge to be necessary for the payment of salaries and wages, and then the balance is appropriated by statute to the two classes of stockholders in their order.

I should have come, without hesitation, to this conclusion upon the words of the statute, but I agree with your Lordship that our opinion is strongly confirmed by the decisions that have been given upon the analogous and almost identical clauses of various general Acts of Parliament, of which the most important is the Companies Clauses Act. It is perhaps unfortunate that the judicial factor has no veto upon the action of the Trustees in fixing the rates, and that even where he may think it perfectly clear that the rate might be raised without injury to the traffic of the harbour, he has no power to do it. I hope, however, with your Lordship that the law is not entirely powerless in giving a remedy in the case of *mala fide* administration were such a case to arise. I see great difficulty in holding that we could interfere with the action of the Trustees so long as they maintained the rates at the scale which was fixed in the past. On the other hand, I can hardly doubt that if the Trustees were arbitrarily to lower the rates so as to deprive the

bondholders of their dividend without any corresponding advantage to the June 11, 1908.
harbour, that would be a breach of duty for which these Trustees, like all other trustees, would be accountable to this Court.

I therefore agree with your Lordship that the Lord Ordinary's interlocutor should be affirmed.

LORD KINNEAR.—I agree with your Lordship in the chair.

LORD PEARSON was absent.

THE COURT adhered.

WM. B. RAINNIE, S.S.C.—J. & J. Ross, W.S.—Agents.

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JAMES CULLEN GRIERSON AND ANOTHER, Appellants (Reclaimers).— No. 138.
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Bankruptcy—Sequestration—Appeal—Competency—Election of Trustee—Eligibility of Trustee—Finality of Sheriff's deliverance—Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), sections 68, 69, 71.—At a meeting of creditors convened for the purpose of electing a trustee on a bankrupt estate, and presided over by the Sheriff, an objection was stated to W., a candidate, in respect that he was a creditor, that his claim was founded on documents as to which questions must arise, and as to which he would have to adjudicate as trustee, and that accordingly he had an interest opposed to the general interest of the creditors. The objection was considered and repelled by the Sheriff, who, after a vote was taken, declared W. elected.

In an appeal against the deliverance of the Sheriff on the ground that sec. 68 of the Bankruptcy Act, 1856, enacted that "it shall not be lawful to elect as trustee the bankrupt or any person conjunct or confident with the bankrupt, or who holds an interest opposed to the general interest of the creditors," that W. had such an interest, and that therefore the Sheriff's deliverance was *ultra vires*, held that the objection in question was one for the consideration of the Sheriff, and that after he had considered and repelled it, his deliverance, under sec. 71 of the Bankruptcy Act, 1856, was final and not subject to review.

ON 22d February 1908 the estates of Thomas Ogilvy, farmer, Ler- 1st DIVISION.
wick, were sequestrated, and a meeting appointed to take place on Bill-Chamber.
20th March 1908 for the purpose of electing a trustee.

The meeting took place at Lerwick on 20th and 21st March, and was presided over by the Sheriff-substitute (Broun). The minutes of the meeting bore that Mr David Williamson, agent, North of Scotland Bank, Lerwick, and Mr J. W. Macintosh, accountant, Glasgow, were proposed for the office of trustee; that Mr J. C. Grierson, a creditor, protested against the eligibility of Mr Williamson (1) in respect that he was identified with the bankrupt's law-agent, and (2) "that he had an adverse interest in respect that his bank had a claim of over £600 against the bankrupt which was improperly vouched"; that "the Sheriff-substitute having examined the claim of the North of Scotland Bank, held that the said claim was sufficiently vouched and repelled Mr Grierson's objections on both heads"; that a vote was taken, when a majority in value of the creditors voted in favour of Mr Williamson; and that the Sheriff-substitute thereupon pro-

June 11, 1908. nounced a deliverance, declaring Mr Williamson to be duly elected trustee.

Grierson v.
Ogilvy's
Trustee.

Mr Grierson and Mr Macintosh presented a note of appeal against the deliverance of the Sheriff-substitute, and craved for its recall, on the ground that, Mr Williamson being ineligible for the office of trustee, the Sheriff had exceeded his jurisdiction under the Bankruptcy Act, 1856, in declaring him elected,* and that the proceedings at the meeting of creditors were *ultra vires* and illegal.

In support of his contention that Mr Williamson was ineligible, the appellant stated:—"6. During the taking of the sederunt . . . Mr Grierson took personal exception to Mr Williamson acting as trustee in respect (1) that he was the nominee of and confident with the bankrupt's law-agent, and (2) that he had interests conflicting with the general interest of the creditors in respect that his own claim was founded upon documents as to which questions must arise conflicting with the interests of the general creditors, and (3) that there was a claim by the North of Scotland Bank for £643, to which he took exception to the first item of £231 that it was not properly authenticated in terms of the Bankers Books Evidence Act, and the other items were open to objection and inquiry, and Mr Williamson (agent for the bank) was not the party to do so."

Other objections were stated to the regularity of the proceedings to which it is unnecessary to refer.

On 14th April 1908 the Lord Ordinary on the bills (Ardwall) refused the appeal †

* The Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), enacts:—

"68. *Procedure at meeting for election of trustee.*— . . . It shall not be lawful to elect as trustee the bankrupt, or any person conjunct or confident with the bankrupt, or who holds an interest opposed to the general interest of the creditors, or whose residence is not within the jurisdiction of the Court of Session.

"69. *Judgment of Sheriff as to trustee.*—If the Sheriff be present at the election of trustee, and there be no competition for the office, or objection stated to the candidate or candidates, he shall, by a deliverance on the minutes, declare the person chosen by the creditors to be trustee, and if there be competition or objections to the candidate or candidates, such objections to the votes or candidates shall be stated at the meeting, and the Sheriff may either forthwith decide thereon, or make *avizandum*, and he shall, if necessary, make a short note of the objections and of the answers, on which he shall, within four days after the meeting, hear parties *viva voce*, and declare the person or persons trustee or trustees in succession whom he shall find to have been duly elected, and state the grounds of his decision in a note, and the same, as well as such short note, shall form part of the process.

"71. *Judgment of Sheriff as to trustee final.*—The judgment of the Sheriff declaring the person or persons elected to be trustee or trustees in succession, shall be given with the least possible delay; and such judgment shall be final, and in no case subject to review in any Court or in any manner whatever."

† "OPINION.—(After dealing with an objection which is not reported)—All the other objections to the Sheriff-substitute's deliverance appear to me to be irrelevant in view of the provisions of section 71 of the Bankruptcy Act, 1856, which declares that 'the Sheriff's judgment declaring a person elected a trustee shall be final and in no case subject to review in any Court or in any manner whatever.' See also *Yeaman v. Little*, 8 F. 702, and cases there cited."

The appellants reclaimed.

June 11, 1908.

The case was argued before the First Division on 16th May 1908.

Grierson v.
Ogilvy's
Trustee.

Argued for the reclaimers;—Mr Williamson was a person holding an interest opposed to the general interest of the creditors, in respect that he would have to adjudicate upon his own claim, regarding which inquiry would be necessary, which he was not the proper person to conduct.¹ He was accordingly a person whom it was not lawful to elect as trustee,² and in declaring such a person elected the Sheriff had not acted in the exercise of his statutory jurisdiction.³ In such a case his decision was not final, and an appeal against his deliverance was competent.⁴ Reference was also made to *Miller v. Duncan*,⁵ with regard to the respective duties of the creditors and the Sheriff in the election of a trustee.

Argued for the respondents;—The qualification of a candidate for the office of trustee was one of the matters expressly left by the statute for the decision of the Sheriff.⁶ In this case the Sheriff had heard the objections, had considered them—as appeared from the minutes—and had given his award. In these circumstances his decision was final.⁷ The accuracy of the minutes could not be impugned now.⁸ The purpose of the statute was to provide a speedy method of electing the trustee, and appeals would not readily be allowed.⁹

At advising,—

LORD PRESIDENT.—This is a reclaiming note from a judgment of the Lord Ordinary officiating on the Bills, which deals with several points arising in a sequestration. But only one point was argued before your Lordships, which is not expressly dealt with by the Lord Ordinary, but which is covered by that portion of his opinion where he says,—“All other objections to the Sheriff-substitute's deliverance appear to me to be irrelevant in view of the provisions of section 71 of the Bankruptcy Act, 1856.” The objection stated is that the gentleman who was declared by the Sheriff to have been elected trustee, was incapable of holding that office in respect that, as is alleged, he had an interest opposed to the general interest of the creditors. That is explained to mean that he himself had a claim founded upon documents as to which questions might arise, and that his interest to sustain his own claim thus conflicted with the interests of the general creditors. The argument which was seriously pressed upon us was this: Section 68 of the Bankruptcy Act, 1856, which is headed, “Procedure at meeting for election of Trustee,” provides for the meeting of creditors, and for the election of a trustee, and concludes,—“It shall not be lawful to

¹ *Robison v. Stuart*, Nov. 23, 1827, 6 S. 104; *Bisset v. Nicholson*, July 20, 1841, 3 D. 1283, at p. 1286.

² Bankruptcy Act, 1856, sec. 68.

³ *Foulis v. Downie*, Oct. 27, 1871, 10 Macph. 20, at p. 23; *Buchan v. Bowes*, June 13, 1863, 1 Macph. 922, at p. 924; Bankruptcy Act, 1856, sec. 69.

⁴ *Yeaman v. Little*, March 16, 1906, 8 F. 702; *Farquharson v. Sutherland*, June 16, 1888, 15 R. 759.

⁵ March 18, 1858, 20 D. 803.

⁶ Bankruptcy Act, 1856, sec. 69.

⁷ Bankruptcy Act, 1856, sec. 71, 170.

⁸ *Brown v. Lindsay*, March 2, 1869, 7 Macph. 595.

⁹ *Galt v. Macrae*, June 9, 1880, 7 R. 888.

June 11, 1908. elect as trustee the bankrupt, or any person conjunct or confident with the bankrupt, or who holds an interest opposed to the general interest of the creditors, or whose residence is not within the jurisdiction of the Court of Session." Section 69 makes the Sheriff the Judge as to the person who

Grierson v. Ogilvy's Trustee.

Ld. President. has been elected, and section 71 provides that the judgment of the Sheriff declaring the person elected to be trustee, "shall be final and in no case subject to review in any Court or in any manner whatever." The case for the reclaimers was presented to us, not as an appeal against a judgment of the Sheriff, but as an appeal against an *ultra vires* act. It being impossible under the statute to appoint a person having an adverse interest, it was competent for this Court, as the reclaimers argued, to set aside such an appointment as an act done outwith the powers of the statute, and the familiar rule was appealed to that no finality clause can prevent an *ultra vires* act being set aside. I have come to the conclusion that the argument is not well founded. There is no doubt as to the policy of the statute. It was to get the trustee into the saddle as quickly as possible. I need not remind your Lordships of the remarks made in the case of *Yeaman v. Little*¹ by Lord Pearson, who has had a very large experience of this class of case, and by myself, where, with reference to the case of *Farguharson v. Sutherland*,² it was said that it was not desirable to extend the doctrine of that case or to relax the stringent provisions of the statute as to appeals. I am confirmed in my opinion by the terms of section 69 of the Act. I consider that the objection with which we are now dealing falls within the category of "objections to the candidate," referred to in that section, with regard to which it is provided that they are to be decided on by the Sheriff. If this is so, it was not *ultra vires* of him to decide upon this objection, and the finality clause applies. It seems to me that you get in the sentence at the end of section 68 an example of two classes of objections. Suppose the bankrupt himself had been appointed trustee. There could be no doubt of the fact that he was the bankrupt, and if you can imagine such an extraordinary thing as the Sheriff declaring the bankrupt elected, no doubt that appointment could be set aside, not by way of reviewing the Sheriff's decision, but on the ground that the appointment was *ultra vires*. But when you consider the other objections stated in section 68, it is apparent that they are matters which admit of questions being raised and decided, as, for instance, whether a certain person is "conjunct and confident" with the bankrupt. The expression "conjunct and confident" is one which was used in the old Scots Acts, and there are many cases in the books dealing with its significance. I do not suppose that all the possibilities of doubt regarding it are yet exhausted, and there may still be cases where there is room for argument as to who is a "conjunct and confident" person. If such cases arose, it would be for the Sheriff to say whether the objection had been made out or not. Similarly in the present case, it is for the Sheriff to decide whether the candidate has, or has not, an adverse interest, and when he has considered and decided that, his judgment is final. In the practical working out of the statute I do not think that any harm can be done, because, even supposing the Sheriff to have decided

¹ March 16, 1906, 8 F. 702.

² June 16, 1888, 15 R. 759.

wrongly, and that the trustee has an adverse interest, the most he could do June 11, 1908.
 would be to rank his own debt, and as to that he is not final. So that even Grierson v.
 taking the matter at the worst, I do not think that there is any serious Ogilvy's
 lacuna in the scheme of the Act. [His Lordship then dealt with certain Trustee.
 other objections with which this report is not concerned.] Ld. President.

I accordingly move your Lordships to adhere to the judgment of the Lord Ordinary.

LORD M'LAREN.—I take the same view as your Lordship. The argument submitted to us was that while the statute determined by exclusion who was eligible for the office of trustee, if the Sheriff confirmed the election, his decision was final, provided of course that he had exercised his jurisdiction. I agree that there may be cases in which the Sheriff's decision would not be final, as, for example, where he had appointed as trustee the bankrupt's brother or the bankrupt's son. In such a case I should hold that the Sheriff's attention had not been called to the relationship, and that, accordingly, he had not applied his mind to the true question, and so had failed to exercise his jurisdiction. On the other hand, if the objection to the trustee was based on agency—that he was the agent of someone who had a claim against the bankrupt's estate—I should not take the same view, because the question of agency is one of degree, and I should assume that the Sheriff had considered the matter and come to a different opinion from the appellant, and whenever it is ascertained that the Sheriff has exercised his jurisdiction the statute declares his decision to be final.

Similarly, where the person elected trustee has an interest which is manifestly opposed to that of the general body of creditors—as for instance where he claims a preference—I should be of opinion that this was a case where the election could not be sustained, and I should assume in such a case that the Sheriff's attention had not been called to the matter, and that accordingly he had not given a decision on the point.

But if all that is said against the trustee's election is that he, in his capacity as an individual, has a claim against the bankrupt estate, you get at once into a question of degree, for the objection taken might be so trifling that no sensible Judge would pay any attention to it, and on the other hand it might be so serious as to require very careful consideration. These seem to me to be just the kind of questions which the statute has left to the determination of the Sheriff, and nothing has been shewn to convince me that in the present instance the Sheriff had not fully considered the matter.

I therefore think the objection fails.

LORD KINNEAR.—I am of the same opinion. I think on the construction of the statute that the question which it is proposed to raise for our consideration is exactly one of those questions which are by the statute to be decided by the Sheriff finally. The statute says that the creditors are to meet and elect a fit person as trustee. Then it says it shall not be lawful to elect as trustee the bankrupt or any person conjunct or confident with the bankrupt, or who has an interest opposed to the general interest of the creditors, or whose residence is not within the jurisdiction of the Court of

June 11, 1908. Session. Now, all these objections are objections to the election by the creditors of a particular person, and so must be considered in the first instance by the creditors. Then the statute says that if there is no competition for the office the Sheriff shall declare the person chosen by the Lord Kinnear. creditors to be trustee. If there is competition he has to find who has been duly elected, and his decision is not subject to review in any Court or in any manner whatever. But the question whether it is a good objection to the trustee that he is a conjunct or confident person or has an interest opposed to the general interest of the creditors, is a question which must be decided before the Sheriff can decide whether the trustee is duly elected or not, and when he has applied his mind to that question and settled it one way or other it appears to me that the express terms of the statute make his decision final. I agree with your Lordship's observation as to the true purpose and effect of this provision. For the books shew that under previous statutes the proceedings were apt to be delayed by protracted litigation between persons competing for the office of trustee, and it is clear enough as Lord Adam points out in one of the previous cases that such litigations could be of no advantage whatever to the creditors, or to the estate. This is the evil which the action was intended to meet. But such a question as that which it is proposed to raise in this case is just one of those which might probably lead to protracted litigation, because the decisions rest on fine distinctions, and a defeated candidate was not very likely to be satisfied with a single judgment against him. I think that this is just the kind of question which it was intended to exclude from appeal. In any case I think that the terms of the statute clearly make the Sheriff's decision final. I agree also that this Court is not prevented by the finality clause from setting aside judgments which are not pronounced in the true and honest exercise of jurisdiction conferred by the statute; but I think that the question whether a decision has been pronounced in the exercise of such jurisdiction cannot depend upon the greater or less materiality of the question or upon the amount of attention which may be supposed to have been given to it. I suppose such a judgment might be set aside on the same grounds as any other final judgment, as for example, if it had been obtained by fraud. But it is not necessary to consider what would be a sufficient ground. It is enough to say that there is no ground for reduction alleged in the present case. Whether the Sheriff was right or wrong in declaring this man elected is not material, because his deliverance is final.

LORD PEARSON was absent.

THE COURT adhered.

CLARK & MACDONALD, S.S.C.—CARMICHAEL & MILLER, W.S.—Agents.

No. 139. ALEXANDER BROCK, Pursuer (Respondent).—*Constable—Hamilton.*
 JOHN BROCK, Defender (Reclaimer).—*M^cClure, K.C.—Mercer.*
 June 12, 1908. *Writ—Instrumentary Witness—Knowledge of Granter by Witness—Act 1681, cap. 5.*—The Act 1681, cap. 5, enacts:—"And it is further statute and declared that no witness shall subscribe as witness to any partie's subscription unless he then know that partie. . . ."
 Brock v. Brock. *Held* that a codicil was validly executed where one of the witnesses had

not previously known the granter but was introduced to him at the time of June 12, 1908. the execution by the other witness, who was an acquaintance, and whom he knew to be a law-agent.

Brock v.
Brock.

ALEXANDER BROCK, joiner, Motherwell, son of the deceased John Brock, builder, Linlithgow, brought an action against his brother John Thomas Brock, builder, Linlithgow, in which he concluded for reduction of a codicil bearing to be granted by the late John Brock, dated 24th September 1896.

2D DIVISION.
Ld. Johnston.

The pursuer averred that the codicil was not executed in accordance with law,* seeing that one of the witnesses, John Allan Wilson, did not know the late John Brock, and had no sufficient information as to his identity.

Proof was allowed and led.

The following were the material facts relating to the execution of the codicil under reduction :—

The testing-clause was in the following terms :—“In witness whereof, this codicil, written by David Barclay, solicitor, 30 Hanover Street, Edinburgh, is subscribed by me at Edinburgh, on the 24th day of September 1896 years, before these witnesses, the said David Barclay and John Allan Wilson, residing at 73 Cumberland Street, Edinburgh.

“David Barclay, *witness*.

JOHN BROCK.”

“John A. Wilson, *witness*.

It had been arranged that the deed should be signed in Mr Barclay's office. After Mr Brock had come to the office Barclay went to look for a witness, and, meeting John Allan Wilson, with whom he was acquainted, he asked him to act. Wilson agreed to act, and went to Barclay's office for that purpose. On entering the office Wilson found a man there whom he had not previously known, but whom Barclay introduced to him as Mr Brock. Mr Brock and Wilson bowed to each other in acknowledgment of the introduction. Mr Brock, who had already adhibited his signature to the codicil, then acknowledged his signature. Barclay said to Mr Brock that he should not have signed until Wilson was present. Mr Brock reiterated his acknowledgment of the signature. Barclay then signed as a witness; and then Wilson signed. Wilson then left the office. Wilson knew Barclay well and had on previous occasions acted as a witness at Barclay's request.

On 20th June 1907 the Lord Ordinary granted decree of reduction on a ground not now reported.

The defender reclaimed.

The case was heard before the Second Division on the 4th, 5th, 10th, 11th, and 12th June 1908.

The argument for the defender and reclamer was directed solely to the ground on which the Lord Ordinary proceeded.

Argued for the pursuer and respondent;—Under the Act 1681, cap. 5, no person was entitled to act as a witness unless he knew the granter. Now it was settled that it was not necessary that the witness should have a particular antecedent knowledge. It was enough if he had credible information that the party subscribing was the granter of the deed.¹ But a mere introduction by the other

* The Act of 1681, cap. 5—(quoted in rubric).

¹ Campbell v. Robertson, 1698, M. 16,887; Walker v. Adamson, 1716, M. 16,896; Bell's Lectures on Conveyancing, 3d edition, p. 52.

June 12, 1908. witness was not enough. The object of the Act was to guard against personation. The safeguard provided was that each witness should have credible information as to the identity of the granter. Where the information of one witness was derived wholly from the other witness, the information was truly the information of only one witness. The safeguard provided by the statute, therefore, was not present, and the attestation was bad.

The defenders were not called on for a reply.

LORD JUSTICE-CLERK (after discussing a question not now reported).—With regard to the attestation, I have never understood that it was necessary for a witness to be in any other position than that he should be told, if he does not know already, whose signature it is that he is to witness. If the granter is introduced to him that is sufficient; because what he is to witness is the fact that he saw the signature exhibited or heard the granter acknowledge it. A simple introduction by name is all that is necessary if the witness does not know the granter personally.

LORD STORMONTH-DARLING concurred.

LORD LOW (after discussing a question not now reported).—I should like to say a single word as to the argument that was addressed to us for the pursuer founded on his fourth plea in law, which is to the effect that “the said codicil, in respect that it was not executed in accordance with law, should be reduced.”

That plea is founded on the allegation that one of the instrumentary witnesses neither knew Mr Brock nor had any sufficient evidence of his identity.

The question depends on the construction of the Act of Parliament 1681, cap. 5, which, *inter alia*, enacts that “no witness shall subscribe as witness to any partie’s subscription, unless he then know that partie, and saw him subscribe . . . or that the partie did, at the time of the witnesses subscribing, acknowledge his subscription.” There are two decisions on the question what is required under the enactment by way of knowledge on the part of the witnesses of the identity of the party whose signature they are to witness, and these decisions have been held to rule the law ever since. The first is the case of *Campbell v. Robertson*.¹ There the sufficiency of the attestation of a bond was challenged on the ground that one of the witnesses was a boy of fourteen, who was called off the street to be a witness, and who deposed that he did not know the granter. The Court held that that was not a good attestation, but they laid it down that the knowledge of the party required by the Act “cannot be understood of a distinct, particular, antecedent knowledge, but only that he called himself so to the witnesses.” According to that decision, therefore, a statement by the person whose signature is to be attested that he is the granter of the deed is sufficient to warrant the witness to subscribe as witness.

The second case is *Walker v. Adamson*,² where the circumstances were different. The deed challenged was a disposition granted by one Janet

¹ M. 16,887.

² M. 16,896.

Handyside, and one of the witnesses deponed "that, he never saw the sub-June 12, 1908.
 scriber of the disposition before, nor knew that there was such a person, till Brock v.
 the neighbours in Hastie's Close declared to the deponent that she was the Brock.
 daughter of John Handyside, merchant in Edinburgh; and at her subscrib- Lord Low.
 ing the said Janet declared to the deponent and two of the neighbours then
 present that she was the daughter of the said John Handyside, upon the
 faith whereof the deponent subscribed as witness." In these circumstances
 the report bears that:—"The Lords found that the witnesses had such
 credible information that the subscriber was the true person designed in
 the writ, that they might lawfully sign as witnesses to a subscription."

The result of these decisions seems to me to be that when a deed is
 challenged on the ground that the witness did not know whose signature
 he was attesting, the question is whether he had credible information that
 the person whose signature he attested was the granter of the deed.

Now, the present case stands thus:—Mr Barclay says that having no
 clerk in the office, he was in the habit of obtaining the services of a neigh-
 bour, a Mr Keenan, and that he had arranged that Mr Keenan should be
 present on the occasion in question. Keenan, however, did not appear and
 could not be found, and accordingly the services of Mr Wilson, an
 acquaintance of Mr Barclay, were obtained. Barclay introduced Wilson
 to Mr Brock, and the latter acknowledged his signature, and Wilson
 signed as witness, Barclay being the other witness.

I am of opinion that Wilson had sufficient and credible information that
 the person to whom he was introduced was the person designed in the writ
 to justify him in subscribing as witness. Wilson knew Barclay well, and
 was aware that he was a qualified law-agent and carried on business. When,
 therefore, Barclay introduced a gentleman to him as a client by the name of
 and as being the person designed in the writ as granter thereof, and when
 that gentleman tacitly assented to Barclay's statement by acknowledging the
 introduction, and then acknowledged his signature, I think that witness had
 such credible information as to the identity of the person whose signature
 he witnessed as is required by the statute as construed by the judgments to
 which I have referred. I am therefore of opinion that the codicil cannot
 be set aside on the ground of insufficient authentication.

LORD ARDWALL concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, and
 assoilzied the defender.

J. FARQUHARSON MACDONALD, Solicitor—CUNNINGHAM & LAWSON, Solicitors.—Agents.

ARTHUR CUTHBERT, First Party.—*Dickson, K.C.—Macmillan.*
 ARTHUR CUTHBERT AND OTHERS (John Cuthbert's Trustees),
 Second Parties.—*Chree.*

No. 140.

June 12, 1908.

Alimentary Provision—Assignment—Amount.—A beneficiary entitled Cuthbert v.
 under a will to a liferent provision declared to be alimentary, and amount- Cuthbert's
 ing to over £5000 per annum, desired to assign £2100 per annum, or alter- Trustees.
 natively the whole provision so far as in excess of £1000 per annum, which
 he stated to be a sufficient alimentary provision for himself, to an insurance

June 12, 1908. company, in order to raise a sum of money sufficient to pay his debts. A special case was presented in order to test the validity of the proposed assignation.

Cuthbert v.
Cuthbert's
Trustees.

The case was *dismissed* as incompetent, on the ground that any judgment which the Court might pronounce would be premature, and would not be *res judicata* in questions which might arise in the future with possible alimentary creditors.

Question whether an alimentary provision is adjudgeable.

1ST DIVISION. By trust-disposition dated 6th April, and registered in the Books of Council and Session 4th May 1904, the now deceased John Cuthbert, who then resided at Carpow, Abernethy, Perthshire, and afterwards at Kildrochet, Stranraer, Wigtownshire, assigned and disposed to trustees his whole means and estate.

By the ninth purpose of his trust-disposition and settlement the deceased John Cuthbert directed his trustees to pay the whole free income of his estate to his nephew, Arthur Cuthbert, and to his nephew's son, Claude Arthur Cuthbert, equally between them or to the survivor, "for their and his liferent alimentary use allanarly, and free from their and his debts or deeds or the diligence of their or his creditors."

Questions having arisen regarding the extent to which Arthur Cuthbert's life interest could be alienated so as to make it available for payment of his debts, a special case was presented, to which the parties were (1) Arthur Cuthbert, and (2) John Cuthbert's trustees.

The case stated :—

"3. The said John Cuthbert, the truster, died on 20th May 1905, survived by the said Arthur Cuthbert and Claude Arthur Cuthbert. The said Arthur Cuthbert is the party of the first part. The said Arthur Cuthbert is forty-seven years of age and is married, and has only one child, the said Claude Arthur Cuthbert, who is seventeen years of age. His wife is still living. She is possessed of separate estate, and is not dependent upon him for her support. The trustees named accepted office and are the parties of the second part.

"4. . . . The whole free income of the said trust means and estate is at present in terms of the said trust-disposition divisible equally between the said Arthur Cuthbert and Claude Arthur Cuthbert. The present free annual income of the trust is estimated at upwards of £11,000, of which the said Arthur Cuthbert is entitled to one-half. . . .

"5. The affairs of the first party have recently become embarrassed in consequence of his having contracted debts amounting to £23,000. He has no available assets other than the alimentary income payable to him under the above-mentioned trust-disposition. In these circumstances his creditors are threatening him with action or sequestration, with a view to attaching by diligence the income payable to him under the said trust-disposition in so far as in excess of a reasonable alimentary provision. The first party is desirous of obviating such proceedings, and has made a provisional arrangement with the Norwich Union Assurance Society whereby, in consideration of his granting to them an assignation to the sum of £2100 per annum payable out of his said liferent provision, together with covering policies of insurance on his life, the Society will advance to him a sum sufficient to enable him to pay off his whole creditors at once in full. The parties are agreed that the said debts are due and payable by the first party, and that the balance of the first

party's income under the said trust-disposition, over and above the annual sum of £2100 proposed to be assigned will, if the trust income be maintained at its present amount, constitute an ample alimentary allowance to the first party. The creditors of the first party have been apprised of the proposed transaction, and have agreed to hold their hands in the meantime. The second parties consider the proposed arrangement a reasonable one and advantageous for the first party. A question has, however, arisen in view of the terms of the said trust-disposition as to the power of the first party to grant an effectual assignation in the terms proposed, and as to the power of the second parties to recognise and act upon the same."

June 12, 1908.
Cuthbert v.
Cuthbert's
Trustees.

The first party contended that in order to raise funds to pay off his creditors he was entitled to grant a valid assignation of such an annual sum out of the alimentary liferent payable to him under the said trust-disposition as would leave him a reasonable alimentary provision, and in particular that he was entitled to grant an assignation of an annual sum of £2100 payable out of the said liferent, and that the second parties were bound to recognise and give effect to such an assignation when duly intimated to them. In any event, the first party contended that he was entitled to grant a valid assignation to his said liferent provision in so far as in excess of £1000 per annum.

The second parties contended that the first party was not entitled to assign any part of his income from the trust-estate. They maintained that he was not now entitled to determine what would be a sufficient alimentary provision for him during the whole of his life, and that in any event £1000 was not sufficient as an alimentary provision. They further maintained that in any event he must *primo loco* have secured to him such sums as would from time to time, and having regard to all circumstances, be a sufficient alimentary provision for him, and that he could not effectually grant, and they were not bound to recognise, an assignation for the whole of his life of a fixed amount out of his income, thus restricting his alimentary liferent to the balance, whatever it might happen to be, of the yearly income.

The questions of law were:—“(1) Has the first party power, in order to raise funds to pay off his creditors, to grant a valid and effectual assignation to the sum of £2100 per annum, payable out of the income provided to him under the said trust-disposition? And if so, are the second parties bound to give effect to such an assignation? (2) In the event of the first question being answered in the negative, has the first party power, in order to raise funds to pay off his creditors, to grant a valid and effectual assignation to his liferent provision under the said trust-disposition in so far as in excess of a sufficient alimentary income? And if so, are the second parties bound to give effect to such an assignation? (3) In the event of the second question being answered in the affirmative, is the sum of £1000 per annum a sufficient alimentary provision for the first party?”

Argued for the first party;—A provision even if declared to be alimentary was only protected from the diligence of creditors to the extent of a reasonable provision, and *quoad excessum* was open to diligence.¹ Not only were the termly payments attachable, but the

¹ Livingstone v. Livingstone, Nov. 5, 1886, 14 R. 43; Haydon v. Forrest's Trustees, Nov. 30, 1895, 3 S. L. T. 182; Lewis v. Anstruther, Dec. 17, 1852, 15 D. 260; Fraser on Husband and Wife, 2d ed., i. 765.

June 12, 1908. right itself was attachable, and therefore assignable.¹ In the cases referred to and in many others the Court had entertained and decided the question of what constituted a reasonable alimentary allowance. In the present case a reasonable allowance would remain secured to the first party if an assignation were made to the Norwich Union Society in either of the forms indicated in the questions. The questions could be competently decided in a special case since they were such as could have been raised in an action of declarator.²

Cuthbert v.
Cuthbert's
Trustees.

Argued for the second parties ;—It was well settled by authority that in general an alimentary provision was not assignable,³ although in the cases referred to it was true that no distinction was taken between a reasonable provision and one which, though declared to be alimentary, was more ample in amount. In any event, such a provision was assignable only to alimentary creditors, for it was only by such creditors that it could be attached.⁴ The practical difficulty in the way of validly executing such an assignation as was here proposed lay in the fact that it was impossible to predict that the income might not shrink, so that, after deduction of the sum assigned, the remainder would be insufficient to meet the claims of future alimentary creditors, or of the beneficiary himself. The person in whose favour the proposed assignation was to be made was not an alimentary creditor.

At advising,—

LORD M'LAREN.—This is a special case between Arthur Cuthbert, who is the nephew and beneficiary under the testament of the late John Cuthbert of the first part, and the said John Cuthbert's trustees of the second part. The question relates to the effect of an alimentary liferent interest, and the extent to which that alimentary interest can be alienated so as to make it available for payment of debts.

The provision under consideration is the ninth purpose of Mr John Cuthbert's will, which provides that the trustees shall hold and apply, pay and convey the whole free income of the trust-estate to Arthur Cuthbert and another, equally between them, or to the survivor of them in liferent for their and his liferent alimentary use allenary, and free of their and his debts or deeds, or the diligence of their or his creditors. Arthur Cuthbert has, we do not know how, but probably through business transactions, incurred debts to the extent of £23,000, but having no capital, and being threatened with diligence by his creditors he has entered into a preliminary arrangement with the Norwich Union Assurance Society, whereby, in consideration of his granting to them an assignation to the sum of £2100 per annum payable out of his said liferent provision, together with covering policies of assurance on his life, the Society will advance a sum of money sufficient to enable him to pay off his whole creditors at once. The trustees seem willing to support this agreement, which is one, no doubt, very advan-

¹ Claremont's Trustees v. Claremont, Nov. 10, 1896, 4 S. L. T. 144.

² Thomson's Trustees v. Thomson, Oct. 22, 1897, 25 R. 19.

³ Ersk. iii. 5, 2; Mackenzie v. Morison, 1791, M. 10,413; M'Donnell v. Clark, Nov. 25, 1819, F. C.; Rennie v. Ritchie, April 25, 1845, 4 Bell's App. 221; Hewats v. Robertson, Nov. 30, 1881, 9 R. 175.

⁴ Earl of Buchan v. His Creditors, July 11, 1835, 13 S. 1112; Harvey v. Calder, June 13, 1840, 2 D. 1095; Lewis v. Anstruther, June 11, 1852, 14 D. 857, and Dec. 17, 1852, 15 D. 260.

teagous to Mr Cuthbert at the present moment, but they decline to take the June 12, 1908. responsibility of doing so unless with the approval of the Court. In these ^{Cuthbert v.} circumstances three questions have been submitted for our opinion. The ^{Cuthbert's} first is as to the first party's power to grant a valid and effectual assignation ^{Trustees.} to the sum of £2100 per annum payable out of the income provided to him ^{Lord M'Laren.} under the said trust-disposition; that is to say, cutting off that fixed sum from the amount of the alimentary interest and leaving the remainder for his enjoyment. The next question, in the event of the first question being answered in the negative, is whether the first party has power to grant a valid and effectual assignation to his liferent provision under the said trust-disposition in so far as it is in excess of a sufficient alimentary income. Now, that seems quite a harmless question, as it is in accordance with the spirit of the law on this subject, but it is followed by the third question which is to the following effect,—“In the event of the second question being answered in the affirmative, is the sum of £1000 per annum a sufficient alimentary provision for the first party?”—so that by questions two and three taken together we are asked to say whether it is a legal arrangement that Mr Cuthbert's income should be reduced for all time coming to the minimum sum of £1000 as being sufficient to satisfy his alimentary requirements. The Court has recognised the principle that where a person is in the enjoyment of an annual income under the form of an alimentary liferent that sum may be made available to his creditors year by year in so far as it is in excess of the amount which is required for an alimentary provision, and no difficulty attends this view, because in any one year the income is known, and an opinion can be formed as to what is the necessary sum to maintain the person in the rank of life to which he belongs, without deteriorating to a lower style of living. These facts can be ascertained from year to year. But I am not aware that it ever has been held that an alimentary interest is adjudgeable, and it is impossible to determine the question in this case because other parties who would be interested in the decision of that question are not here, that is to say, the alimentary creditors of the beneficiary whose claims may emerge from year to year. But we are asked in the first question to affirm that the Norwich Union Society have an effectual assignation to this liferent provision, and we are asked to do so on the ground that the sum remaining is sufficient to satisfy the wants of the first party. This year we are told, the income amounts to over £5000. But that is only the condition in this year. There is no difficulty in holding that for the present, more than sufficient would be left for alimentary maintenance. But then we do not know what the income in future years will be. There may be losses through the depreciation of securities or from other causes which may sweep away the fund altogether. Such things have happened, and in some future year the estate of the uncle might be so diminished as not even to provide the £2100 payable to this Insurance Company. In such a case nothing would be left for the beneficiary, and I need hardly say that an alimentary income of nil is not enough for anyone to live upon. This seems to be an insuperable obstacle to giving any answer whatever to the first question.

Questions two and three proceed on the supposition that the Insurance Company instead of having security over the entire estate should limit that

June 12, 1908. security to the annual income less £1000, which would always remain for the aliment of the beneficiary. Well, if he has considered this question, and has come to the conclusion that £1000 is enough to satisfy his alimentary wants, it is highly probable that this would be a satisfactory arrangement, but as one of your Lordships has observed, this only goes to prove that the Insurance Company have a good speculative security for their advance. I do not think that this Court in administering this somewhat delicate equitable jurisdiction can assume that a sum sufficient for the aliment of a party in the present year would remain sufficient for his aliment in all time. We do not know that the value of gold for instance may not change, and that a sum now sufficient to maintain a person with decency in the position in life which he occupies might not be sufficient to maintain him in a similar position twenty years hence. Accordingly, I see considerable difficulty in answering questions two and three at all. Indeed, the theory of this case involves the startling assumption that an alimentary interest is adjudgeable, because I do not see how otherwise a security can be created over that interest for the money it is proposed should be advanced. I have therefore come to the conclusion that it is impossible to give any answer to either of these questions. It must be left to the Insurance Company, if they are satisfied with the security, to consider whether they will make this advance without the authority of the Court. If we were so ill advised as to answer the questions as the parties to this case desire, this would not prevent creditors coming forward in the future to make a claim on the annual income, because our decision would not be *res judicata* in a question with them. The question would then arise whether the assignation which had been made to the Insurance Company was valid, and whether it gave a preference to the Insurance Company over these other creditors. I therefore move that we should dismiss the case.

LORD KINNEAR.—I also think that this case must be dismissed as incompetent. I do not think that the incompetency arises from the shape in which the case is presented, for I assent to the view which was stated by counsel, viz., that the Court may entertain in the form of a special case any question which might be entertained as a declaratory conclusion in an action of declarator. But I think that if an action of declarator had been brought in which the Court was asked to affirm the proposition which we are asked to affirm in this case, such an action must have been dismissed. The question we are asked is whether, if the first party grants an assignation to the Insurance Company of part of his income, that will be a valid and effectual assignation in circumstances about which it may be easy to speculate, but which it is impossible to foresee, and we are to decide this in the absence of persons who may have an interest and who are not now before the Court. Whether there is left a sufficient margin of income to make the proposed loan a safe investment is a question of which the lenders may be able to judge, but about which they are not entitled to ask the Court to speculate or to advise them. The practical question is whether if this assignation were now granted it would be valid and effectual in the event of questions arising at some future time between the assignees and creditors of the grantor, who might arrest a term's income for an alleged alimentary debt.

This question we cannot decide, because our decision would not be *res June 12, 1908.*
judicata against the hypothetical arrester. It is perhaps natural that as ^{Cuthbert v.}
 both parties desire a judgment, they should not have called our attention ^{Cuthbert's}
 to the many cases in which the Court has refused to entertain questions of ^{Trustees.}
 this kind. The Court has uniformly refused to consider a declaratory ^{Lord Kinnear.}
 conclusion that if such and such a thing were done, it would make a valid
 and effectual deed; and that is just the proposition that we are asked in
 this case to affirm or deny. I need only refer to two authorities, viz., *Earl*
*of Galloway v. Garlies*¹ and *Harvey v. Harvey's Trustees*.² In the latter
 case the principle is explained by Lord Justice-Clerk Inglis. The question
 there was whether children who had an interest in certain provisions were
 entitled to test on their provisions, and Lord Justice-Clerk Inglis said
 (p. 1325),—"The question presents itself for our consideration whether if we
 were to pronounce judgment upon this question of the right of the younger
 children to test upon any portion of the provisions settled by the deed of
 1839, that would be an operative and conclusive judgment when the ques-
 tion really arises. It might or might not. . . . There might be parties
 coming before the Court at a distance of years and trying that question
 over again, and representing your Lordships' judgment pronounced now as
 utterly inoperative and useless. For what reason? Simply because it was
 a premature judgment that ought never to have been pronounced." His
 Lordship goes on to point out that the fatal objection to such a premature
 judgment is that it will not become *res judicata* against all persons who
 can become interested in the matter.

Upon the same ground, viz., that any judgment we pronounced now
 would be premature, I think this case ought to be dismissed.

LORD JOHNSTON.—I concur. I regret that we cannot save Mr Arthur
 Cuthbert from one of the disagreeable results of the circumstances which
 have placed him in his present position. I am afraid he must either
 execute a trust-deed or go through the Bankruptcy Court, and there the
 question which we are asked to decide *ab ante* may properly be tried
 between his trustee and his creditors.

It is unfortunate that this should be necessary. But I do not think the
 questions attempted to be raised can otherwise competently and effectually
 be raised.

The LORD PRESIDENT and LORD PEARSON were absent.

THE COURT dismissed the case as incompetent.

TODS, MURRAY, & JAMIESON, W.S.—E. A. & F. HUNTER & Co., W.S.—Agents.

¹ June 26, 1838, 16 S. 1212.

² June 28, 1860, 22 D. 1310.

No. 141. MILES M'INNES (Inspector of Poor of Parish of Dumfries), Pursuer.
—*J. H. Orr.*

June 12, 1908. SAMUEL RIGG (Inspector of Poor of Parish of Kelton), Defender
(Appellant).—*D.-F. Campbell—Chree.*

Rigg v. Bell.

JAMES BELL (Inspector of Poor of Parish of Parton), Defender
(Respondent).—*Orr Deas—Jameson.*

Poor—Settlement—Lunatic—Residential Settlement—Retention—Lunatics (Scotland) Act, 1857 (20 and 21 Vict. cap. 71), sec. 75.—The Lunatics (Scotland) Act, 1857, sec. 75, enacts:—"Every pauper lunatic detained in any district asylum under this Act shall be deemed and held to belong and be chargeable to the parish of the legal settlement of such lunatic at the time the order for his reception in such asylum was granted, and the expense of his maintenance in such district asylum shall be defrayed by such parish accordingly, and the residence of any pauper lunatic in any such district asylum shall be deemed to be the residence of such lunatic in the parish legally chargeable with the maintenance of such lunatic."

A lunatic who was born in the parish of Parton, and who had on 15th August 1895 a residential settlement in the parish of Kelton, was admitted to an asylum in another parish as a pauper lunatic on that date. For a few months after her admission she was maintained by the parish of Kelton. For the next ten years she was maintained by her brother in the same asylum as a private patient, and her name taken off the poor's-roll. Thereafter her brother ceased to contribute to her support, and she again fell upon the rates, being detained in the same asylum under the order granted when she was first admitted.

In a question between the parish of Kelton, who contended that she had lost her residential settlement by non-residence during the period when she was a private patient, and the parish of Parton, who contended that her settlement remained the same as at the date of her admission, *held* that the lunatic had not lost her residential settlement, and that she was chargeable to the parish of Kelton as the parish of her settlement at the time when the order for her reception was granted,—(*disc.* Lord Johnston, who was of opinion that when the lunatic became a private patient she ceased to be a pauper lunatic, and that sec. 75 no longer applied).

Kirkwood v. Lennox, July 10, 1869, 7 Macph. 1027, *followed*.

1st DIVISION.
Sheriff of
Dumfries and
Galloway.

MILES M'INNES, inspector of poor of the parish of Dumfries, raised an action in the Sheriff Court at Kirkcudbright, against Samuel Rigg, inspector of poor of the parish of Kelton, and James Bell, inspector of poor of the parish of Parton, in which the Court was craved to ordain the defender Rigg, or otherwise the defender Bell, to relieve the pursuer of the advances made and to be made by him on account of Janet Cannon, a pauper lunatic, residing in the Crichton Royal Institution, Dumfries.

The Crichton Institution is situated in the parish of Dumfries, and for the purposes of the Lunatics Act, 1857, is the district asylum for pauper lunatics in the district of Dumfries.

The following narrative of the facts, which were not in dispute, is taken from the averments of parties:—

Janet Cannon was born in the parish of Parton, and on 15th August 1895 had a residential settlement in the parish of Kelton. On that date, being a pauper and a lunatic, she was admitted to the Crichton Royal Institution as a pauper lunatic. The parish of Kelton admitted liability for her support, and maintained her until 2d November 1895.* From 2d November 1895 until 1st May 1906,

* The Lunatics (Scotland) Act, 1857 (20 and 21 Vict. cap. 71), sec. 75, is quoted in the rubric.

Janet Cannon was maintained by her brother as a lunatic at the Crichton Institution, and during that period her name was transferred from the list of pauper patients to the list of private patients kept at the asylum, and was thereupon struck off the poor-roll of the parish of Kelton. After 1st May 1906 her brother ceased to contribute to her support, and she again became a pauper. As she had not recovered, she continued to reside in the Crichton Institution, and at the date when the action was raised she was still detained there under the order which was granted when she was first admitted in 1895. June 12, 1908.
Rigg v. Bell.

The pursuer pleaded;—(1) The pauper not having a parochial settlement in the parish of Dumfries, the pursuer is entitled to be relieved of her maintenance by the Parish Council of the parish in which such settlement exists. (2) The pauper having a residential settlement in the parish of Kelton, the pursuer is entitled to decree as concluded for against the defender Samuel Rigg, as representing the Parish Council of that parish. (3) Alternatively, and assuming that such residential settlement has been lost by absence, the pursuer is entitled to decree against the defender James Bell, as representing the Parish Council of the parish of Parton, which is the parish of the pauper's birth settlement.

The parish of Kelton pleaded;—(1) The pauper, Janet Cannon, having been resident outwith the parish of Kelton, and not having been in receipt of parochial relief from the period from 2d November 1895 to 1st May 1906, and having thus lost her residential settlement in the said parish, the defender Samuel Rigg is entitled to be assolized. (2) The pauper, Janet Cannon, having lost her residential settlement in the parish of Kelton as before mentioned, and being a lunatic and incapable of acquiring a residential settlement, the parish of Parton, as her birth settlement, is bound to support her, and the defender Samuel Rigg should be assolized.

The parish of Parton pleaded;—(1) The pauper not having a parochial settlement in the parish of Parton, said parish of Parton is not liable in relief to the pursuer for the pauper's maintenance. (2) The pauper having a residential settlement in the parish of Kelton, that parish is alone liable to the pursuer for the sums sued for, and the defender James Bell is entitled to be assolized. (3) The pauper having a residential settlement in the parish of Kelton, the defender James Bell is entitled to be assolized.

Joint minutes were lodged for the parties, by which they renounced probation, and admitted that either the parish of Kelton or the parish of Parton was liable in relief to the pursuer for the sums sued for.

On 15th May 1907 the Sheriff-substitute (Napier) pronounced this interlocutor:—" . . . Finds in law (1) that Janet Cannon has lost her residential settlement in the parish of Kelton by non-residence therein; (2) that the parish of Parton, being the parish of her birth settlement, is now bound to support her: Therefore sustains the pursuer's third plea in law, and pleas one and two of the defender Samuel Rigg, inspector of poor of the parish of Kelton: Repels the pleas stated by the defender James Bell, inspector of poor of the parish of Parton; and decerns against the said James Bell as craved.

The defender James Bell appealed to the Sheriff.

On 6th August 1907 the Sheriff (Fleming) pronounced this interlocutor:—"Sustains the appeal; recalls the interlocutor of the Sheriff-substitute of 15th May 1907 complained of; finds of new, in fact, in

June 12, 1908. terms of the findings in fact in said interlocutor: Finds, in law, that by the provision of section 75 of the Lunacy (Scotland) Act, 1857, Janet Cannon has not lost her residential settlement in the parish of Kelton, and that that parish is still bound to support her; therefore sustains the pursuer's second plea in law, and the defender James Bell's second plea in law, and decerns against the defender Samuel Rigg as craved." *

The defender Samuel Rigg appealed to the Court of Session.

Argued for the appellant;—Apart from the effect of section 75 of the Lunatics Act,¹ there could be no doubt that the lunatic had lost her settlement in Kelton by non-residence.² [Counsel for respondent stated that he did not dispute this.] Section 75 had no bearing, for it applied only to the case of a person who, throughout the whole period of his residence in the asylum, was both pauper and lunatic. In the present case the lunatic was supported by her brother for more than ten years, during which time she was capable of losing, and did lose, her residential settlement.³ *Kirkwood v. Lennox*⁴ was not conclusive against the appellant's contention. The Lord President in that case, on whose opinion the respondent founded, proceeded on the view that a lunatic could neither acquire nor lose a settlement—a view which was inconsistent with *Keith Parish Council v. Kirkmichael*

* "NOTE.—The only question in this cause is whether the 75th section of the Lunacy (Scotland) Act, 1857, applies. If it does not, the residential settlement acquired in Kelton has been lost by absence, for the fact that the person was a lunatic during that absence does not render him incapable of losing such a settlement (*Crawford v. Beattie*, 24 D. 357), and the birth settlement in Parton revives. If it does apply, the residential settlement in Kelton, being the lunatic's legal settlement when the order for her reception in the district asylum was granted, continues notwithstanding her bodily absence from that parish.

"This section was carefully considered in the case of *Kirkwood v. Lennox*, 7 Macph. 1027, where the circumstances were very similar to the present case, and the Court there held that the section did apply. The ground of judgment given by Lord President Inglis was that a study of the section shewed that the only conditions imposed by it were, first, that the person is a pauper lunatic, and, second, as a pauper lunatic is detained in the asylum, and his Lordship came to the conclusion that it was clear 'to my mind that if the person was sent to the asylum as a lunatic, and there became a pauper, the section was meant to apply.'

"Lords Deas and Ardmillan proceeded on the ground that a person sent to an asylum by an inspector of poor is a pauper lunatic within the meaning of the section, and therefore the settlement will not change.

"Were it necessary, I should be prepared to follow the opinion of the Lord President; but it is not, for the further facts desiderated by Lords Deas and Ardmillan are here present. The lunatic was a pauper at the date of her committal to the asylum, and was sent there by the inspector of poor. What happened afterwards during her detention in the asylum does not, in the opinion of any of those Judges, affect the applicability of the section, and therefore the settlement as at the date of the lunatic's committal remains."

¹ Lunatics (Scotland) Act, 1857 (20 and 21 Vict. cap. 71).

² *Keith Parish Council v. Kirkmichael Parish Council*, Nov. 8, 1901, 4 F. 76; *Thomson v. Kidd and Beattie*, Oct. 28, 1881, 9 R. 37; *Crawford and Petrie v. Beattie*, Jan. 25, 1862, 24 D. 357.

³ *Johnston v. Black*, July 13, 1859, 21 D. 1293, at p. 1296.

⁴ July 10, 1869, 7 Macph. 1027.

*Parish Council.*¹ Even admitting that the views of the Lord President in *Kirkwood*² had been followed in practice,³ that was no reason why the question should not be reconsidered if the practice was not well founded. June 12, 1908.
Rigg v. Bell.

Argued for the respondent, James Bell;—The present case was indistinguishable from the case of *Kirkwood*,² by which it was ruled. The crucial point was the settlement of the pauper lunatic at the date when she was admitted to the asylum,⁴ and so long as she continued to reside in the asylum her settlement could not change.

At advising,—

LORD M'LAREN.—The essential facts in this poor-law case are of the most simple character. The pauper, when admitted to the Crichton Lunatic Asylum at Dumfries, was chargeable to the parish of Kelton, which was her residential settlement. After a short interval she came to be practically maintained by her brother, and was taken off the pauper roll. But latterly her brother ceased to contribute to her support, and she then became again chargeable. The parish of Kelton says that the parish of Parton, the birth settlement of the pauper, is liable on the ground that the pauper's residential settlement in the parish of Kelton was lost by her residence in Dumfries. This would probably be the case were it not for the provisions of the 75th section of the Lunacy (Scotland) Act, 1857, which provides that every pauper lunatic "shall be deemed and held to belong and be chargeable to the parish of the legal settlement of such lunatic at the time the order for his reception in such asylum was granted."

I am unable to see that the effect of the 75th section is displaced by the circumstance that during part of the period of the ward's detention she was to a certain extent maintained by a relative. Under the statute, the condition of chargeability is indefinite as to time, and, as I think, is applicable to the whole or any part of the period of the insane person's detention in an asylum. Accordingly, when the question of chargeability now arises, I think it must be solved by the 75th section. If my proposition is sound, there can be no difficulty in applying the 75th section, which is perfectly explicit on this subject. It says that the lunatic shall be chargeable to the parish of her legal settlement at the time the order for her reception was granted. Now, Kelton was the parish of her settlement at the time the Sheriff's order was granted, and it follows, in my opinion, that Kelton is liable.

If it were necessary to consider the motive of this statutory provision, it is not difficult to infer that it was considered that a lunatic during the period of his or her detention had neither the volition nor the power to perform such acts as are usually necessary to the acquisition or the loss of a settlement. But, in my view, it is unnecessary to consider the motive of the framer of the clause, because even if we were to regard it as arbitrary, and inconsistent with the principles that regulate settlements when these

¹ 4 F. 76.

² 7 Macph. 1027.

³ Graham's Poor-Law, p. 86; *Drainie P. C. v. Speymouth P. C.*, P. L. M. 1900, 448.

⁴ *Palmer v. Russell*, Dec. 1, 1871, 10 Macph. 185.

June 12, 1908. have to be worked out by legal decision, I think the enactment is clear and free from ambiguity, and that it must be followed.

Rigg v. Bell.

Lord M'Laren.

I am further of opinion that the present case is governed by the opinion of Lord President Inglis in the case of *Kirkwood v. Lennox*,¹ an opinion which, as I read it, is altogether independent of the special circumstances of the case considered. The Lord President's opinion, I think, must be taken to represent the opinion of the majority of the Court, though Lord Kinloch took a somewhat different view. It has often been observed that a point in the law of parochial settlement when once decided ought not to be disturbed, because it is much more important that the law should be known and acted on than that it should be theoretically perfect. In the present case, which depends on the construction of statute law, this consideration has great weight, and even if I were less clear in my own mind as to the meaning of the 75th section, I should not be disposed to reconsider the judgment in the case of *Kirkwood*,¹ which is one of great authority. I am accordingly of opinion that the appeal should be dismissed, and the interlocutor of the Sheriff affirmed.

LORD KINNEAR.—I agree with Lord M'Laren. I should have thought it enough for the decision of this case to say that the question here raised is answered in the opinion of Lord President Inglis in the case of *Kirkwood v. Lennox*,¹ which decision, in my opinion, rules the present case. I do not think that the soundness of that decision has been questioned. I am aware that there was a difference of opinion upon the bench, but I do not think that the authority of the decision is open to challenge upon the ground that the Lord President and Lord Deas differed upon a question which it was, as the learned Judges point out, unnecessary to decide, and which certainly did not determine the judgment. As I read the opinions the majority of the Court agreed with the Lord President in the construction which he put upon the 75th section of the Lunacy Act of 1857, which is the only question we have to consider here. I find it difficult to regard the Act of Parliament as requiring further interpretation, but reading it for myself I come to the same conclusion which has been already judicially arrived at by Lord President Inglis. I agree with Lord M'Laren that it is not necessary to consider the motive of the statutory provision, but the purpose which it had in view seems to be clear enough. The main object of this part of the Act was to establish district asylums in which the pauper lunatics from the various parishes in each district were to be received. It would have been inconvenient and inequitable to regulate the mutual liabilities of such parishes by the existing law of settlement, because that would have imposed upon the parish in which asylums happened to be situated the burden of maintaining all the paupers which other parishes, originally liable, had sent to the asylum as lunatics, so as to determine their own liability by the cessation of residence, as soon as the lunatic had been three years in the asylum. This inconvenience is obviated by the provisions of section 75, which are perfectly simple and adequate. The section provides that "every pauper lunatic detained in any district asylum

¹ 7 Macph. 1027.

under this Act shall be deemed and held to belong and be chargeable to the parish of the legal settlement of such lunatic at the time the order for his reception in such asylum was granted, and the expense of his maintenance in such district asylum shall be defrayed by such parish accordingly." In applying that enactment to the present case, the first question is whether the pauper is detained in a district asylum under the Lunacy Act; and as to that, it is admitted that the pauper is detained in the Crichton Royal Institution, which for the purposes of the Act is a district asylum, on a warrant obtained from the Sheriff-Clerk of Dumfriesshire at the instance of the inspector of poor of the parish of Kelton. The first condition of the 75th section is therefore satisfied; and the only remaining condition to fix liability on Kelton is that Kelton shall be shewn to have been the parish of the legal settlement of the lunatic at the time the order for her reception in the Crichton Asylum was granted. But that, again, is settled by admission. It is not disputed that that parish was liable for her maintenance at the time of her admission. The section goes on to provide, "and the residence of any pauper lunatic in any such district asylum shall be deemed to be the residence of such lunatic in the parish legally chargeable with the maintenance of such lunatic." Again, there is no dispute that the pauper has continued to reside in the district asylum ever since, and accordingly, in my opinion, Kelton is the parish that remains chargeable for her maintenance. It is said by the Sheriff-substitute that during the time when her brother was able to give some assistance towards her maintenance she might have been removed from the Crichton Institution, with the consent of the authorities, to another asylum. What might have been the effect of such a removal upon the settlement of the pauper is a totally different question, but it is not one that we are called upon to answer in this case. But the answer is that that did not happen. If she had been removed she would not now have been detained upon the order obtained by the inspector of the poor of Kelton in 1895. I therefore agree with Lord M'Laren that the judgment of the Sheriff should be affirmed.

June 12, 1908.
Rigg v. Bell.
Lord Kinncar.

LORD JOHNSTON.—I regret that I am unable to concur in the judgment which your Lordships propose.

Janet Cannon, whose settlement is in dispute, had admittedly her birth settlement in the parish of Parton. Prior to 15th August 1895 she had acquired a residential settlement in the parish of Kelton. On that date she was admitted as a pauper lunatic to the Crichton Royal Institution, Dumfries, a district asylum in the sense of the Lunatics (Scotland) Act, 1857. At the date of her becoming chargeable she was not actually residing in Kelton but in Crossmichael, but Kelton, as the parish of her then residential settlement, properly admitted liability, and she was maintained down to 2d November 1895, a period of two and a half months, at the expense of Kelton. The Crichton Institution is, either by endowment or otherwise, a wealthy corporation, and is able on a comparatively small payment to receive paying patients, who thus are supported partly at the expense of the institution and partly by contributions from their own funds or from relations, but as private and not as pauper patients. On 2d November 1895 the lunatic's brother, Frederick S. Cannon, undertook to make the necessary contribu-

June 12, 1908. tion, which I understand was only £10, and his sister was at that date removed from the list of pauper to that of private patients of the asylum kept in terms of the Lunatics Act, 1857, section 96, and Schedule I, and Rigg v. Bell. her name was struck off the poor-roll of the parish of Kelton. The brother continued to make the necessary payment, and Janet Cannon was maintained as a private or non-pauper lunatic in the Crichton Institution for ten and a half years, or down to 1st May 1906, when her brother's contributions ceased, and she again became chargeable as a pauper lunatic. The question is, whether Kelton, the parish of her former residential settlement, still remains liable, or whether she reverts to her birth settlement in Parton. Ld. Johnston.

It is admitted that unless the 75th section of the Lunatics Act, 1857, applied to keep alive the lunatic's residential settlement in Kelton, not only for the two and a half months of her maintenance by Kelton, but also for the ten and a half years of her maintenance by her brother in the Crichton Institution, in the parish of Dumfries, Parton, as the parish of her birth settlement, is liable. That question depends upon the construction to be put upon that 75th section. But it is maintained by Parton that the question of such construction is foreclosed, so far as this Division is concerned, by the decision in the case of *Kirkwood v. Lennox*.¹

I find myself unable, owing to the circumstances of that case, and the divergent grounds of judgment on which the four Judges who took part in it reached their decision, to satisfy myself whether the question is foreclosed, without first considering for myself the enactment in question.

The ostensible purpose and operative result of the 75th section of the Act is, writ short, that the residence of a pauper lunatic in a district asylum is to be deemed residence in the lunatic's parish of settlement, whatever that was at the date of admission. In other words, its object and effect is to treat the district asylum as conventionally situated in the parish of each lunatic pauper's settlement, so as to obviate any result from residence in a parish which would very seldom be the same *de facto* as the parish of settlement. Whether more was intended or is effected depends on a scrutiny of the clause in detail.

But I entirely demur to considering this 75th section by itself. I think for its sound construction a consideration of the general provisions of the Act, so far as bearing upon pauper lunatics and district asylums, is absolutely requisite.

The object, as stated in the preamble of the Act, is to make more efficient provision for the care and treatment of lunatics, and for the provision, maintenance, and regulation of lunatic asylums in Scotland; and accordingly it repeals all previous Acts regulating lunatic asylums. It bears therefore to be complete within itself. Now, the first thing that strikes one is the distinction disclosed in the interpretation clause (section 3), and constantly appearing throughout the Act between public asylums, private asylums, and district asylums. And as the section in question is concerned only with district asylums, it is necessary to ascertain with definiteness what a district asylum is.

If I were to describe shortly the main objects of the Act, I should say

¹ 7 Macph. 1027.

they were—First, the creation of a new General Board of Commissioners in Lunacy in Scotland, and the definition of their powers and duties; second, the placing under their supervision all asylums and all lunatics in Scotland; third, the regulation of the admission of lunatics and their detention in asylums; and fourth, the provision for pauper lunatics. And I think that this last-mentioned purpose was more of a new departure, and bulks more largely in the Act, than any of the others. It is with it only that we are here concerned.

June 12, 1908.
Rigg v. Bell.
Ld. Johnston.

A district asylum is defined (section 3) to “mean an asylum, in terms of this Act, of one of the districts described in the Schedule H hereunto annexed.” By Schedule H the whole country of Scotland is divided into districts, and the Dumfries district is declared to comprise the counties of Dumfries, Kirkcudbright, and Wigton. Kelton (and also Parton, if that were material) is in Kirkcudbright, and thus in the Dumfries district.

The enactments regarding district asylums are contained in sections 49 to 80 of the Act, and it must, from a consideration of these sections, be at once apparent that the sole object of the creation of district asylums was to provide for the maintenance of pauper lunatics. The country is divided (section 49 and Schedule H) into districts. District Boards are created (section 50). The Board (*i.e.*, the Commissioners in Lunacy) are (section 51) on inquiry to determine whether the existing accommodation for pauper lunatics for each district is sufficient, or whether a district asylum for pauper lunatics shall be provided. The provision and the maintenance of district asylums is to be defrayed (sections 52 to 55) out of an assessment. But to obviate the necessity of erecting new district asylums, “special arrangements” are (section 56 *et seq.*) sanctioned whereby a District Board may obtain the transfer of an existing asylum, or the appropriation of a portion of an existing public asylum to its use for its pauper lunatics. But with regard to the Dumfries district it is exceptionally enacted (section 60) that the Crichton Institution shall be obliged to receive the pauper lunatics of the Dumfries district “upon the conditions herein provided and prescribed in respect to pauper lunatics sent to the district asylums to be established in virtue of the Act.” Therefore in the Dumfries district, the Crichton Institution stands for the district asylum, but, exceptionally, the District Board neither obtains the transfer of it or of appropriated accommodation in it.

There immediately follows the section to which I have referred a series of clauses (sections 73 to 79) which provide for payment of the expense of maintaining lunatic paupers. It is assumed that the District Board in respect of the previous provisions is the paymaster in the first instance. It is then provided (section 73) that “there shall be paid to the District Board for each pauper lunatic sent to and detained in any district asylum such sum,” &c., and the money so to be paid to the District Board is to be applied by them in defraying the maintenance and expenses of the patients, salaries of officials, and all other necessary expenses of the district asylum. I pass over section 75 in the meantime. The provisions of sections 76 to 79 are not in any very logical order, but their gist is this:—The expense of examining, removing, and maintaining any lunatic shall primarily be a charge on the estate of such lunatic, and failing such estate, shall be a charge on the parish of settlement, subject to this, that if the parish of settlement

June 12, 1908. cannot be ascertained the said expense shall be a charge on the parish in
Rigg v. Bell. and from which the lunatic was taken and sent, with recourse to such parish
against any other party or parish liable. Then there is a provision in section
Ld. Johnston. 77 which I think is not without bearing on the question at issue. It says
that the expense incurred for "or in relation to the examination, removal,
and maintenance of any lunatic, shall be defrayed out of the estate of such
lunatic; or if such lunatic has no adequate estate, and if such expense shall
not be borne by the relations of such lunatic, then the lunatic shall be treated
as a pauper lunatic, and such expense shall be defrayed by the parish of
settlement of such lunatic." I emphasise the words "if such expense shall
not be borne by the relations of such lunatic," if they are so borne then
such lunatic shall not be treated as a pauper lunatic. And I think it follows
that though a lunatic has been admitted and maintained for a time properly
as a pauper lunatic, if afterwards the expense of maintenance comes to be
borne by the relations of such lunatic then the lunatic must cease to be
treated as a pauper lunatic. And it is quite in accordance with this that
the authorities of the Crichton Institution in November 1895 transferred
the lunatic Janet Cannon from the statutory list of pauper lunatics to that
of private patients, and that she continued on the latter list from November
1895 to May 1906.

Now, embedded in this fasciculus of clauses relating to the payment and
repayment of the expense of maintenance of pauper lunatics is the 75th
section, which the Court is now called on to interpret. It provides, in the
first place, that "every pauper lunatic detained in any district asylum under
this Act shall be deemed and held to belong and be chargeable to the parish
of the legal settlement of such lunatic at the time the order for his reception
in such asylum was granted." Found in the company in which it is, and
expressed as it is, that provision has reference solely to those lunatics who
in terms of section 77 are to be treated as pauper lunatics. I am not moved
by the fact that the expression used is "detained," whereas in other sections
it is "sent to and detained." Where the words "sent to" are added there
is a reason, for they always have reference not merely to maintenance but
to preliminary examination and removal. Further, I cannot read the
expression "such lunatic" as meaning anything more or less than "such
pauper lunatic," which is its proper relative. I cannot hold that where a
lunatic is received and detained for a time properly as a pauper lunatic, but
afterwards becomes, either by succeeding to property or by the intervention
of friends, a private patient, that the provision above quoted is intended to
interfere, or has the effect of interfering, with the ordinary law of settlement
after the lunatic has ceased to be treated as a pauper lunatic so that his
settlement at the date of his reception is necessarily to regulate his settle-
ment during the whole period of his residence in the asylum.

I do not think that it was the intention of the Legislature to deal in this
section with any but those lunatics who were under the Act to be con-
tinuously treated as pauper lunatics, and that to interpret the provision above
quoted as the respondent seeks to do, and to apply it to the present case, is
inadmissible. When I speak of the intention of the Legislature, I mean of
course its intention as gathered from the expressions it has used, and from
the surrounding circumstances, particularly including the surrounding provi-

sions amongst which or the collocation in which the enactment in question June 12, 1908. is found. But at the same time I think that the deductions from the expressions used, interpreted as a Court must interpret them, are entirely consistent with what one must infer was the legislative intention of Parliament. There is no doubt that section 75 is necessary in the matter of pauper lunatics, as a supplement to sections 73 and 76-78, and that it prevents the residential settlement of a lunatic, admitted as a pauper, from being lost by residence as a pauper in a district asylum and consequent absence from the parish of such residential settlement. But does it do more? It must be admitted on the authorities—(*Crawford and Petrie v. Beattie*; ¹ *Thomson v. Kidd and Beattie*; ² *Keith v. Kirkmichael* ³) that a lunatic admitted as a private patient, in course of time loses by detention any residential settlement he or she may have had on admission, and none the less that the private patient after having lost such residential settlement has become a pauper patient. The extraordinary result of the strained interpretation proposed to be put on the word “detained” would clean upset the result of these decisions, for it would send back the lunatic who, after losing his residential settlement by residing as a private patient in an asylum which happens to be like the Crichton Institution a pro-district asylum, has become a pauper, upon the residential settlement which he has lost, for that was the settlement he had when his order for reception was granted. Or else it must be held that the section does not apply to such case, because there is no order of the Sheriff for reception of the lunatic as a pauper in a district asylum, but only for his reception as a lunatic. Admittedly this extraordinary result cannot be reached. Was then the 75th section intended to distinguish, and does it distinguish, between the case of the lunatic who has been detained long enough to lose a residential settlement after ceasing to be a pauper, and that of the lunatic who has been detained long enough to lose such settlement before becoming a pauper? I humbly think not.

Rigg v. Bell.
Ld. Johnston.

The following consideration materially confirms the above conclusion. The district asylum is in its conception an asylum only competent for pauper patients. The moment the patient ceases to be a pauper—though, as in the Crichton Institution, he may continue to reside under the same roof—the asylum ceases to be, in the conception of the Act *quoad* him, a district asylum.

I return to the terms of the 75th section. Having provided for the conventional continuance of the existing settlement, it enacts, in the second place, that “the expense of his maintenance in such district asylum shall be defrayed by such parish accordingly.” “His,” just as “such,” can only refer to pauper lunatic, for the parish has nothing to do with the maintenance of any lunatic not a pauper.

Then lastly and, as I think, conclusively, to provide or explain the ratio of the above chargeability which is inconsistent with the ordinary law, the section goes on to say,—“The residence of any pauper lunatic in any such district asylum shall be deemed to be the residence of such lunatic in the parish legally chargeable with the maintenance of such lunatic.” These words aptly suit the necessity of the situation, if the earlier part of the sec-

¹ 24 D. 357.

² 9 R. 37.

³ 4 F. 76.

June 12, 1908. tion is confined in its operation to the case of the lunatic who is a pauper when admitted and remains a pauper during his detention, to which only do I think that the section applies. But it is wholly inappropriate in its terms if it be attempted to construe it as providing that the residence of a lunatic, not only while he is a pauper but also after he ceases to be a pauper, shall, if he again becomes chargeable, be necessarily deemed to be in the parish of his legal settlement at the time he was originally admitted to the asylum.

Rigg v. Bell.

Ld. Johnston.

I would therefore, if I felt myself free to form an opinion for myself, be for reverting to the Sheriff-substitute's interlocutor. In doing so I am satisfied that I should be giving effect to every word of the section and straining none. A lunatic admitted as a pauper will retain his parish of settlement so long as he is detained as a pauper. When he ceases to be a pauper he is found to have that settlement which he has so retained. But he then becomes as capable of losing that settlement if he continues in the asylum as a private patient as he would be if he went to a different asylum or returned to his friends. This gives full effect and does no violence to the terms of the enactment.

But it is maintained that the question is foreclosed by the decision of this Division of the Court in *Kirkwood v. Lennox*.¹ I admit that the question is foreclosed by the judgment of the late Lord President Inglis, and if I found that his ground of judgment had been adopted by the rest of the Court I should of course be bound by it, whether I agreed with it or not. The case, however, presents itself in a very exceptional light. A lunatic with a residential settlement in Govan was admitted to and detained in Gartnavel Asylum as a private patient from 10th August 1864 to 30th November 1868, when, her funds being exhausted, she became a pauper lunatic. Now, Gartnavel being in Govan, there happened in this case to be no change of residence occasioned by the committal to the asylum. Had there been, there would *de facto* have been absence from Govan for more than four years, and the residential settlement would admittedly not have been retained. The late Lord President personally held the opinion, which is not generally received, that mental capacity was requisite for the retention as well as for the acquisition of a settlement, and hence it would have followed that the pauper's residential settlement would have been lost by more than four years' residence as a lunatic in an asylum, though locally situated in the parish of residential settlement. If in the late Lord President's opinion this ground of judgment was not to receive effect, resort must be had to the 75th section of the Act of 1857, and on consideration of its provisions his Lordship held it to apply; and if it properly applied in that case, I admit that it must *a fortiori* apply in the present. The judgment is, I admit, not merely an *obiter dictum* of the late Lord President, it is his judgment in deciding the cause. But it is not the judgment of the Court. Lord Kinloch differed from the Lord President in thinking it necessary to have recourse to the statute, which he therefore did not attempt to interpret. For he held, disagreeing with the Lord President, that mental capacity is not necessary for the retention of a residential settlement, and based his

¹ 7 Macph. 1027.

judgment in favour of the liability of Govan on the ground that *de facto* June 12, 1908.
 there had been continued residence in Govan, though in an asylum. Lord Rigg v. Bell.
 Deas, again, does not adopt the interpretation put upon the 75th section —
 by the Lord President, but bases his judgment on the view that the dis-
 covery of certain funds did not take the lunatic out of the category of a
 pauper lunatic, in which he thought the pauper was at the date of her con-
 finement. And I think, though his Lordship's meaning is not very clear,
 that Lord Ardmillan agreed with Lord Deas. In these circumstances the
 interpretation of the 75th section of the statute contended for is that of the
 Lord President Inglis alone. The Court is therefore not precluded from
 consideration of the question as an open question, though bound to recog-
 nise the weight of the great authority of the late Lord President in favour
 of the respondent's contention. I have given the most respectful considera-
 tion to his Lordship's judgment in *Kirkwood v. Lennox*,¹ but for the reasons
 I have stated I am unable to follow it. I think, therefore, that this appeal
 should be sustained. —
 Ld. Johnston.

The LORD PRESIDENT and LORD PEARSON were absent.

THE COURT dismissed the appeal, and affirmed the judgment of
 the Sheriff.

BONAR, HUNTER, & JOHNSTONE, W.S.—PURVES & SIMPSON, W.S.—
 SCOTT & GLOVER, W.S.—Agents.

ROBERT GARDINER AND ALEXANDER GARDINER, Petitioners
 (Reclaimers).—*Hunter, K.C.—Macmillan—J. G. Jameson.*

No. 142.

THE HONOURABLE WILLIAM JAMES HEWITT AND OTHERS (Horatio June 16, 1908.
 Granville Murray Stewart's Trustees), Respondents.—*D.-F. Campbell* Gardiners v.
 —*Hon. W. Watson.* Stewart's
 Trustees.

Lease—Outgoing Tenant—Obligation to take over sheep stock—Transmission of obligation against representatives of lessor—Entail—Lease by heir of entail—Executor.—An heir of entail in possession of an entailed estate granted a lease of a sheep farm which contained this clause :—"The proprietor binds and obliges himself that he or the then incoming tenant shall purchase the waygoing blackfaced hill sheep stock . . . at the expiration of this tenancy . . . at the valuation of two arbiters mutually chosen." The granter of the lease died and was succeeded in the entailed estate by the next heir of entail, who disentailed and died before the termination of the lease. The lease being about to terminate, his representatives and the incoming tenant both intimated to the outgoing tenant that they declined to purchase the sheep stock. The tenant then sought to enforce the obligation against the trustees and executors of the granter of the lease by presenting a petition against them for the appointment of an arbiter to value the sheep stock.

Held that the obligation had transmitted against the trustees and executors of the granter, and that they were bound to appoint an arbiter.

By lease dated 25th and 28th January 1896 Horatio Granville 1st Division.
 Murray Stewart, heir of entail in possession of the entailed estate of Lord Guthrie.
 Cally, in Kirkcudbrightshire, let to Robert Gardiner and Alexander
 Gardiner the farms of Killeron and Orchars, forming part of that

June 16, 1908. estate, for a period of nineteen years from Whitsunday 1896, with a break in favour of either party at Whitsunday 1908.

Gardiners v.
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Trustees.

The lease contained this clause :—" And the tenants hereby undertake to purchase the blackfaced hill sheep stock usually kept on the said farms, and also the last crop of grain and the dung on the lands at their entry, and the threshing-mill, grates, and bells at Killeron, all at the valuation of arbiters or oversman as aforesaid. Further, the tenants bind and oblige themselves and their foresaids to sell, and the proprietor binds and obliges himself that he or the then incoming tenant shall purchase, the waygoing blackfaced hill sheep stock usually kept on the lands at the expiration of this tenancy, and not exceeding nineteen hundred head in all on the farm of Orchars, and two hundred head on the farm of Killeron, and the last crop of grain under this lease, the manure made upon the lands from the time of the input of the last green crop, and the threshing-mill, grates, and bells at Killeron, all at the valuation of two arbiters mutually chosen, or oversman as aforesaid, at the usual times."

Mr Murray Stewart died in May 1905, leaving a trust-disposition and settlement whereby he appointed the Honourable William James Hewitt and certain others to be his trustees and executors, and disposed to them his whole estate, heritable and moveable, in Scotland for the purposes therein mentioned. He also left a will in English form conveying to the same parties, as his trustees and executors, the residue of his real and moveable property situated in England and Ireland.

Mr Murray Stewart was succeeded in the entailed estate of Cally by the next heir of entail, Colonel James William Murray Baillie, who disentailed the estate, and thereafter conveyed it to a body of trustees for certain specified purposes. Colonel Murray Baillie died in March 1906, and at Whitsunday 1906 his trustees were the heritable proprietors in possession of the estate of Cally, including the farms of Killeron and Orchars.

The Messrs Gardiner, the tenants of these farms, took advantage of the break in the lease, and gave notice to Colonel Baillie's trustees that they would terminate their tenancy at Whitsunday 1908. Colonel Baillie's trustees intimated that they were not prepared to take over the sheep stock at the termination of the lease, and the incoming tenant of one of the farms (the other remaining unlet) also declined to take over the stock on his farm. The Messrs Gardiner then called upon Mr Murray Stewart's trustees to fulfil the obligation undertaken by the granter of the lease, and nominated Mr George G. B. Sproat to act for them as arbiter in the valuation of the sheep stock. Mr Murray Stewart's trustees repudiated the obligation to take over the sheep stock, and declined to appoint an arbiter.

On 29th April 1908 the Messrs Gardiner presented a petition under section 3 of the Arbitration (Scotland) Act, 1894 (57 and 58 Vict. cap. 13), to which Mr Murray Stewart's trustees were called as respondents, craving the Court to appoint an arbiter to act along with Mr George G. B. Sproat in the valuation of the sheep stock. Answers were lodged for Mr Murray Stewart's trustees in which they stated, *inter alia* :—" The respondents are not parties to the lease within the meaning of section 3 of the Arbitration (Scotland) Act, 1894, and there is no agreement between the petitioners and the respondents to refer the valuation of their sheep stock to two arbiters. The obligation in the lease to take over the sheep stock did not become exigible

during the period when Mr Murray Stewart was proprietor of the subjects, and said obligation was intended by both parties to the lease only to be, and could only be, prestable against the person who should be 'proprietor' of the subjects at the date when said obligation became exigible. Said obligation did not become prestable against Mr Murray Stewart, and accordingly the respondents are not liable thereunder, or parties thereto."

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Owing to the near approach of the Whitsunday term the petitioners moved for an interim appointment of an arbiter, and on 16th May 1908 the Lord Ordinary (Guthrie) pronounced this interlocutor:—"Refuses the motion for the interim appointment of arbiter, and decerns: Reserves meantime all questions of expenses, and grants leave to reclaim."

The petitioners reclaimed, and as the case was not heard till 28th May 1908, being the Whitsunday term day, the petitioners no longer pressed for an interim appointment, and the parties asked the Court to dispose of the case on the merits.

Argued for the petitioners and reclaimers;—The specialty here was that this was an entailed estate, and therefore the ordinary question between heir and executor did not arise. Standing the judgment in *Gillespie v. Riddell*,¹ such an obligation as this did not transmit against the succeeding heir of entail, and therefore the question came to be, was it enforceable against the representatives of the granter or not enforceable against anyone, and the latter was not lightly to be presumed to be the nature of an obligation that a tenant would be willing to enter into. This was in fact a personal obligation binding on the granter, and therefore it transmitted in the ordinary way against his representatives unless there was something in the deed constituting the obligation to shew that they were excluded. There was nothing of the kind here. This question had been raised and decided in *Todd v. Moncreiff and Skene*,² and that decision had been followed in *Fraser v. Fraser*.³ These decisions were in favour of the reclaimers' contention, and were directly in point. There were also previous decisions to the same effect.⁴ The *Duke of Bedford v. Earl of Galloway's Trustee*⁵ was distinguishable, for there the word "fore-saids" was used, which was held to mean "heirs of entail," and the obligation in that case was one which ran with the lease. If this obligation had transmitted against the respondents they were bound to appoint an arbiter.⁶ There was no force in the argument that this was an obligation *ad factum præstandum*; it was only an obligation to pay a sum of money, the amount of which fell to be ascertained by arbitration.

Argued for the respondents;—On a true construction of this lease there was clearly no intention to impose a personal obligation on the

¹ *Supra*, p. 628.

² Jan. 14, 1823, 2 S. 113, aff. May 27, 1825, 1 W. & S. 217.

³ June 7, 1825, 4 S. 73, 5 S. 722, 8 S. 409, aff. Feb. 25, 1831, 5 W. & S. 69.

⁴ *Webster v. Farquhar*, 1791, Bell's 8vo Cases, 207; *Taylor v. Bethune*, 1791, Bell's 8vo Cases, 214; *Montgomery v. Hyalop*, March 10, 1824, 2 Shaw's App. 63.

⁵ July 8, 1904, 6 F. 971.

⁶ *Alexander's Trustees v. Dymock's Trustees*, July 13, 1883, 10 R. 1189; *Marquis of Breadalbane v. Stewart*, Jan. 29, 1903, 5 F. 359, March 3, 1904, 6 F. (H. L.) 23.

June 16, 1908. *Gardiners v. Stewart's Trustees.* grantor which would transmit against his executors. The word "proprietor" meant "proprietor for the time being," and in fact the parties had dealt as if this was a lease of a fee-simple estate and not of an entailed estate. The intention then being to make the landlord at the time of the lease liable to the tenant in this obligation, it was doing violence to the terms of the lease to construe it as imposing an obligation on the personal representatives of the grantor. It might be that the obligation was not binding on the succeeding heir of entail, but that was not a ground for creating an obligation which was never intended to be created. Indeed, such an unnatural obligation could never have been intended. It was natural that the landlord should take over the sheep stock; it was most unnatural that the representatives of a deceased landlord, who no longer owned the land, should take them over. If they were bound to take them over, they were equally entitled to insist on taking them over, which was an absurd construction of the lease. It was to be noted that what was sought to be enforced here was an obligation *ad factum præstandum*—viz., to take over the sheep stock. It was not competent to enforce such an obligation, any more than the obligations as to manure, &c., against those who no longer owned the land; if any remedy was competent to the petitioners it must take the form of an action for damages. *Todd v. Moncreiff and Skene*¹ was distinguishable on the ground that the obligation there was an existing obligation enforceable on the grantor during his lifetime, not one to arise in the future as here. *Fraser v. Fraser*² was distinguishable on the same ground. In all the cases where personal representatives had been held liable the obligation was either one necessary to make good the subject of the lease, or one enforceable against the grantor at the inception of the lease.³ The decision in the *Duke of Bedford v. Earl of Galloway*⁴ was directly in point, and ruled this case.

At advising on 16th June 1908,—

LORD PRESIDENT.—In 1896 Mr Murray Stewart let to the petitioners two farms on the estate of Cally, of which he was then heir of entail in possession, for nineteen years, with a break at Whitsunday 1908, on twelve months' prior notice by either party. The said lease contained, *inter alia*, the following clause:—(His Lordship read the clause quoted *supra*).

Mr Murray Stewart died in May 1905. The respondents are his executors. He was succeeded in the entailed estate by Colonel Murray Baillie, as next heir of entail, who disentailed the estate and conveyed it to trustees, who presently hold it.

The petitioners gave due notice to the said trustees of their intention to avail themselves of the break in the lease. The said trustees intimated that they did not intend, as representing Colonel Baillie, the heir of entail, to take over the sheep stock at a valuation; and the incoming tenant of one of the farms (the other had not been again let) made a similar intimation. The petitioners then called upon the respondents to take over the

¹ 1 W. & S. 217.

² 5 W. & S. 69.

³ *Kerr v. Redhead*, Feb. 5, 1794, 3 Pat. App. 309, Lord Thurlow, 315; *McGillivray's Executors v. Masson*, July 18, 1857, 19 D. 1099, Lord Deas, pp. 1105, 1106.

⁴ 6 F. 971.

stock as representing the late Mr Murray Stewart, and to appoint an arbiter June 16, 1908. for the purposes of valuation; and on their refusing to do so, the petitioners presented this application under the provisions of the Arbitration ^{Gardiners v. Stewart's Trustees.} (Scotland) Act, 1894. The petition having been presented before Whitsunday 1908, the petitioners moved for the interim appointment of an ^{Ld. President.} arbiter, but the Lord Ordinary held such a motion to be incompetent and refused it, but granted leave to reclaim. As his Lordship's interlocutor was dated 16th May 1908, it followed that Whitsunday was past before the reclaiming note came before your Lordships. The parties then concurred in asking your Lordships to decide the case on the merits instead of sending it back to the Lord Ordinary.

It must be assumed that, in accordance with the judgment recently pronounced in the case of *Gillespie v. Riddell*,¹ the refusal of Colonel Baillie's trustees to take over the stock was justified. We are told that that case is under appeal, but until reversed it remains the law. Nor do I see any advantage in postponing our judgment in this case to await the result of that appeal. The simple question then is—Did the late Mr Murray Stewart become personally bound in the obligation quoted?—in which case his executors must fulfil his obligation—or, did he contract *qua* heir of entail only?—that is to say, contract in such a way that the obligation was prestatable from him during his life, but was not exigible from either his heirs or his executors, although it was ineffectually sought to be imposed upon the heir of entail.

I do not doubt that such a bargain is a legal possibility. Indeed, all bargains, unless forbidden by positive law, or struck at on some such ground as being contrary to public policy, are possible. And there is, so far as I know, no such disability here. Nevertheless, it is, I think, clear that if a man binds himself he must make it very clear that he does not bind his representatives, for if he fails to make that clear the usual result will follow—that a man's representatives are bound by his obligations.

But further, though not actually decided—for after all each deed must be judged of according to its own terms—I am of opinion that the matter is practically settled by authority. This is not the first time that an obligation intended to fall upon heirs of entail (and if it was not intended so to fall, then *cadit questio*) has missed its mark. In the review which my brother Lord Kinnear gave of the decided cases in *Gillespie v. Riddell*¹ he especially mentions *Todd v. Moncreiff and Skene*,² which was a judgment of the House of Lords, and which decided that while the heir of entail was free the executor was bound. It was urged that that case was distinguishable from the present by the fact that the debt sought to be imposed on the future heir of entail was a debt which otherwise would have been presently exigible from the granter of the lease, for he had practically borrowed £625 from the tenant, as the tenant put up the steading instead of the landlord; whereas it is said here that the transaction was all *in futuro*. It is a little doubtful whether in substance the present case is truly distinguishable. For the tenant here was taken bound to buy the sheep stock at his entry from the outgoing tenant at that date; and it is not rash to

¹ *Supra*, p. 628.

² 1 W. & S. 217.

June 16, 1908. conjecture that the landlord was, or thought he was, liable to that tenant if he could not find someone else to take up the obligation. But even if Gardiners v. Stewart's Trustees. that were not so, there are at least two of the earlier cases which are approved in *Todd v. Moncreiff and Skene*¹ which cannot be distinguished in Ld. President. that way, and in which, though no decision could be pronounced, opinions to the same effect were given. I refer to *Webster v. Farquhar*² and *Taylor v. Bethune*.³ I am aware that the opinion that the executor is liable is, in the first of the cases, only to be found in the rubric. But the cases were advised together, and the general question was held to be the same in both. I would also refer to the case of *M'Gillivray's Executors v. Masson*,⁴ and especially to some portions of the opinion of Lord Deas. That was not a case of entail. The landlord had bound himself to pay to the tenant the value of meliorations at the end of the lease. He died during the currency. The executors brought an action to have themselves declared free in a question with the tenant, and the tenant was assoilized. But the remarks of Lord Deas are very valuable as shewing the distinction which falls to be made between different stipulations which may all be included in a lease. He says,—“I do not say that although an heir-at-law has entered into possession and drawn the rents, the landlord's executors must nevertheless remain under every obligation undertaken by the landlord to the end of the lease. But in this matter we must distinguish. There are obligations incumbent respectively on landlord and tenant, inseparable from the nature of the right, such as the obligation to pay rent, on the one hand, and to maintain the tenant in possession, on the other; and it may very well be that the heir and the tenant, who assume towards each other the relative position of landlord and tenant, may become alone responsible to each other in such obligations. Nor do I say that no course of dealing between the heir and the tenant will extend the same rule even to an obligation like the present.” And then he goes on,—“In entail law accordingly all leases are regarded as, strictly speaking, alienations; and agricultural leases of ordinary endurance are held excepted only because they are necessary acts of administration.” But obligations may be engrafted upon a lease (as upon any other deed) which are extrinsic to its character as a real right, and not even essential to its objects as a contract. Such obligations are not necessarily to be dealt with in the same manner with the proper and inherent subject-matters of the tack. It is said there is no case affirming the liability of executors. But there is the express authority of Lord Braxfield in *Taylor v. Bethune*,³ and there is no case or authority the other way. Lord Braxfield's opinion goes even to the executor's ultimate liability, and I am not to be understood to question its soundness to that extent, although it is not necessary to go into that point here. The case of *Webster v. Farquhar*,² decided about the same time with the case of *Taylor*,³ and following the case of *Blythwood*,⁴ goes deep into the principle. It was there held that an obligation to pay at the end of the lease for the houses built by the tenant was not prestatable from the next heir of entail, but solely from the representatives of the granter of the lease, although the houses were quite necessary for the estate,

¹ 1 W. & S. 217.

³ 19 D. 1099.

² Bell's 8vo Cases, 207 and 214.

⁴ Jan. 14, 1780, F.C., and M. 15,432.

and went to increase its value. Now, this could only have been because the June 16, 1908. obligation was deemed extrinsic to the lease, for the heir in possession had full powers to grant a lease with all clauses and obligations properly incidental to a lease. Gardiners v. Stewart's Trustees.

The authority on which the respondents really relied was the *Duke of Bedford*.¹ That, however, does not seem to me to aid them. In the first place, it was decided strictly upon its own words of obligation, "himself and his forebears," when all the Judges held that "forebears" must, from the context, mean heirs of entail, whereas here the expression is merely "himself," without any addition of forebears to qualify or restrict it. In the second place, the question there was of warranty of what was contained in a lease as a composite contract, whereas here there is no question of warranty, but a question of who is bound to perform an obligation, with the possibility, and I think necessity, of distinguishing between different sorts of obligations, as was pointed out by Lord Deas.

My opinion, therefore, is that the petitioners are entitled to hold the respondents bound. Inasmuch, however, as the respondents have intimated through their counsel their willingness, if such is our opinion, to appoint an arbiter, I think they may be allowed to do so; and if they do so by minute, it will be unnecessary *hoc statu* to grant the prayer of the petition. The petitioners, however, must, I think, have their expenses.

LORD M'LAREN and LORD KINNENR concurred.

LORD PEARSON was absent.

THE COURT subsequently pronounced this interlocutor:—"Recall said interlocutor: Appoint W. J. Sproat, Borgue House, Kirkcudbrightshire, to act as arbiter along with George G. B. Sproat, Boreland of Anwoth, Kirkcudbrightshire, in the reference mentioned in the petition, with the same powers as if the said arbiters had been duly nominated by the parties to the lease referred to in the petition, and decern. . . ."

WEBSTER, WILL, & Co., S.S.C.—SCOTT & GLOVER, W.S.—Agents.

OWEN MULLEN, Appellant.—*Hunter, K.C.—J. A. Christie.*
D. Y. STEWART & COMPANY, LIMITED, Respondents.—*Christie.*

No. 143.

Master and Servant—Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1, subsec. 1—Accident arising out of and in the course of the employment—Rescuing fellow-workman not engaged on employer's work.—Mullen, a workman, justifiably left the works in which he was employed, to obtain refreshment. While returning to his work he met a squad of his fellow-workmen, who were engaged in hauling a bogie across a public street which intersected the works. M'Ginlay, a fellow-workman of Mullen, came up, and improperly seized the rope by which the bogie was being hauled, and began to pull against the squad. In doing this M'Ginlay slipped and fell over the rope, and was in danger of being injured by the bogie. Mullen came to M'Ginlay's assistance, and succeeded in rescuing him from danger, but before he himself could get out of the way he was jammed by the bogie, and sustained severe injuries. June 17, 1908.
Mullen v. Stewart & Co., Limited.

June 17, 1908. *Held* that Mullen had not been injured by accident arising out of and in the course of his employment.

Mullen v. Stewart & Co., Limited.
2D DIVISION.
Sheriff of Lanarkshire.

OWEN MULLEN, labourer, 30 Villiers Street, Townhead, Glasgow, having claimed compensation under the Workmen's Compensation Act, 1906, from Messrs D. Y. Stewart & Company, Limited, St Rollox, Glasgow, the matter was referred to the arbitration of one of the Sheriffs-substitute (A. O. M. Mackenzie) at Glasgow, who refused compensation, and at the request of the claimant stated a case for appeal.

The case set forth that the following facts were established :—
“(1) On 2d September 1907 the appellant was in the employment of the respondents in their works at St Rollox. (2) These works are situated partly on the north and partly on the south side of a public street called Charles Street. (3) A single line of rails, sunk to the level of the causeway, has been laid across the street to enable steel castings to be moved on bogies from the one part of the works to the other. (4) On entering the works on the south side of the street the rails are flanked on either side with brick retaining walls 2 feet in height, and built so near the rails that there is no room for a man between the wall on either side and a bogie passing on the rails. . . . (6) On the day mentioned the appellant was one of a squad of eight men employed in coremaking at a place in the works to the north of Charles Street, and some distance to the west of the line of rails already mentioned. (7) As the job at which the squad was engaged was not completed at 6 P.M., being the close of the ordinary day's work, the squad returned after a short interval for supper to work overtime until it was finished. . . . (10) Taking advantage of [an] interval the appellant and two of his companions left the works and went to a public-house about three or four minutes' walk distant for a glass of beer, and after spending a minute or two there they proceeded to return to the works with the intention of finishing their job. (11) In order to reach their working-place the appellant and his companions had to cross the rails already mentioned, and when they came near them they saw that a squad of men were engaged in hauling a bogie loaded with a steel casting by a rope from the north to the south side of the street. (13) The appellant and his companions were upon the pavement on the south side of the street, and were able to cross the rails in front of the men who were hauling the bogie. (14) Two other members of the appellant's squad, who had left the works at the same time and for a like purpose as the appellant and his companions, were a short distance behind them when they crossed the rails. (15) On coming to the rails one of these men, James M'Ginlay by name, seized the rope at a point between the hindmost member of the hauling squad and the bogie, and saying 'Now comes the tug of war' began to pull against the squad. (16) In doing this M'Ginlay slipped and fell across the rope, and as he could not at once regain his feet and the bogie was coming near the narrow entrance to the works on the south of the street, his position was very dangerous. (17) The appellant, whose attention had been attracted by a cry, seeing M'Ginlay's precarious situation, ran to his assistance, and having reached him just before the bogie entered the narrow way, he succeeded in hoisting him on to the top of the retaining wall on the west side of the rails at a point just inside the entrance, but before he could get clear of the rails himself the bogie jammed his left foot against the retaining wall. (18) The injuries which the

appellant thus received were so serious that it was found necessary June 17, 1908.
to amputate his foot above the ankle, and he has been since the acci-
dent, and still is, totally incapacitated for work.”

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The Sheriff-substitute found “that the appellant’s injuries were not sustained by accident arising out of and in the course of his employment.”

The question of law was :—“ Whether the accident which occurred to the appellant on 2d September 1907 arose out of and in the course of his employment with the respondents ? ”

The appellant maintained that the accident arose out of and in the course of his employment.¹

Counsel for the respondents was not called on.

LORD STORMONTH-DARLING.—The Sheriff-substitute in this case has come to the conclusion that the injuries sustained by the appellant were not sustained in an accident arising out of and in the course of his employment.

I am of opinion that his conclusion is a sound one.

The manner in which the accident took place is clearly set forth by the Sheriff-substitute, and there is no dispute as to the facts. It occurred at a time when the appellant was outside of the works of his employers and not upon their premises. I do not think that that fact, although in certain circumstances it might be of great importance, would, in the present case, have prevented the appellant obtaining compensation if the injuries he met with had been sustained while he was engaged in his employers’ service. It appears, however, that the appellant and two comrades were returning to the works after having obtained a glass of beer during an interval in their employment, a perfectly legitimate and indeed a necessary proceeding in view of the fact that they were working overtime, and had not nearly completed the task they had in hand. While thus returning to the works the appellant suddenly saw a fellow-workman, M’Ginlay, in a position of considerable danger and went to his assistance. I need not refer to the circumstances in detail, as they are fully stated by the Sheriff-substitute. The act of the appellant was undoubtedly a very meritorious one, but the question which we have to decide is whether the injuries he sustained while carrying it out are injuries for which he can claim compensation under the Act. Mr Christie maintained that they were, and dwelt on the fact that he was acting in the interest of his employers. In a certain sense of course that is true, for it is always to the advantage of employers to have accidents and possible claims for damages prevented when possible. But the real question is, was the appellant’s act done to prevent an accident to a fellow-workman in the course of the latter’s employment, and for which he might have made a claim against his employers. The answer must clearly be in the negative. M’Ginlay was not engaged in his employers’ business; in fact it would appear that he was actually interfering with those who were engaged in carrying it on. However plucky, therefore, and praiseworthy

¹ *The following Authorities were cited*:—London and Edinburgh Shipping Co. v. Brown, 1905, 7 F. 488; Rees v. Thomas, L. R., [1899] 1 Q. B. 1015; Benson v. Lancashire and Yorkshire Railway Co., L. R., [1904] 1 K. B. 242; Blovelt v. Sawyer, L. R., [1904] 1 K. B. 271; Keenan v. Flemington Coal Co., Limited, 1902, 5 F. 164; Morris v. Mayor of Lambeth, 1905, 22 T. L. R. 22.

June 17, 1908. the appellant's act may have been, I entirely fail to see how the accident which he unfortunately sustained can, from any point of view, be regarded as having arisen out of and in the course of his employment. That being so, it follows that he is not entitled to compensation under the Act.

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LORD LOW.—I am sure that we have all great sympathy with the appellant, who has lost one of his feet in trying to save a fellow-workman from a position of danger. But this cannot influence our judgment on the question which we have to determine, whether he has a claim for compensation under the statute. I am of opinion that he has not, and I go upon this, that in no reasonable sense could the accident be said to have arisen out of the employment. I do not think that the appellant's claim for compensation is affected by the fact that M'Ginlay was a fellow-workman. The case would, in my judgment, have been the same if M'Ginlay had been a stranger, or if instead of falling in front of a hutch belonging to the respondents he had fallen in front of a tramway car. I am therefore of opinion that the decision of the Sheriff-substitute was right.

LORD ARDWALL.—I concur with your Lordships. I think that the appellant here deserves very great sympathy and very great praise. But the question we have to decide is whether the accident arose out of and in the course of his employment with the respondents.

Shortly before the accident happened the appellant along with two of his companions had left the works and had gone to a public-house for a glass of beer. Now, I do not think that that fact would have disentitled the appellant to recover compensation. In the circumstances it was most reasonable to go and get some refreshment. The men had been at work all day, it was now after 9 P.M., they had one more hour's work before them, and the public-house was probably the only place they could get some refreshments. But the question still remains whether the accident arose out of his employment. I am of opinion that it did not. It arose out of an attempt by the appellant to rescue a workman named M'Ginlay from danger. If M'Ginlay had been engaged on his master's work at the time of the accident, and the appellant had also been engaged in his master's work, the case would have fallen under the case of the *London and Edinburgh Shipping Company v. Brown*.¹ But these are not the circumstances before us. M'Ginlay had improperly begun to play with a rope by means of which another squad of men were hauling a bogie from the north to the south side of the street, and he had fallen across the rope, so that at the time of the accident M'Ginlay had not returned to his own working place. He was not engaged on his master's work; on the contrary, he was impeding another squad of men in their work, and he was in no different position as regards the respondents than he would have been if he had been a stranger who had fallen in the street in front of a lorry or a tramway car, and it is obvious that in neither of these cases could it have been said of Mullen if he had been injured in trying to rescue M'Ginlay, that the accident arose out of and in the course of his employment. I am therefore of opinion that the judgment of the Sheriff-substitute was right.

¹ 7 F. 488.

The LORD JUSTICE-CLERK was absent.

June 17, 1908.

THE COURT pronounced this interlocutor :—" Answer the question of law therein stated in the negative: Find and declare accordingly, and decern; therefore affirm the dismissal of the claim by the arbitrator, and decern."

Mullan v.
Stewart & Co.,
Limited.

ST CLAIR SWANSON & MANSON, W.S.—MACKAY & YOUNG, W.S.—Agents.

MRS MARGARET ALLAN STUART MACKENZIE OR DAVISON (Trustee of Sir James Thompson Mackenzie, Bart.), Pursuer, Real Raiser, and Claimant.—*Fleming, K.C.—Hon. W. Watson.*

No. 144.
June 17, 1908.

SIR VICTOR AUDLEY FALCONER MACKENZIE, BART., Claimant.—*D. Anderson.*

Mackenzie's
Trustee v.
Mackenzie.

JOHN COWAN (Eric Mackenzie's Curator *ad litem*).—*Macphail.*

Process—Appointment of curator ad litem—Minor defender not appearing—Multiplepinding—Minor and Pupil.—It is not competent on the motion of a pursuer to appoint a curator *ad litem* to a minor defender who has not appeared in the action.

This rule applies in the case of a multiplepinding.

(SEE *ante*, 1907, S. C. (H. L.) 17, and 1907, S. C. 139.)

2D DIVISION.
Ld. Johnston.

In an action of multiplepinding, brought by the testamentary trustees of the late Sir James Thompson Mackenzie of Kintail and Glenmuick, Baronet, for the determination of various questions regarding the succession of the testator, and with a view to the division and administration of his estate and the exoneration of the trustees, a question arose with regard to the competency of appointing, on the motion of the pursuers, a curator *ad litem* to a minor who had been called as a defender, but who had not appeared or made any claim in the action.

With reference to this matter the Lord Ordinary (Johnston) reported the case to the Second Division.*

* In reporting the case the Lord Ordinary said :—" This is a case which has been more than once before your Lordships' Division—a multiplepinding under which the estate of the late Sir James Thompson Mackenzie of Glenmuick is being distributed. A question has arisen with reference to the appointment of a curator *ad litem* to one of the minor defenders, and I report it to your Lordships because it appears to me that a mistake has been made which I myself have no power to put right.

" The action was raised so far back as 1892 by the trustees of the late Sir James T. Mackenzie. The defenders called included the eldest son of the late Sir James T. Mackenzie, viz., the now also deceased Sir Allan Russell Mackenzie and his children. At the date in 1892 when the action was raised, two, at anyrate, of these children were pupils and were represented and their interests protected by their father as their administrator-in-law. The action has proceeded upon this footing, that the various questions which have from time to time arisen in connection with Sir James's succession have been brought before the Court by separate records made up on claims and answers within the multiplepinding. More than one of these questions has been before your Lordships, and even reached the House of Lords. During the first fifteen or sixteen years that the process has been running, the younger children of Sir Allan Mackenzie made no appearance either through their father or directly, and indeed have made no appearance to this day. Sir Allan Mackenzie himself died on 19th August 1906, and as he died intestate appointing no tutors or curators to his children, the

June 17, 1908. The case was heard before the Second Division on 29th May 1908.

Mackenzie's
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Argued for the trustee (pursuer, real raiser, and claimant);—The position of the minor defender would not be prejudiced by the appointment of a curator *ad litem*. Such an appointment did not *per se* have the effect of making any decree thereafter pronounced a decree *in foro*. If the curator in the case of a pupil appeared, or in the case of a minor induced his ward to appear in the action, then the decree would be *in foro*, but unless the curator so appeared or induced his ward to appear, any decree pronounced would be a decree in absence notwithstanding the appointment of a curator.¹ There was therefore no reason why a curator should not be appointed here. But whatever might be the rule in an ordinary action the case of a multiplepoinding was special. It was not disputed that a defender sued by a pupil or minor without tutors or curators was entitled to have a curator appointed to such a pursuer as a condition of the

result is that from 1906 onwards the younger children of Sir Allan have been without tutors and curators. The process has gone on without consideration of the change of circumstances arising from Sir Allan's death, and during the last winter session I had before me two new branches of the case, both of which involved very large interests indeed. One of them is raised on a record which is dated March 19th, 1907, and deals with the rights of parties in the residue of the estate, which amounts to about £170,000. That question was raised by a new claim for the present Sir Victor Mackenzie, the eldest surviving son of Sir Allan, who, under the settlement would have been the heir of entail of Kintail had that entail not been broken. He claims the residue, and not only claims that it has vested in him, but claims that as much of it as is free should immediately be paid over to him. He is opposed by the surviving trustee, but no appearance having been entered for the minor beneficiaries under the settlement—the beneficial contradictors, if I may so style them—the case has gone on between the present Sir Victor and the surviving trustee. I have pronounced findings in which I have, so far as the Outer-House is concerned, disposed of the question of principle on which the residue is to be distributed, and the case was continued to deal with the questions of accounting that it might be ascertained how much the residue really was, and how much of it was free from prior obligations to be paid by Sir Victor. The other case also involves a claim by Sir Victor as in the position of a person who would have been heir of entail to an English estate, in which a large sum of money was directed to be invested for the purpose of a trust settlement. The claim is to the entailed money. The persons interested are Sir Victor, the present baronet, and certain substitutes. Here again, there being no appearance for anybody else, the case has proceeded between Sir Victor and the trustee. That case is in the position of the parties having been ordered, with the assistance of Professor Rankine, to adjust a case for the English Courts.

“ My last interlocutors in both these cases were dated 26th February 1908. At that stage the trustee, acting I have no doubt on advice and with the object of assisting to protect, as he thought, the minor beneficiaries, made an application in which he stated that Allan Keith Mackenzie and Eric Dighton Mackenzie, the second and third surviving sons of the late Sir Allan Mackenzie, were still in minority, and that in consequence of the death of their father, he considered it proper that a curator *ad litem* should be appointed to them, to protect their interests in the present process, and therefore craved the Court to make such appointment.

“ Upon that request by the trustee, Lord Salvesen, who was acting on

¹ Sinclair v. Stark, 1828, 6 S. 336.

action being allowed to proceed at his instance. The pursuer and real raiser in an action of multiplepinding and exoneration was really in the position of defender against the claims of all the parties called. The trustee therefore in any view was entitled to have a curator *ad litem* appointed to this minor defender so that she might get a good discharge. The curator *ad litem* had therefore been competently and properly appointed, and if the present curator was discharged another should be appointed in his place. June 17, 1908.
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Argued by counsel for the curator *ad litem*;—The appointment of the curator *ad litem* should never have been made. It was incompetent at the instance of a pursuer to appoint a curator *ad litem* to a pupil who had not appeared in the action.¹ The same rule applied in the case of a minor.² The fact that the action was a multiplepinding made no difference. A person who had been called as a defender in a multiplepinding, but had not appeared in the action,

my behalf at a time when I was absent from Court, pronounced an interlocutor, treating it, as I have no doubt I should have done myself, if incidentally brought before me, as a mere matter of form, appointing John Cowan, Esq., advocate, Edinburgh, to be curator *ad litem* to these two minors. Mr Cowan accepted the office and acted. But he has now presented a minute in the Outer-House which has led me to make this report.

"After narrating his appointment, the curator says he instructed an agent to prepare a memorial to the Right Honourable Charles Scott Dickson, K.C., for the purpose of, *inter alia*, obtaining his opinion as to whether he should advise his wards to reclaim against the interlocutors to which I have referred; that on 6th April he wrote to both Allan Keith Mackenzie and Eric Dighton Mackenzie intimating his appointment, explaining the position of matters, and stating the steps already taken in their interest; and that on the 10th April he received a letter (undated) from the said Allan Keith Mackenzie intimating that he did not desire an appeal to be taken. This letter is produced. The said Allan Keith Mackenzie, however, attained majority a few days afterwards, on 26th April 1908, and the curator's duties, if he any had, in regard to him were thus ended. On the 29th of April 1908 the curator also received a letter from the said Eric Dighton Mackenzie (that is, the younger boy), who is still under seventeen years of age, and at Eton College, intimating that he also did not desire any appeal to be taken. That letter is also produced. On the 14th May he received Mr Dickson's opinion. The opinion shortly stated was to the effect that it was advisable to reclaim, and that it was the duty of the minuter to have a personal interview with his ward. On the same date the curator wrote to the said Eric Dighton Mackenzie, enclosing a copy of Mr Dickson's opinion and requesting a personal interview. On 22d May 1908 an interview between the curator *ad litem* and his ward took place in Edinburgh. At the said interview the curator explained the case and the effect of the interlocutor as fully as possible to his ward. He strongly urged the ward to concur with him in taking such steps as might be necessary for obtaining the judgment of the Inner-House. The ward, however, refused his concurrence. The minuter then states that he has been advised that without the ward's concurrence it is impossible for him to take any effective steps to protect further the ward's interest, and in these circumstances he desires to be relieved from the office of curator *ad litem* to the said Eric Dighton Mackenzie, and he craves the Court accordingly.

"Now, the reason that I have reported the matter to your Lordships is that I feel that inadvertently a mistake was made in the Court's interfering

¹ Calderhead's Trustees v. Fyfe, 1832, 10 S. 582.

² Swan, Petitioner, 1866, 1 S. L. R. 100.

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was not in the position of a pursuer. The appointment of the curator *ad litem* in this case was not made in the interest of the minor, but in the interest of the trustee and of Sir Victor Mackenzie, with the object of putting the minor in a worse position if at a future date he desired to re-open the questions dealt with in this multiplepinding. The present curator should therefore be discharged, and no new curator should be appointed.

At advising on 17th June 1908,—

LORD JUSTICE-CLERK.—The question which has been reported upon to this Division by the Lord Ordinary is whether an appointment of a curator which was made to certain minors was one which should not in the circumstances have been made. The circumstances in which the question arises are these: In 1892 an action of multiplepinding and exoneration was

at all to appoint a curator to these two minors, but I feel also that if I am wrong in that, while it may be my duty at his request to relieve the curator, Mr Cowan, it would be my duty to appoint someone else in Mr Cowan's place, and I therefore desire your Lordships' instructions in the matter.

"My reason for holding that no such step should have been taken is founded upon the position as litigants of pupils and minors. In the case of *Sinclair*, which your Lordships will find reported in 6 S. 336, the matter was very solemnly considered by the whole Court in the matter of a pupil, and your Lordships will find upon page 338 the law very carefully laid down in the opinion of eight of the consulted Judges to the effect that where a pupil is a pursuer the opposite party may require that he be properly represented or that the action do not go on, but that where a pupil is a defender no one can compel him to come into Court, and that the appointment of a curator *ad litem* is truly an interference to compel the pupil to come into Court, so that a judgment might be pronounced against him on a different footing from that on which it would be pronounced against him were he left to himself.

"That authority has been frequently referred to, and your Lordships will find a very good example in the case of *Grieve*, 9 Macph. 582, of the result of proceeding against a pupil who had no tutor, and the position in which such pupil is entitled to be placed. It illustrates the position in which a pupil ought to find himself when he becomes major where he has been brought into Court and has not appeared, and which would be interfered with by the appointment of a curator *ad litem* at the instance of any pursuer.

"I do not find—and counsel will no doubt assist your Lordships—any case which has dealt with the matter from the point of view of a minor in the same circumstances as those of the pupil in *Sinclair's* case. But it appears to me that the same principles apply, and if it would be erroneous practice to compel a pupil to come into Court, it would be equally improper to compel a minor to come into Court by the appointment to him of a curator *ad litem*.

"I think the only case that counsel referred me to in which the position of a minor is concerned is the case of *M'Conochie*, 9 D. 791, but that was the case of a minor pursuer. The father refused to concur in the action. It was held that as the minor was a pursuer in that case, and was entitled to have her case brought before the Court, a curator *ad litem* should be appointed for the purpose of the action in consequence of the father's refusal to protect her interests.

"In these circumstances I have reported the matter to your Lordships, and the only other question is this: This is an action of multiplepinding

raised in reference to the very large estate of the late Sir James Thompson June 17, 1908. Mackenzie, Baronet, who died in August 1890. There has been protracted procedure in the case. Sir Allan Russell Mackenzie and his children were called. For many years his children did not appear in the proceedings, and up to the present time the younger children have not entered appearance. He died in 1896, and did not appoint any tutors or curators to his children.

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Lord Justice-
Clerk.

The case has reached the stage of the rights of parties in the residue having to be settled. The eldest son of Sir Allan, Sir Victor, claims the whole residue, which is resisted by the trustee. After certain procedure had taken place the trustee took steps to have a curator *ad litem* appointed to the other sons of Sir Allan, who were in minority. The appointment was made by Lord Salvesen, who was acting for Lord Johnston when he was absent from Court because of indisposition.

The curator appointed applied to be relieved of office in respect that Mr Allan Keith Mackenzie and Mr Eric Dighton Mackenzie, his two wards, refused to allow him to reclaim against an interlocutor, as to which advice of counsel had been taken. Mr Allan having become major the curatory fell as regarded him. As regards Eric, the curator on the advice of counsel had a personal interview with him, when he found him fixed in his determination not to give his name to a reclaiming note. In these circumstances the curator desires to be relieved of office.

That being the present position of matters the Lord Ordinary desires the instruction of the Court. He is prepared to relieve the present curator, but he feels that if it was right to appoint a curator at all, then the question of the appointment of another gentleman to be curator would at once arise.

The Lord Ordinary's difficulty is that he has strong doubt whether, in the circumstances, any appointment should have been made. The point in question is, Can a person who is not major be compelled against his will to compare as a defender in an action? On that question I have come to the conclusion that the view of the Lord Ordinary is sound. In the case of

—not an ordinary action—and it was maintained to me by the counsel for the trustee that a multiplepinding must be treated on a different footing from an ordinary action, because it involved the exoneration of the pursuer, and that the pursuer was entitled to compel everyone to attend for their interest, for the purpose of enabling him to get his exoneration. I venture to think that this is a consideration which ought not to vary the result. If in an ordinary action a curator should not be appointed, I think in a multiplepinding he should not be appointed either. As to the circumstance of one of the defenders being a minor preventing the trustee getting his exoneration on distributing the funds, that is a question between them, just as much as if they were parties to an ordinary action, and it seems to me that the same principle applies as in an ordinary action.

“Lastly, my reason for reporting the question is that it appears to me to be a matter with which I cannot very well deal. The interlocutor, though granted by Lord Salvesen, is really my interlocutor, for it was signed by him for me, and I cannot recall my own interlocutor. I therefore report it to your Lordships, because it is not a question on the merits—it is a question of putting right an administrative, not a contentious matter in the suit. In these circumstances, I ask your Lordships to deal with the matter, as your Lordships may be advised, either by disposing of it yourselves, or by remitting to me with instructions to do what your Lordships deem proper.”

June 17, 1908. *Sinclair*¹ the question arose very sharply, and was decided by a full Bench. And this is confirmed by the subsequent case of *Grieve*.² The principle seems to be that the rights and interests of a young person are not to be affected by an action raised against him in any way which may affect his asserting any right he may have when he comes of age to act for himself. As it is expressed in the Lord Ordinary's judgment in *Calderhead v. Fyfe*,³ "The Judge has no power . . . to exercise any jurisdiction over an absent defender. Hence he cannot appoint a curator for him." These were cases of pupils, but I see no difference in principle in the case of a minor. He of course is in one respect in a different position from a pupil, because he is not held to be incapable of contracting, but is only protected in doing so. But if he does not choose to become a defender in proceedings, then I cannot see why the opposing party should be entitled to force his hand by getting a curator *ad litem* appointed to him, he having no desire to have anything to do with the litigation.

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Mackenzie.

Lord Justice-
Clerk.

I agree with the view expressed by the Lord Ordinary in reporting the case that the fact that the present proceedings are in the form of a multiplepinding should not make any difference as to the result. The rights of the minor to be affected by the proceedings are just such rights as could be dealt with in an ordinary action. It is a mere accident that the existence of double distress leads to the form of the case being a multiplepinding, which is after all a conglomeration of actions. The position of a party in a multiplepinding is that he defends against the claims of other litigants so as not to have his own claims defeated.

I am therefore of opinion that a curator should not have been appointed to this minor, who is not, and refuses to be, a litigant in the cause. That he is not a pursuer is plain, for he is not a party to the litigation at all. As a defender he cannot be dealt with by the Court as having any power over him, and those who are in Court have no right to move for a curator to be appointed to him, and the Court cannot grant the appointment.

LORD STORMONTH-DARLING, LORD LOW, and LORD ARDWALL concurred.

THE COURT pronounced this interlocutor:—"The Lords remit the cause to the Lord Ordinary with instructions to recall the appointment of Mr John Cowan, advocate, as curator *ad litem* to the minors Allan Keith Mackenzie and Eric Dighton Mackenzie, of 11th March 1908, and with power to the said Lord Ordinary to dispose of the expenses incurred in the Inner-House, as also the remuneration of, and the expenses incurred by, the said curator *ad litem*, and thereafter to proceed as accords."

TODD, MURRAY, & JAMIESON, W.S.—BRUCE, KERR, & BURNS, W.S.—
R. R. SIMPSON & LAWSON, W.S.—Agents.

¹ 6 S. 336.

² 9 Macph. 582.

³ 10 S. 582.

JOHN PATTERSON HUTCHISON, Pursuer (Reclaiming).—*Mair*.
MRS AGNES FORREST STEVENSON OR HUTCHISON, Defender
(Respondent).—*Wark*.

No. 145.

June 17, 1908.

Process—Reclaiming Note—Competency—Omission to box Record—Justifiable Mistake—Court of Session Act, 1825 (6 Geo. IV. cap. 120), sec. 18—Act of Sederunt, 11th July 1828, sec. 77—Court of Session Act, 1808 (48 Geo. III. cap. 151), sec. 16.—Circumstances in which the Court sustained the competency of a reclaiming note although copies of the record had not been boxed until after the reclaiming days had expired.

Hutchison v.
Hutchison.

M'Evoy v. Braes' Trustees, Jan. 16, 1891, 18 R. 417, and *Wallace v. Braid*, Feb. 16, 1899, 1 F. 575, distinguished.

IN an action of divorce at the instance of John Patterson Hutchison against his wife, Mrs Agnes F. Stevenson or Hutchison, the Lord Ordinary (Guthrie), on 26th May 1908, pronounced an interlocutor assoilzieing the defender.

1st DIVISION.
Lord Guthrie.

On 16th June (the twenty-first day after the date of the interlocutor), the pursuer presented a reclaiming note. Of the copies of the reclaiming note placed in the boxes only a small number had a copy of the record attached, and when the principal copy of the reclaiming note with record attached was presented to the boxing clerk, he refused to certify it as boxed, on the ground that it was not conform to the copies placed in the boxes. On the record being detached from the reclaiming note he certified the latter as boxed, and it, together with a separate copy of the record uncertified, was thereafter lodged with, and received by, the Clerk of Court.

When the case appeared in Single-Bills, counsel for the reclaiming, in moving the case to the roll, stated that he thought it proper to draw the attention of the Court to the fact that the regular number of copies of the record had not been boxed, although enough had been tendered to the boxing-clerk for the use of the Judges of the Division.* In explanation of the failure to box the record counsel stated that the reclaiming had changed his agent during the currency of the reclaiming days, that his original agent had omitted, after the closing of the record, to have a sufficient number of copies of the record printed, as was the usual practice, in case they should be required for the purpose of a reclaiming note, that the new agent, relying on a sufficient

* The Court of Session Act, 1825 (6 Geo. IV. cap. 120), sec. 18, enacts:—"When any interlocutor shall have been pronounced by the Lord Ordinary either of the parties dissatisfied therewith shall be entitled to apply for a review of it to the Inner-House . . . provided that such party shall, within twenty-one days from the date of the interlocutor, print and put into the boxes appointed for receiving the papers to be perused by the Judges a note reciting the Lord Ordinary's interlocutor . . . and if the interlocutor has been pronounced without cases the party so applying shall, along with his note as above directed, put into the boxes printed copies of the record authenticated as before."

The Act of Sederunt, 11th July 1828, sec. 77, directs that reclaiming notes shall first be moved as Single-Bills, and sent to the roll—"Provided always that such notes, if reclaiming against an Outer-House interlocutor, shall not be received unless there be appended thereto copies of the mutual cases, if any, and of the papers authenticated as the record in terms of the statute, if the record has been closed; and also copies of the letters of suspension or advocacy, and of the summons with amendment, if any, and defences . . ."

June 17, 1908. number of copies being in existence, had only discovered that they were not on presenting the reclaiming note, when it was too late to have them reprinted, the type having been taken down.¹

Hutchison v.
Hutchison.

Counsel for the respondent, on being asked by the Court if he pressed the objection to the competency of the reclaiming note, referred to the cases of *Burns v. Waddell & Son*,² and *Wallace v. Braid*,³ to shew that, whether he pleaded the objection or not, the omission to box the records was fatal to the competency of the reclaiming note.

LORD M'LAREN referred to section 16 of the Court of Session Act, 1808.*

LORD PRESIDENT.—The point here raised is an unusual one. This is an ordinary twenty-one days' interlocutor reclaiming note, and it appears that although the reclaiming note was tendered on the last of the reclaiming days with a copy of the closed record attached to it, the boxing-clerk quite properly refused to certify it as having been boxed, since the reclaiming notes which had been put into the boxes did not have copies of the record attached to them. There is no question that ordinarily this would be fatal, but here the circumstances are peculiar—a change of agency took place during the currency of the reclaiming days. The second agent quite naturally assumed that the printing of the record had been carried on in the usual way. At the lodging of the reclaiming note he sent for extra copies, but discovered that the first agent had not a sufficient number, that the printer had none, and that the original number printed had been only thirty instead of sixty, with the result that there was a shortage for boxing to the Inner-House, and the type had been taken down. We were referred to the cases of *M'Evoy v. Braes' Trustees*⁴ and *Wallace v. Braid*,³ which embrace both Divisions of the Inner-House. There is no doubt that those cases are binding upon us, but in neither of them was there any attempt to shew that the mistakes which arose were really beyond the control of the agent.

Lord M'Laren has pointed out that under section 16 of the Court of Session Act of 1808, if the reclaiming days have from mistake or inadvertency expired, it is competent to submit the interlocutor to review by petition, and it seems that this is a case where if this form were gone through we could reponne the reclaimer. That being so, we would not think nowadays of compelling a party to go through a mere form, so I propose that we should allow the reclaiming note to be received, the party

¹ The following cases were cited:—*M'Evoy v. Braes' Trustees*, Jan. 16, 1891, 18 R. 417; *M'Lachlan v. Nelson & Co., Limited*, Jan. 29, 1904, 6 F. 338.

² Jan. 14, 1897, 24 R. 325.

³ Feb. 16, 1899, 1 F. 575.

* The Court of Session Act, 1808 (48 Geo. III. c. 151), sec. 16, enacts:—
" . . . If the reclaiming or representing days against an interlocutor of a Lord Ordinary shall, from mistake or inadvertency, have expired, it shall be competent, with the leave of the Lord Ordinary, to submit the said interlocutor by petition to the review of the Division to which the said Lord Ordinary belongs; but declaring always that in the event of such petition being presented, the petitioners shall be subjected in the payment of the expenses previously incurred in the process by the other party."

⁴ 18 R. 417.

undertaking to box the requisite prints in the usual way. But I wish to June 17, 1908.
make it clear that this case is very special, and that I have no intention Hutchison v.
of going against the cases of *M'Evoy*¹ and *Wallace*.² If there had been no Hutchison.
change in the agency here, the case would have been an entirely different Ld. President.
one and the result would probably have been otherwise. I put the case on
this, that the second agent had the right to expect that the first agent had
ordered the ordinary number of prints.

LORD M'LAREN.—I agree with your Lordship. I think we have to consider the question here as being under precisely the same conditions as if a petition had been presented under section 16 of the Court of Session Act of 1808, and that we should only give relief if an excusable mistake has been made. I think that the mistake was, in the peculiar circumstances, excusable, but this decision is no encouragement to neglect precise rules of procedure.

LORD KINNEAR concurred.

LORD PEARSON was absent.

THE COURT repelled the objection to the competency of the re-claiming note.

W. R. MACKERSY, W.S.—J. & J. GALLETTY, S.S.C.—Agents.

THOMAS OGILVIE Senior, Appellant.—*D.-F. Campbell—W. Mitchell.* No. 146.
INLAND REVENUE, Respondents.—*Sol.-Gen. Ure—Munro.* —

*Revenue—Income-Tax—Foreign Possessions—Business carried on abroad by person residing in United Kingdom—Income-Tax Act, 1853 (16 and 17 Vict. cap. 34), sec. 2, Schedule D—Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 100, Schedule D, Cases I. and V.—*O., a British subject resident in Aberdeen, was the sole partner of the firm of O. & Sons, carrying on business in Toronto, Canada. O. carried on the business by managers in Toronto, who were required to render to him a weekly statement of all the transactions. O. had the sole right to manage and to control every department, and was alone entitled to the profits, and alone liable for the debts.

O. having been assessed for income-tax under Schedule D, Case I., upon the whole profits of his business in Canada, appealed, contending that the Canadian business being entirely conducted by the managers there without his interference it was to be regarded as a foreign possession liable to income-tax only on the profits received in this country under Case V.

Held that the business was carried on by O. in the United Kingdom, and that he was liable to be assessed on the whole profits of the business under Case I. of Schedule D.

THOMAS OGILVIE senior, residing at Keppelstone, Aberdeen, the 2^d Division, sole partner of Thomas Ogilvie & Sons, woollen warehousemen, 72 Exchequer and 74 Bay Street, Toronto, Canada, appealed to the Commissioners Cause.
for the General Purposes of the Income-Tax Acts for the county of Aberdeen against an assessment for the year ended 5th April 1907 of £ made on him under Schedule D of the Income-Tax Act in respect of the profits of the business of Thomas Ogilvie & Sons. The assessment was made under authority of the Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 100, Schedule D, First Case; the Income-

¹ 18 R. 417.

• 1 F. 575.

June 17, 1908. Tax Act, 1853 (16 and 17 Vict. cap. 34), sec. 2; and the Finance Act, 1906 (6 Edw. VII. cap. 8), sec. 6.*

Ogilvie v.
Inland
Revenue.

The following facts were admitted:—" . . . (2) That in 1904 Thomas Ogilvie senior acquired the business of woollen warehousemen carried on at 72 and 74 Bay Street, Toronto, Canada, and has since by himself, and for his own behoof, continued and carried on said business under the firm name or style of Thomas Ogilvie & Sons. . . . (4) That the said Thomas Ogilvie senior is the sole owner of the foresaid business of woollen warehousemen, carried on under the

* The Income-Tax Act, 1853 (16 and 17 Vict. cap. 34), sec. 2, Schedule D, imposes income-tax—"For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom, from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits and gains."

Sec. 5 enacts that the duties granted by the Act shall be raised, levied and collected under the regulations and provisions of 5 and 6 Vict. cap. 35 (Income-Tax Act, 1842).

The Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), enacts:—

Sec. 100. "The duties hereby granted contained in the schedule marked (D) shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said last-mentioned duties, as if the same had been inserted under a special enactment. . . .

"Schedule D. . . . Rules for ascertaining the said last-mentioned duties in the particular cases herein mentioned.

"First Case.—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule to this Act.

"Rules: First, Computation of Duty on Trade.—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up. . . .

"Fifth Case.—The duty to be charged in respect of possessions . . . in the British plantations in America or in any other of Her Majesty's dominions out of Great Britain [now the United Kingdom] and foreign possessions. The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the actual sums annually received in Great Britain [now the United Kingdom; see sec. 5 of the Act of 1853] . . . computing the same on an average of the three preceding years, as directed in the First Case. . . ."

Sec. 39. "No person who shall on or after the passing of this Act actually be in Great Britain [now the United Kingdom] for some temporary purpose only and not with any view or intent of establishing his residence therein, and who shall not actually have resided in Great Britain [now the United Kingdom] at one time or several times for a period equal in the whole to six months in any one year, shall be charged with the said duties mentioned in Schedule D as a person residing in Great Britain [now the United Kingdom] in respect of the profits or gains received from or out of any possessions in . . . any other of Her Majesty's dominions for any foreign possessions."

firm name or style of Thomas Ogilvie & Sons at 72 and 74 Bay Street, Toronto, aforesaid, and is alone entitled to the profits and liable in the losses of and in connection with said business. (5) That said business of Thomas Ogilvie & Sons . . . is carried on for and on behalf of the said Thomas Ogilvie by managers in accordance with agreement with them produced . . . * Said managers report state of trade and progress of business from time to time to the said Thomas Ogilvie senior. (6) The said managers—Messrs Canavan and Hire—do the whole buying and selling for the Canadian business, sending to this country statements of sales, &c., as provided in Article 3 of the agreement with them. (7) The whole transactions of the Canadian firm are recorded in books kept in Canada, and the accounts are audited annually, and yearly balance-sheets made up by auditors in Canada. . . . (9) The whole capital of the Canadian business is supplied by Mr Ogilvie. (10) No portion of the profits of the Canadian business has been remitted to this country.”

On 5th September 1907 the Commissioners found—“(1) That the undertaking or business of woollen warehousemen carried on at 72 and 74 Bay Street, Toronto, Canada, under the firm name or style of Thomas Ogilvie & Sons is the sole property of Thomas Ogilvie senior, residing at Kepplestone, Aberdeen, Scotland; (2) That the said Thomas Ogilvie is by himself the sole trader carrying on business under said firm name or style of Thomas Ogilvie & Sons, and vested with the sole right to manage and control every department of its affairs, and is alone entitled to the profits and liable in the losses of and in connection with said business; (3) That the managers and other employees associated and employed in the carrying on of said business of Thomas Ogilvie & Sons have no power to act in the carrying on of the trade apart from the authority express or implied which they hold from the said Thomas Ogilvie senior; and (4) that the said Thomas Ogilvie & Sons and Thomas Ogilvie, the sole partner thereof, are bound and liable to account to the Revenue for the profits earned by them, and that said profits are liable to assessment for income-tax purposes under the Income-Tax Act, 1842, Schedule D, Case I., and the Income-Tax Act, 1853, Schedule D. Accordingly the Commissioners refused the appeal, and remitted to the parties to adjust the figures liable to assessment.”

The appellant required the Commissioners to state a case for the opinion of the Court, which they did, setting forth the facts given above. The cause was heard before the Second Division on 3d and 4th June 1908.

Argued for the appellant;—The question was whether the assessment was to be made on the whole profits of the business under Case I. of Schedule D,¹ or only on the profits received in the United Kingdom under Case V. Case I. was an extremely general enactment, and must give way to the more specific enactment of Case V. if that were applicable. If, therefore, the business was a possession in His Majesty's dominions out of the United Kingdom the assessment must be made under Case V. No doubt the appellant was the sole

* The agreement bore that the firm had agreed to employ J. B. Canavan and T. F. Hire as salesmen and agents to assist in the business, subject to the general control of the firm, and that they should render a weekly statement of the transactions in the business to Mr Ogilvie.

¹ Income-Tax Act, 1842 (5 and 6 Vict. c. 35), sec. 100.

June 17, 1908. owner of the business and was resident in Scotland. But he did not interfere with the conduct of the business. The whole trading operations were carried out by the managers in Canada; the books were kept there; and the audit took place there. The agreement between the appellant and the managers was not an ordinary contract of service. The managers were engaged for five years; they were partly remunerated by commission; and the amount of the profits was determined not by the appellant but by the auditor. In these circumstances, it was plain that the business was wholly carried on in Canada. It was therefore a colonial possession within the meaning of Case V., and the assessment must be made under that Case, and not under Case I.¹ The respondents could not succeed unless the facts that the appellant was the owner of the business and was resident in Scotland were conclusive. That contention was unsound.² No doubt the owner of the business had the control over it in the sense that he could bring it to an end. But in determining where the business was carried on, the true criterion was not ownership but management,³ and in the present case it was clear that the management was in Canada. The contention that ownership was conclusive involved unreasonable consequences in the case of foreigners temporarily resident in this country. Under section 39 of the Income-Tax Act, 1842,⁴ a foreigner temporarily resident here was exempted from the duties imposed by Schedule D in respect of profits derived from foreign possessions. Now, under Case V. profits derived from foreign possessions were assessable only in so far as they were received in the United Kingdom. If foreign possessions did not include a business exclusively carried on abroad, it followed that a foreigner temporarily resident here would be liable to pay income-tax on the whole profits derived by him from a business carried on in his own country, whether they were received in the United Kingdom or not. It was unreasonable to suppose that the foreigner should be exempted from taxation in respect of investment profits received in this country and yet should be assessed on trade profits which were not received here, and a construction involving this result should be rejected. The cases of the *San Paulo (Brazilian) Railway Co., Limited, v. Carter*⁵ and *De Beers Consolidated Mines, Limited, v. Howe*⁶ were distinguishable. In these cases it was held that the business was managed in the United Kingdom. In *Lloyd v. Solicitor of Inland Revenue*⁷ the only question raised was whether the party assessed was resident in this country. That case therefore had no application to the present.

Argued for the respondents;—The appellant was the sole owner of the business, and was resident in Scotland. Accordingly Case I. applied, and the appellant was assessable on the whole profits of the business.⁸ Further, the appellant could not succeed unless the busi-

¹ Colquhoun v. Brooks, 1889, L. R., 14 A. C. 493; Kodak Limited v. Clark, L. R., [1903] 1 K. B. 505; The Gramophone and Typewriter, Limited, v. Stanley, L. R., [1906] 2 K. B. 856 (aff. L. R., [1908] 2 K. B. 89).

² Colquhoun v. Brooks, 1889, L. R., 14 A. C. 493.

³ San Paulo (Brazilian) Railway Company, Limited, v. Carter, L. R., [1896] A. C. 31, per Lord Halsbury (L. C.), at p. 38.

⁴ 5 and 6 Vict. c. 35.

⁵ L. R., [1896] A. C. 31.

⁶ L. R., [1906] A. C. 455.

⁷ 1884, 11 R. 687.

⁸ Lloyd v. Solicitor of Inland Revenue, 1884, 11 R. 687; Inland Revenue v. Cadwalader, 1904, 7 F. 146.

ness were wholly carried on abroad. If it were partially carried on June 17, 1908. in the United Kingdom he was assessable on the whole profits.¹ Now, the appellant was the sole owner of the business; he had provided the whole capital; the managers were his servants, and had no authority to carry on the business apart from that which they derived from him; he could bring the business to an end at any time; and the Commissioners had found that he was the sole trader. In these circumstances it was clear that the control of the business remained with the appellant in this country, and that was quite inconsistent with the idea that the business was exclusively carried on abroad. It followed that the assessment must be made under Case I., not under Case V.² *Colquhoun v. Brooks*³ was distinguishable. There the party assessed was a sleeping partner in a business wholly carried on in Australia. He had no control over the business, and there was no machinery for estimating the profits which remained in Australia, because accounts were not sent home. It was on the last point that the decision mainly turned, and that difficulty was not present here. *Kodak Limited v. Clark*⁴ was a case where a British company held a large majority of the shares of an American company. That was plainly a case of an investment, and therefore fell under Case V., and did not fall under Case I.

At advising,—

LORD STORMONT-DARLING.—This case is not complicated by any question as to the trade or business carried on at Toronto being a trade or business carried on by a partnership or company, or by any question as to where the residence of the firm or company, if there were one, should be held to be. It is the case of Thomas Ogilvie senior, who is declared by the findings of the Commissioners to be “by himself the sole trader, carrying on business under the said firm name or style of Thomas Ogilvie & Sons, and vested with the sole right to manage and control every department of its affairs, and alone entitled to the profits and liable in the losses of and in connection with said business.” That seems to me to be enough for the decision of the case in favour of the Crown, and I am therefore of opinion that the determination of the Commissioners is right, and that the appeal ought to be refused.

It is settled by the judgment of the House of Lords in the *San Paulo (Brazilian) Railway Company, Limited*,⁵ that “where a trade is carried on either wholly in the United Kingdom, or partly within and partly outside it, and profits accrue therefrom to a person or a corporation residing in the United Kingdom” (in this case the profits accrue to a person residing in Aberdeen), “the assessment for income-tax falls under the first case of Schedule D of 5 and 6 Vict. cap. 35, section 100, and does not fall under

¹ *San Paulo (Brazilian) Railway Co., Limited, v. Carter, L. R., [1896] A. C. 31, per Lord Halsbury (L. C.).*

² *Income-Tax Act, 1853 (16 and 17 Vict. c. 34), sec. 2; Income-Tax Act, 1842 (5 and 6 Vict. c. 35), sec. 100; San Paulo (Brazilian) Railway Co., Limited, v. Carter, L. R., [1896] A. C. 31; De Beers Consolidated Mines, Limited, v. Howe, L. R., [1906] A. C. 455; Grove v. Elliotts & Parkinson, 1896, 3 Tax Cases, 481; Apthorpe v. Peter Schoenhofen Brewing Co., Limited, 1899, 80 L. T. 395.*

³ 1889, L. R., 14 A. C. 493.

⁴ L. R., [1903] 1 K. B. 505.

⁵ L. R., [1896] A. C. 31.

June 17, 1908. the fifth case, and the duty is to be computed upon the full amount of the balance of the profits or gains of the trade, and not only upon the actual sums received in the United Kingdom." Therefore the question is whether the trade is carried on either wholly in the United Kingdom, or partly within and partly outside it. And it is enough for the view that the assessment for income-tax falls under the first case and not under the fifth, if the necessary inference from the facts is that the trade is carried on partly in the United Kingdom and partly outside it. In the *San Paulo* case¹ the Lord Chancellor (Halsbury), at p. 38, and Lord Watson, at p. 41, both held that a great deal of the trade was carried on in Brazil, where the railway was made, and had to be managed and worked (as, indeed, the memorandum of association itself required), but both of the noble and learned Lords, while admitting that these facts determined in a sense the locality of the trade, were equally clear that they did not determine, or even aid in determining, where the "head and brain of the trading adventure" were situated, and they had no difficulty in holding that these were to be found in London, and in rejecting the contention that the particular localities in which debts were incurred to the company or were paid to its agents were of any consequence in ascertaining by whom its trade was carried on.

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Darling.

Now, apply this judgment to the case in hand, and what do you find? The "head and brain of the trading adventure" in Toronto are undoubtedly to be found in Aberdeen, where Mr Thomas Ogilvie senior resides, to which weekly statements of the transactions of the Toronto business in all its departments are sent (App. No. I, p. 9 of the case), and where the sole right to manage and control every department of its affairs is centred. Mr Ogilvie senior is Board of Directors and Company all in one, for the case states that "the managers and other employees associated and employed in the carrying on of said business of Thomas Ogilvie & Sons have no power to act in the carrying on of the trade apart from the authority, express or implied, which they hold from the said Thomas Ogilvie senior."

It is said that, although all this may be true, although Mr Thomas Ogilvie senior may have in theory the absolute control of the business or trade locally situated in Toronto, since it is carried on for his sole benefit, and he could do with it what he likes, with no one to say him nay, yet not a single instance has ever occurred in which he has, as matter of fact, attempted to exercise his control, or to give directions even about the smallest detail. Yet the right of control is there all the time, and might be exercised at any moment. It is a matter, as it seems to me, of power and right, and not of the actual exercise of right or power. The necessary inference from forbearance to exercise the right of control is that the man who possesses it is content for the time with the way in which his wishes are being carried out, and his interests attended to by his employees. "He cannot, according to the rule established in *Colquhoun v. Brooks*,² escape from liability under the first case, unless he is able to shew that no part of the trade is carried on within the United Kingdom, or, what comes to precisely the same thing, that the trade is exclusively carried on in a country or countries outside the

¹ L. R., [1896] A. C. 31.

² 1889, L. R., 14 A. C. 493.

United Kingdom, whether subject to Her Majesty or not"—so said Lord Watson at p. 40 of the *San Paulo* case.¹ It is only when the trade is carried on exclusively abroad that the question so anxiously discussed about "foreign possessions" in *Colquhoun v. Brooks*² has any significance.

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It remains to notice in passing the reservation (for it is no more than a reservation) contained in Lord Davey's opinion at p. 43 of the *San Paulo* case,¹ thus:—"Whether it would be possible in any case for a sole owner of a foreign business having exclusive power of control over it, but resident in this country, successfully to maintain that he did not carry on a business here, it is unnecessary to say. That question, which is probably one of fact, will be dealt with when it arises according to the circumstances of the case." The form in which the question is put rather suggests the reply. I am of opinion that the question which Lord Davey adumbrated arises for decision here, and that it should be answered for the Crown.

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Darling.

LORD LOW concurred.

LORD ARDWALL.—I concur generally in the opinion of Lord Stormonth-Darling, and propose only to touch on a ground regarding which I have some difficulty, namely, the question of whether the mere possession of "full control" by a person in this country brings the business over which such control exists within the category of "a business carried on partly in this country." I do not think it is necessary to decide this question, and desire to reserve my opinion upon it. The second finding in fact stated by the Commissioners, which has been quoted in full by Lord Stormonth-Darling, taken along with the third finding of the Commissioners to the effect that "the managers and other employees associated and employed in the carrying on of said business of Thomas Ogilvie & Sons have no power to act in the carrying on of the trade apart from the authority, express or implied, which they hold from the said Thomas Ogilvie senior," and the fact that Thomas Ogilvie senior resides in Scotland, appear to me, in view of the provisions of the statutes and the decided cases, to settle the question put to us in the respondent's favour, because it appears that it is the firm of Thomas Ogilvie & Sons, resident in Scotland, who carry on the business in question by means of "salesmen and agents" at their "branch" (as they call it) in Canada. There is accordingly no such question regarding "control" as arose in the case of *Kodak Limited v. Clark*,³ where although a British Company had in a sense the control of an American Company by reason of owning 98 per cent of the American Company's shares, yet because the American Company was a separate company with different interests and entirely distinct and separate management from the British Company, the American Company was held not to be partly carried on in this country—nor is *Colquhoun's*² case an authority for the present, where the active partners were in Australia, and a sleeping partner, possessing some powers of control, but exercising none, lived in this country. In such cases, and in several other reported cases, it became a question of importance whether, although a power of control existed to some effects, it was ever so exercised

¹ L. R., [1896] A. C. 31.

² 1889, L. R., 14 A. C. 493.

³ L. R., [1903] 1 K. B. 505.

June 17, 1908. as to constitute a "carrying on" of the business in this country. In the present case, however, not the control merely but the whole command and management of the Canadian business rests with the "firm" of Thomas Ogilvie & Sons, which is resident in Scotland. The "salesmen and agents" Lord Ardwall. in Canada have no powers except what are delegated to them, expressly or impliedly, by the said "firm"—that is, by Thomas Ogilvie senior.

I am accordingly constrained to hold that the business of Thomas Ogilvie & Sons, of which the appellant is the sole partner, is partly carried on in this country, and that the present case falls under Case I. of Schedule D of the Income-Tax Acts.

The LORD JUSTICE-CLERK concurred with Lord Stormonth-Darling.

THE COURT affirmed the determination of the Commissioners, and decerned.

J. & A. F. ADAM, W.S.—PHILIP J. HAMILTON GRIERSON, Solicitor of Inland Revenue—Agents.

No. 147. DANIEL BEATON, Pursuer (Reclaimer).—*G. Watt, K.C.*—*T. G. Robertson.*

June 17, 1908. THE CORPORATION OF THE CITY OF GLASGOW, Defenders (Respondents).—*Morison, K.C.*—*M. P. Fraser*—*A. Crawford.*

Beaton v.
Corporation of
Glasgow.

Reparation—Master and Servant—Slander—Slander by Servant—Liability of Master—Scope of Employment—Relevancy.—Murray, the Superintendent of the Gorbals Public Baths, Glasgow, employed by the Corporation of Glasgow, sent a report to Thomson, the General Manager of the Public Baths, Glasgow, also employed by the Corporation, commenting adversely on the conduct of Beaton, a swimming instructor at the Gorbals Baths, employed by the School Board of Glasgow. Thomson, the General Manager, sent the report to the School Board of Glasgow.

In an action of damages raised by Beaton against the Corporation the pursuer averred that Thomson, "in the execution of his duty as General Manager of the Public Baths," had forwarded the report to the Glasgow School Board, who employed Beaton to teach swimming, and that the report was slanderous, and caused the School Board to dismiss him. "In writing and dispatching the said report the said Robert A. Murray and William Thomson acted within the scope of their authority from the defenders, and in the discharge of their duties as servants of the defenders, and in the supposed furtherance of the interests of the defenders."

The defenders pleaded that the action was irrelevant, and that the defenders were not responsible for the acts of their servants "outwith the scope of their duties and authority."

Held (aff. judgment of Lord Mackenzie) that *prima facie* it was no part of the duty of the general manager of baths to make communications on behalf of the Corporation to the School Board, that it was not enough to aver generally that the report was forwarded by the general manager "in the execution of his duty," and that in the absence of any averment that he had special authority to act as he did, the action was irrelevant.

1st DIVISION.
Lord Mac-
kenzie.

THE CORPORATION OF GLASGOW have the control and administration of the public baths of Glasgow under the Glasgow Police Act, 1866.

In 1907 William Thomson was general manager of the Corporation Baths, and Robert A. Murray was superintendent of the Gorbals Baths.

In May 1907 Murray, the superintendent of the Gorbals Baths,

being dissatisfied with the conduct of Daniel Beaton, a swimming instructor appointed by the School Board of Glasgow, sent a written report on the subject to Thomson, the general manager, who sent the report to the School Board.

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On 30th October 1907 Daniel Beaton raised an action against the Corporation of Glasgow, concluding for £1000 as damages for alleged slander.

The summons also contained conclusions for interdict and reduction, to which it is unnecessary to refer.

The pursuer averred :—(Cond. 7) "On or about 1st May 1907 the said Robert A. Murray, as superintendent of the said Gorbals Baths, delivered to the said William Thomson, as general manager of the public baths, a written report, in the following terms :—' Board school boys had large pond to-day. Right away at 10 o'clock 20 lads came in. Our head bathman was at the door to control them, and asked them to take dressing-boxes in rotation, but Mr Beaton interfered, and shouted to the boys, "spread yourselves, lads," with the result that 20 boys were all over the place, and he had disorder at the very start of the day. . . . In short, it looks like a repeat of last summer's performance, as Mr Beaton is allowing or winking at all regulations, and playing on his position as instructor, and if he is allowed to go on as he has begun, I must be freed of all responsibility as to the conduct of the place.' The said report was forwarded by the said William Thomson in the execution of his duty as general manager of the public baths to the Clerk of the Glasgow School Board, who employed the pursuer as swimming instructor, as before mentioned, and particularly employed him to teach swimming at the Gorbals Baths. The statements in the said report are of and concerning the pursuer, and they are false, and were intended to prejudice the pursuer, and otherwise to damage him in the eyes of the Glasgow School Board, with the view of bringing about his dismissal from their employment. The statements contained in said report are slanderous, and the said Robert A. Murray in writing and handing over the same, and the said William Thomson in dispatching the same, represented, and intended to represent, that the pursuer had been guilty of . . . contravention of the bye-laws, and of continued misconduct in, and misuse of, his position as an instructor, and was unfit to occupy the position and discharge the duties of a swimming instructor. The said Robert A. Murray and William Thomson were aware of the falsity of the charge, but nevertheless maliciously, and without probable or any cause, preferred it against the pursuer, with the object of persuading the said School Board to dismiss him from their employment, which in consequence thereof, and of the illegal actings of the defenders . . . they did. In writing and dispatching the said report the said Robert A. Murray and William Thomson acted within the scope of their authority from the defenders, and in the discharge of their duties as servants of the defenders, and in the supposed furtherance of the interests of the defenders."

The pursuer pleaded ;—(5) The defenders having libelled the pursuer in his character and in his reputation as a swimming instructor as condescended on, and the pursuer having suffered loss, injury, and damage thereby, he is entitled to reparation therefor.

The defenders in answer stated :—"Believed to be true that in May 1907 the said Robert A. Murray wrote a letter, referred to above as a report, to the said William Thomson in the terms quoted, and that

June 17, 1908.—the said William Thomson forwarded it to the Clerk of the Glasgow School Board. Explained that such letter was not known to or authorised by the defenders, and that in forwarding it to the Clerk of the Glasgow School Board the said William Thomson was acting out-with the scope of his duties as General Manager of the Public Baths. The said letter is referred to.”

The defenders pleaded;—(1) The averments of the pursuer being irrelevant, and insufficient in law to support the conclusions of the summons, the action should be dismissed. (7) The defenders, not being responsible for any actings of their said servants outwith the scope of their duties and authority, are not liable for the loss or damage, if any, thereby caused to the pursuer.

On 19th March 1908 the Lord Ordinary (Mackenzie) pronounced this interlocutor:—“ Allows the parties a proof of their averments other than the averments relating to the question of slander.”*

The pursuer reclaimed.

The case was argued before the First Division on 17th June 1908.

Argued for the reclamer;—(1) The report complained of was plainly slanderous and capable of bearing the innuendo put upon it. It was injurious to his credit and reputation, and charges made in similar terms had been held actionable.¹ (2) A corporation was liable for a slander uttered by one of its servants while acting within the scope of his employment. Although the particular act might not be authorised, still if the act were done in the course of employment which was authorised, the master was liable.² *Prima facie*, in forwarding the report to the School Board, Thomson was acting within the scope of his employment as a servant of the Corporation, and it was so averred by the pursuer. In any event, it was a question of fact whether or not Thomson was acting within the scope of his employment, and the pursuer was entitled to a proof of his general averment to that effect.

Counsel for the respondents were not called upon.

* “OPINION.— . . . As regards the alleged slander, the averments upon this point are contained in cond. 7 as amended. I do not doubt that the statements contained in the report by Robert A. Murray, the Superintendent of the Gorbals Baths, which he delivered to William Thomson, as general manager of the public baths, are capable of being innuendoes as set out in cond. 7. The consequence to the pursuer was serious according to this averment, as he says in consequence of its dispatch to the School Board they dismissed him from his post of swimming instructor. The question, however, is whether the defenders can be sued by the pursuer in respect of what Murray and Thomson did. This question has come up in the recent cases of *Ellis v. The National Free Labour Association*, 1905, 7 F. 629; and *Agnew v. The British Legal Life Assurance Company*, 1906, 8 F. 422. The question is whether there is any *prima facie* case that Thomson was acting within the scope of his authority in sending this report to the School Board. In my opinion no such case has been averred. I am quite unable to see that Thomson had any authority or duty to do anything in the matter but report to his committee. Accordingly I am of opinion that the pursuer is not entitled to sue the defenders for damages for slander. . . .”

¹ *M’Kerchar v. Cameron*, Jan. 19, 1892, 19 R. 383; *M’Bride v. Williams and Dalzell*, Jan. 28, 1869, 7 Macph. 427; *A B v. C D*, Nov. 1, 1904, 7 F. 22.

² *Citizens Life Assurance Co. v. Brown*, [1904] A. C. 423, *per* Lord Lindley, at pp. 427-8; *Mackenzie v. Cluny Hill Hydropathic Co., Limited*, 1908, S. C. 200; *Ellis v. National Free Labour Association*, May 12, 1905, 7 F. 629.

LORD PRESIDENT.—I have not the slightest doubt that the Lord Ordinary June 17, 1908. is quite right in not admitting these averments relating to the question of slander to proof, and, in truth, I think there are more objections than the Lord Ordinary has stated. I find it myself exceedingly difficult to hold that there is matter which can be innuendoed at all, but I will not go into that matter, because I shall assume—as the Lord Ordinary has come to a conclusion that they may be innuendoed—that upon that matter he is right.

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But then, what are the circumstances which are averred? It is averred that the local custodier of a bath belonging to the Glasgow Corporation made a report to his superior, the General Manager of the Baths Department, in which he commented strongly upon the conduct of the pursuer; and I will assume that the statements therein were slanderous and untrue. But, none the less, it was a report. Well, the General Manager of the Baths Department then, according to the averment, sends this report which was made to him to an outside party—the Glasgow School Board—who, by that means, become cognisant of these slanderous statements. Upon that the pursuer sues, not the sender of the letter, but the Glasgow Corporation.

Now, it is true that it has recently been held, and I think rightly held, that a corporation may be liable for slander. It was not an easy result to arrive at, and I may remind your Lordships that there was one very eminent Judge (Lord Bramwell) who resisted it with might and main. But, at any rate, it has been allowed; but I think it has been allowed within very narrow limits. And one necessary limit is that the person who is guilty of the slander or libel—a corporation, of course, is a being that cannot act by itself and cannot act except by agents—must be acting within the scope of his authority. Now, it is quite true, of course, that what is the scope of authority is a question of fact. But then, none the less, it is a question of fact which allows of immediate determination when you set forth the particular position that a person is in, unless you can make special averments of authority given. To illustrate my meaning, it is quite obvious that whereas the secretary of the corporation, who is the natural mouthpiece of the corporation, may be understood to have a very general authority, and, therefore, the corporation may have to prove that he acted outside the scope of his authority in doing any particular thing, that could not possibly be said of the office-boy. If you suppose that the office-boy had written the letter which the secretary wrote in the *Citizens Life Assurance Company v. Brown*,¹ I take it that there would have been no case unless, of course, you could make a special averment that by a mandate of the directors of the Corporation—the governing body—this particular office-boy had been given these powers.

Now, that is the first ground upon which these averments fail, and that is the ground on which the Lord Ordinary has gone. The General Manager of the Baths Department is *toto caelo* removed from being the general manager or the secretary of the Glasgow Corporation. He is not the person who generally makes communications on behalf of the Glasgow Corporation, and, therefore, I think that when you merely table the person who wrote the letter as the General Manager of the Baths Department you put yourself

¹ [1904] A. C. 423.

June 17, 1908. out of court, unless you can add a special averment that he had been given special powers to make communications of this sort. No such special
Beaton v. Corporation of Glasgow. averment is made, and, therefore, I do not think there is any ground for the contention which was very well urged by the counsel for the reclaimers,
Ld. President. the contention, namely, that authority being a question of fact you ought not to determine it until the facts are known. That is quite true; but, at the same time, you must have a proper averment of the facts before you are allowed to go to proof upon the general issue.

But then, there is another objection which is not noticed by the Lord Ordinary, but which, to my mind, is quite conclusive. This so-called slanderous document is a report and nothing else, and the province of a report is that it is confidential and is meant to be communicated to the superior officers to whom the report is made. If, accordingly, we find upon the facts averred that the report, instead of being communicated to any superior officer, was sent away to an outsider by the action of a servant, I think that shews, on the face of it, that the servant was not acting within the scope of his authority, but was going outside it—in the absence, of course, of any averment which would shew that this particular act was within the instructions that had been given.

I think, therefore, that upon the pursuer's own shewing, when he says that the General Superintendent of the Baths communicated the report he had got from his inferior officer, not to the Town-Council, but to an absolutely outside body (the Glasgow School Board), that shews that he was acting outside the scope of his authority. Therefore, upon both these grounds I hold the result at which the Lord Ordinary has arrived is perfectly right.

LORD M'LAREN.—I am of the same opinion.

LORD KINNEAR.—I am of the same opinion. I assume with your Lordship that the words complained of might bear an innuendo. But I must say I have the greatest doubt, to put it no further, whether they can possibly bear the only innuendo which the pursuer desires to put upon them. However that may be, I agree with your Lordship that the Lord Ordinary has refused a proof of this particular part of the case upon a perfectly right ground. To make a corporation liable for a slander by a person in their employment it is not enough to say generally that what that person did was done in the execution of his duty. You must go on and make some averment to shew what his duty was, so as to make it apparent that the particular thing complained of at least belonged to the class of services which he was employed to perform. All that is said about the kind of employment that is committed to Mr Thomson, whose conduct is here complained of, is that he was employed as General Manager of the Public Baths. Now, if he had done any wrong in the course of his management of the baths, then it may very well be that the Corporation would be responsible for it. But what he did was not an act of management of the baths in any sense. It was a communication to the Glasgow School Board of a report made to him by another person in the same employment, which is said to be slanderous of the pursuer. But then the only averment which could have made that a relevant ground of complaint

would have been an averment that it was part of his employment under the Corporation of Glasgow to make reports to the Glasgow School Board as to the business of the baths. If it was part of his employment to make reports or communications of any kind on behalf of the Corporation to the School Board it would have been perfectly easy to say so. But that is not said. There is nothing to suggest that he was in any sense, or for any purpose, the mouthpiece of the Corporation. I therefore agree with your Lordship and the Lord Ordinary.

LORD PEARSON was absent.

THE COURT adhered.

D. MACLEAN, Solicitor—CAMPBELL & SMITH, S.S.C.—Agents.

JEANIE WRIGHT JOHNSTONE, Pursuer (Appellant).—*Watt, K.C.*—*J. Macdonald.*

No. 148.

JAMES SPENCER & COMPANY, Defenders (Respondents).—*Johnston, K.C.*—*Constable.*

June 18, 1908.

Johnstone v.
Spencer & Co.

Master and Servant—Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58), secs. 1 (3), 13, First Sched. 8—Arbiter—Sheriff—Jurisdiction—Proof of relationship incidental to arbitration.—The Workmen's Compensation Act, 1906, sec. 13, includes among the dependants of a workman an illegitimate child dependent upon his earnings, and by Schedule 8 provides that "any question as to who is a dependant shall" be settled by arbitration under the Act.

In an arbitration under the Act, a claim was made by a girl who alleged that she was an illegitimate child of the deceased workman. The arbitrator sisted procedure in order that she might establish her allegation in a competent Court.

In an appeal the Court recalled the sist, holding that it was the duty of the arbitrator, in determining the question whether the claimant was a dependant, to decide incidentally her relationship to the deceased.

In an arbitration under the Workmen's Compensation Act, 1906, brought in the Sheriff Court at Glasgow, Jeanie Wright Johnstone sought compensation from James Spencer & Company for the death of her alleged father, William Johnstone. The defenders having denied that Johnstone was her father, the Sheriff-substitute (Fyfe) sisted procedure, in order that the claimant might prove her relationship in a competent Court, and at the instance of the claimant stated a case for appeal.

The case stated:—"The following facts were admitted:—(1) Holt & Company are owners of the steamship 'Yangtze'; (2) In October 1907 this vessel was put in the berth at Glasgow as a general ship to receive cargo for eastern ports; (3) Spencer & Company, who are stevedores at Glasgow, were employed by the shipowners to load the vessel; (4) William Johnstone was one of a squad of quay labourers employed by the stevedores, Spencer & Company; (5) Whilst engaged at the loading of the vessel on 2d October 1907, William Johnstone accidentally fell into the hold and was killed. The appellant, Jeanie Wright Johnstone, alleges that she is an illegitimate child of the said deceased William Johnstone. This allegation is denied. . . . I held that, in this process, I could not decide the disputed question whether Jeanie Wright Johnstone is the illegitimate child of the deceased William Johnstone. I accordingly sisted procedure in the

June 18, 1908. arbitration process that she might establish her title in a competent Court."

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The following question of law was, *inter alia*, stated for the opinion of the Court:—“(1) Whether sisting the action, in order that the appellant may establish in a competent Court that she is the illegitimate child of the deceased William Johnstone, was the proper procedure?”

Argued for the appellant;—The arbiter had erred in declining to consider the question of the paternity of the claimant. Section 8 of the First Schedule of the Act expressly provided that “any question” relating to the matter of dependency was to be settled by arbitration, and this was clearly a question of that nature.* It was no novelty for the Sheriff to deal incidentally with questions of status, for it had been decided that, in an ordinary civil action, it was competent for the Sheriff to decide, for the purposes of the action, whether two persons, not parties to the action, had been irregularly married.¹

Argued for the respondents;—Questions of status could not competently be decided in an arbitration, and it was doubtful whether such questions could be dealt with by the arbiter even incidentally.² In the present case, if the appellant's contention were upheld, there would be manifest injustice to third parties, who had an interest in denying that the deceased workman had any illegitimate children, but who were no parties to the action and had no right to appear. The Act of 1906 was meant to confirm to the arbiter the jurisdiction he had always had in questions of dependency, but not to extend it to questions of status. The arbiter was not necessarily a trained lawyer, and it was not to be supposed that the Legislature intended to confer on him a jurisdiction which was withheld even from a Sheriff. The proper course was to have a separate and preliminary inquiry to determine the matter of the claimant's parentage.³

LORD PRESIDENT.—In this case a claim is made by a child, alleging herself to be the illegitimate child of a deceased workman. The employers answer, “You are not the illegitimate child of the workman,” and the learned Sheriff-substitute has held that he cannot decide whether the child was the child of the workman or not, and he has sisted procedure in the arbitration process in order that the child might establish her title in a competent

* The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58) enacts:—Sec. 1 (3). “If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act . . . the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration in accordance with the Second Schedule to this Act.”

Sec. 13. “In this Act, unless the context otherwise requires . . . ‘dependants’ means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death . . . and where the workman, being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon his earnings . . . shall include such an illegitimate child. . . .”

First Schedule (8). “Any question as to who is a dependant shall, in default of agreement, be settled by arbitration under this Act. . . .”

¹ M'Donald v. Mackenzie, Feb. 6, 1891, 18 R. 502.

² Benson v. Benson, Feb. 14, 1854, 16 D. 555.

³ Swinton v. Swinton, March 20, 1862, 24 D. 833.

Court. I think the matter is settled by the terms of the Act of 1906. June 18, 1908. Section 13 defines dependant as including illegitimate children, and by Johnstone v. section 8 of the First Schedule any question as to who is a dependant is to Spencer & Co. be settled by arbitration under the Act. That seems to me to put upon the Ld. President. arbiter the clear duty of settling such a question as this. It is said that that would involve the decision of a question of status, whereby other persons might be prejudiced, and that such a question cannot be competently entertained by the Sheriff. But that is just part of the necessity of the situation, which was presumably faced by Parliament when the Act was passed. That is enough for the decision of the case, but I may add that it is not a novel idea that the inferior Court should have to decide such questions incidentally for the purposes of the action, and of this a good illustration is found in the case of *M'Donald v. Mackenzie*,¹ where in a question between two parishes in a matter of settlement the Sheriff had to decide whether two persons, not parties to the action, had been irregularly married. There the Sheriff had to decide the question for the purposes of the poor-law, and here he has to decide for the purposes of the Workmen's Compensation Act, a question which he could not decide otherwise as a question of status.

LORD M'LAREN.—I concur.

LORD KINNEAR.—I am entirely of the same opinion.

LORD PEARSON was absent.

THE COURT pronounced this interlocutor:—"Answer the first question of law in the case in the negative. . . . Recall the determination of the Sheriff-substitute as arbitrator mentioned in the case so far as it sists procedure in the arbitration process: *Quoad ultra* affirm the same, and remit to the Sheriff-substitute as arbitrator to proceed as accords, and decern."

PATERSON & SALMON, Solicitors—OLIPHANT & MURRAY, W.S.—Agents.

HENRY LAMONT & COMPANY, Pursuers (Respondents).—

Dickson, K.C.—Orr Deas.

No. 149.

THE DUBLIN AND GLASGOW SAILING AND STEAM PACKET COMPANY,

June 23, 1908.

Defenders (Reclaimers).—*Clyde, K.C.—Spens.*

Lamont & Co.

Process—Reclaiming Note—Competency—Allowance of Proof—Leave to reclaim—Refusal of leave—Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sections 28 and 54—Act of Sederunt, 10th March 1870, sections 1, 2.—In an action of accounting the defenders stated preliminary pleas in which they denied their liability to account. The Lord Ordinary in the Procedure-roll pronounced an interlocutor appointing the defenders "before answer" to lodge the account called for in the summons, and refused leave to reclaim.

Held (1) that the interlocutor did not "import an appointment of proof or a refusal or postponement of the same," within the meaning of the Act of Sederunt, 10th March 1870, that consequently it could not be reclaimed against without leave; and (2) that the Lord Ordinary in the exercise of his discretion having refused leave, the Court could not interfere with his decision.

June 23, 1908.

Lamont & Co.
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1ST DIVISION.
Lord Dundas.

HENRY LAMONT & COMPANY, steamship owners and agents, Glasgow, raised an action against the Dublin and Glasgow Sailing and Steam Packet Company, concluding for an order on the defenders "to exhibit and produce a full and particular statement and account of the gross earnings of the defenders' Company, from 4th December 1878 until 30th November 1907, whereby the true amount due by them to the pursuers for commission thereon, and for rent of office and profit on Clyde dues, may appear and be ascertained," and for payment of £15,000, or such other sum as should be found to be the true balance on an accounting.

The pursuers averred that they had acted as sole agents for the defenders in Glasgow from the date of their commencing business until 30th November 1907. (Cond. 2) "The agreement between the pursuers and the defenders regarding the pursuers' appointment and remuneration as agents was embodied in four letters. . . . By the said agreement the pursuers' remuneration for their services as sole agents in Glasgow, including the provision of office and staff and the guaranteeing of the freights, was to consist of the following,—(1) A commission of 3 per cent on the gross earnings of the Company; (2) an allowance of £100 per annum (afterwards reduced to £80 per annum) in consideration of the Company receiving the use of the pursuers' office; and (3) the benefit or profit upon all Clyde dues on goods carried to Glasgow by the defenders' steamers was to belong to and be accounted for to the pursuers." The defenders had failed to pay the full amount of commission due to the pursuers, and had refused to produce a full statement of their gross earnings and of the profits on Clyde dues that the amount of the remuneration truly due to the pursuers might be ascertained.

The defenders stated:—(Ans. 2) "The letters founded on are referred to for their terms, beyond which no admission is made. Denied that the pursuers' remuneration under said letters was to be 3 per cent on the gross earnings of the Company. Explained that the commission was to be on the gross earnings of the steamers in the Glasgow and Dublin trade alone, for which ships the pursuers were acting as agents. Explained further, that it has been upon this footing that a commission on gross earnings has all along been paid to the pursuers and their predecessors. Explained further, that the profit on Clyde dues, which the pursuers were to get, applied only to the profit on inward dues. The pursuers' predecessors had had this profit, and the defenders desired to put a stop to that part of the arrangement, but, by the letters in question, it was agreed that the pursuers should receive the profit as before. The outward dues were never in question. . . ." They admitted that they had declined to produce the full accounts called for, and denied that the pursuers had any right to require such accounts.

The pursuers pleaded, *inter alia*;—(1) The pursuers having acted as agents for the defenders in terms of the agreement founded on, and the defenders having failed, though called upon, to account to the pursuers for, and wrongfully and illegally withheld in their hands the true balance due to the pursuers, decree should be pronounced against the defenders in terms of the first conclusion of the summons.

The defenders pleaded, *inter alia*;—(1) On a sound construction of the agreement libelled in condescendence 2, the pursuers' claims 1 and 3 as therein set out are irrelevant, and ought not to be admitted to probation. (2) The defenders, having all along accounted to the pur-

suers for any balances due, fall to be assoilzied. (3) The payments made by the defenders to the pursuers having been accepted by them in full knowledge of the system on which the amounts were arrived at as a settlement of all claims competent to them, the pursuers are barred from pursuing this action, and the defenders fall to be assoilzied. (4) The pursuers being barred by *mora* from insisting in the present action, the defenders fall to be assoilzied therefrom.

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On 13th March 1908 the Lord Ordinary (Dundas), before answer, allowed parties a proof of their averments.

On 23d May 1908 the First Division recalled this interlocutor on the ground that the allowance of proof was premature, and remitted to the Lord Ordinary to proceed as accords.

On 4th June 1908 the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary, having heard counsel in the Procedure-roll, before answer, appoints the defenders to lodge in process within three weeks the statement and account called for in the summons, and the pursuers to answer the said statement and account, if so advised, within three weeks thereafter."

The Lord Ordinary refused leave to reclaim.

The defenders reclaimed.

The respondents objected to the competency of the reclaiming note. Parties were heard on 23d June 1908.

Argued for the respondents;—This interlocutor, not being one disposing of the whole merits of the cause, could not be reclaimed against without leave, unless it was held to be one "importing an appointment of proof or a refusal or postponement of the same."¹ It was not an interlocutor of this class, but merely a step in procedure.² The Lord Ordinary had considered it a proper and necessary step, and after he had, in the exercise of his discretion, refused leave to reclaim, the Court could not review his decision.

Argued for the reclaimers;—In an action of accounting the first question was whether the defenders were bound to account at all, and, if that point were decided against them, the next question was on what basis were they bound to account? These were questions on the merits, involving matters of fact, and both these questions were raised in the present case. The interlocutor reclaimed against disposed in effect of the whole of the defenders' preliminary pleas, and amounted, from one point of view, to a refusal of proof, since it prejudged questions which could only be decided on evidence, and from another point of view to an appointment of proof, since the account ordered would be evidence, and indeed the only possible evidence, against the defenders. It was accordingly an interlocutor of the kind specified in section 2 of the Act of Sederunt, 10th March 1870, and reclaimable without leave.³ This interlocutor might entail great hardship on the defenders, since it would force them to disclose their books for thirty years, although finally it might appear that they were under no obligation to account at all. The proper order would have been one allowing proof as to the liability to account and as to the basis on which the accounts were to be made up.

¹ Court of Session Act, 1868 (31 and 32 Vict. cap. 100), secs. 28 and 54; Act of Sederunt, March 10, 1870, secs. 1, 2; Mackay's Manual, p. 294.

² Carron Co. v. Stainton's Trustees, June 27, 1857, 19 D. 932.

³ Little v. North British Railway Co., July 4, 1877, 4 R. 980; Quin v. Gardner & Sons, Limited, June 22, 1888, 15 R. 776.

June 23, 1908. **LORD M'LAREN.**—This is a reclaiming note against an interlocutor of the Lord Ordinary ordering the defender to give in an account, and that account must necessarily be on the basis of the summons, because it is an action of accounting in which an account is claimed for gross profits. It is plain enough that an interlocutor in general terms which orders the account sued for to be put in does touch upon the merits of the case, and I can also sympathise with the objection that was made to the order that a man engaged in commercial business does not wish to have his books made the subject of investigation, or even to give in an account shewing his whole profits for a series of years. Such an account is usually made up for the information of shareholders or partners, and there are obvious inconveniences resulting from its publication. But then, while there may be a little hardship in a particular case, we are dealing with rules of procedure, and we must remember that fixed rules are necessary, and that however carefully these rules are framed, they must inevitably in some cases be attended with present hardship, although without eventual prejudice to the case. I do not think there is any eventual prejudice, because at a certain stage every interlocutor is subject to review, and the whole merits of a case can be brought before the Inner-House.

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The objection to the competency is that this reclaiming note is taken without the leave of the Lord Ordinary. Unless an interlocutor disposes of the whole merits of the case, it cannot, as a rule, be reclaimed against without leave, and it cannot be said that this interlocutor disposes of the whole merits of the case, because the Lord Ordinary has neither dismissed the action nor given decree. It is said that the case falls within the provision of the 28th section of the Court of Session Act of 1868, and the relative Act of Sederunt dated 10th March 1870. I think that whether we look at the Act of Parliament, or whether we look at the Act of Sederunt, it is equally clear that the right to reclaim without the leave of the Lord Ordinary was only intended to be given where the interlocutor reclaimed against made irrevocable findings touching inquiry into the facts of the case. If proof were allowed or the case were sent to a jury, and the interlocutor was not reclaimable without leave, then it is perfectly clear that in the event of the Lord Ordinary refusing his leave a certain amount of prejudice is incurred by the defender who is resisting a proof, because he is subjected to a very costly, and as it may turn out useless, inquiry into the facts. But the same thing cannot be said regarding a preliminary disposal of legal questions because, although there may be an inconvenience in the meantime, there is not much expense, and the whole question can eventually be brought before the Court for review. In this case I think the provision of the Act of Sederunt is even clearer than the Act of Parliament, and of course it was intended to be an improvement on the Act of Parliament, the result of experience in the working of the Act. The provision in section 2 of the Act of Sederunt is that the provisions of the 28th section of the statute giving the right to review without leave shall apply "so far as these import an appointment of proof, or a refusal or postponement of the same." There has not been a refusal or postponement of proof in this case—certainly not a refusal—and it cannot be said to be a postponement, because the Inner-House had already found that an order for proof in this

case was premature. But again I do not think we can hold this to be an June 23, 1908 interlocutor necessarily importing an appointment of proof. I rather think the view of the Lord Ordinary is that if an account is given in he will be in a better position to judge as to how far proof is necessary, or how it is to be limited, than he would be at the present time. In fact, if proof were to be allowed at this stage, I do not see how the interlocutor could be framed except by an order in general terms, and that is the very thing which this Division of the Court has already decided against. I may say that but for the fact that there had been a former unsuccessful reclaiming note causing a certain interruption in procedure, I think it is very likely the Lord Ordinary would have given leave to reclaim against the interlocutor now sought to be reviewed. At all events, he might in the exercise of his discretion have given leave to reclaim, but I presume that his acquaintance with the case had led him to think that it would not be to the benefit of either party to be allowed to reclaim, and we cannot interfere with his Lordship's discretion. Accordingly I move your Lordships that we should dismiss the reclaiming note.

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LORD KINNEAR.—I am of opinion that this is a reclaiming note which cannot be entertained without the leave of the Lord Ordinary, and as the Lord Ordinary has refused to grant leave, it must necessarily be dismissed. If we had to determine the question arising on Mr Clyde's argument, I should think that it would have required serious consideration, and I have no doubt it did receive serious consideration from the Lord Ordinary. But then, having considered it and disposed of it, he says it is not a fit case to bring before the Inner-House, and we cannot interfere with his discretion on this point.

LORD MACKENZIE.—I am of the same opinion.

The LORD PRESIDENT and LORD PEARSON were absent.

THE COURT sustained the objection to the reclaiming note, and refused it as incompetent.

BOYD, JAMESON, & YOUNG, W.S.—J. & J. ROSS, W.S.—Agents.

CHARLES M'INNES, Pursuer (Respondent).—*Johnston, K.C.*—*Cochran-Patrick.*

No. 150.

DUNSMUIR & JACKSON, Defenders (Appellants).—*Clyde, K.C.*—*Murray.*

June 23, 1908.

Master and Servant—Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)—Accident—Injury by Accident—Cerebral Hæmorrhage caused by exertion resulting in paralysis—Workman in bad health.—A workman, while engaged, in the course of his employment, in moving a weight, had an attack of cerebral hæmorrhage as the result of the exertion he was using. The work was being performed in the ordinary manner. He was put to bed, and four days later a second attack supervened, which caused permanent paralysis. At the time of the first attack his arteries were in a degenerate condition, which rendered such an attack more likely to occur.

Held that the workman's final disablement had been caused by accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906.

M'Innes v.
Dunsmuir &
Jackson.

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M'Innes v.
Dunsmuir &
Jackson.

1ST DIVISION.
Sheriff of
Lanarkshire.

IN an arbitration under the Workmen's Compensation Act, 1906,* in the Sheriff Court at Glasgow, in which Charles M'Innes, labourer, claimed compensation from Dunsmuir & Jackson, engineers, Govan, the Sheriff-substitute (Boyd) awarded compensation, and at the request of the defenders stated a case for appeal.

The case stated:—"The following facts were established:—(1) That the respondent is a labourer, and on 6th November 1907 was in the employment of the appellants at a wage of 18s. a week; (2) that the respondent, along with another labourer, had been engaged for some hours in arranging plates in which holes had to be punched by a punching machine; (3) that these plates were between 3 and 4 cwt. each; (4) that the two labourers followed the ordinary and usual course of working:—they lifted the plates on to a barrow, which was managed by a third workman, and the plates were conveyed to the vicinity of the punching machine and stacked on end; (5) that after they were thus arranged, the respondent and another labourer placed before the punching machine a cylindrical pedestal called a 'thimble'; (6) that they then took hold of a plate and brought it to a vertical position, and edged it, with arms and shoulders, towards the thimble and laid it down, so that it leant against the thimble, with the lower edge on the ground; (7) that they then lifted the plate to a horizontal position on to the thimble, and held it until the slings of a crane were attached to each side; (8) that the crane was then heaved until the plate swung, and the labourers then directed the plate under the punching machine; (9) that after the crane was heaved there was no weight on the arms of the labourers; (10) that on the occasion in question a plate had been slung, and subjected to the punching machine for about ten or twelve minutes, when the respondent felt a slight pain on the left side of his head, accompanied by a giddy feeling, which caused him to seize hold of the side of the machine for support; (11) that he was helped outside by his fellow-labourer, and remained resting for a quarter of an hour, and then returned to work; (12) that he worked for about three-quarters of an hour, when he again became giddy, and complained of want of power in his right arm and leg; (13) that he was taken home, and still complained of this loss of power, but by the afternoon he had recovered from this, and shewed no trace of powerlessness in either arm or leg; (14) that he remained in bed, and on the 10th November he had an attack of cerebral hæmorrhage, which caused right side paralysis, from which he still suffers; (15) that the respondent's arteries were, on 6th November 1907, in a degenerate and hard condition, rendering an attack of hæmorrhage more likely to occur; (16) that on said 6th November he had an attack of cerebral hæmorrhage as the result of the exertion he was using in the course of his employment, as described above."

The Sheriff-substitute found that the respondent thus received personal injury by accident in the sense of the Workmen's Compensation Act, that his average weekly wage was 18s., and that he is still unable for his ordinary employment. He therefore awarded him the sum of 9s.

* The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1, subsec. (1), enacts:—"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation. . . ."

sterling per week as from and after 13th November 1907 until the June 23, 1908. future orders of Court, with expenses.

The question of law for the opinion of the Court was:—"Did the respondent sustain injury by accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906?"

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Jackson.

Argued for the defenders;—The injury in respect of which compensation was sought was not caused by an accident within the meaning of the Workmen's Compensation Act, 1906. In the ordinary sense of the term, an accident connoted a fortuitous and untoward event, such as an act of over-exertion causing strain,¹ or the alighting of a bacillus in a man's eye causing anthrax.² It did not include a disease contracted by a workman in the course of his employment, except in the case of "industrial diseases," which were expressly provided for in the Act.³ In the present case the cause of the injury was a disease, and not an accident. The workmen's arteries were in such a condition that an attack of cerebral hæmorrhage was bound to occur at some time. It happened to occur at a time when he was working, but there was no fortuitous element in the event, for, as the Sheriff found, the "ordinary and usual course of working" was being followed, and no injury would have resulted to a man in good health. If the claimant's contention were upheld, it would obliterate the distinction between injury caused by accident and injury caused by disease. Further, there was no finding to justify the inference that the injury complained of (paralysis) was caused by the attack of hæmorrhage on 6th November. *Prima facie* it would appear to have been brought on by the attack on 10th November, when the man was not at work.

Counsel for the pursuer were not called upon.

LORD M'LAREN.—It is true that the general question in this case is not precisely the same as that which was put in the case of *Stewart*⁴ or in either of the two English decisions in the House of Lords; but if I am asked if it differs in principle I am unable to say that it does. If we look for guidance to the case of *Stewart*,⁴ that was a case of injury to the muscles of the back caused by over-exertion in the course of the man's employment; there was nothing external or visible in the injury. Nevertheless it was an injury which prevented the workman from following his employment, and which in fact disabled him from any other employment for some time, and the decision of the Court was that an injury of that kind, which is not visible and external, may nevertheless be an injury caused by accident within the meaning of the statute. That seems a very simple case, and Lord Robertson said in *Brintons, Limited, v. Turvey*² that he thought that a case of rupture was also a very simple case of accident in the sense of the statute. His Lordship's dissent was founded on the ground that in a case of anthrax what was communicated was a disease. I may say that these cases of industrial disease are all now regulated by the

¹ *Stewart v. Wilsons and Clyde Coal Co., Limited*, Nov. 14, 1902, 5 F. 120; *Fenton v. Thorley & Co., Limited*, [1903] A. C. 443.

² *Brintons, Limited, v. Turvey*, [1905] A. C. 230.

³ Workmen's Compensation Act, 1906, sec. 8.

⁴ 5 F. 120.

June 23, 1908. Act of 1906, and therefore we have not to consider whether the contracting of an industrial disease is an accident in the ordinary acceptance of the term. But the present case is not the case of an industrial disease. It is the giving way of an artery causing effusion of blood on the brain, and I am unable to see any distinction between this kind of physiological injury resulting in disablement and the kind of injury we had to consider in the case of *Stewart*.¹ The real difficulty in the case is not to connect the attack of partial paralysis which the claimant sustained in immediate sequence to heavy exertion with that exertion; it is rather whether we are to connect that with the subsequent and more serious paralysis which occurred four days later, and which seems to have resulted in permanent disablement. It is said that the Sheriff has refused to make a finding directly finding that the second attack was consequent upon the first. That may have been because it was one of the matters which he desired to leave to the decision of the Court. At all events, before we can affirm the Sheriff's decision I think it will be necessary that we should hold that these two attacks were connected. The first attack was a slight one, and the man was in course of recovering from it when the second attack supervened. But unless we had evidence which would enable us to assign a different origin to the second attack, I think the logical deduction from the evidence is that the man's improvement was only a partial recovery from the first attack, which was caused by the arteries of the brain being in a strained condition in consequence of over-exertion, and that this second attack was a further development of the injury he suffered from the over-exertion. I think that the decision of the Sheriff as arbiter, holding that the man received injury by accident in the sense of the Workmen's Compensation Act, is a right decision, and that it ought to be affirmed.

LORD KINNEAR.—I am of the same opinion. I think it must in all these cases be kept in view that we are required to construe words of ordinary language, and therefore that the question we have to decide is whether any injury which a workman is said to have sustained, and which is said to be within the definition of the Act, is or is not an accident according to the ordinary sense of the words. I refer to the opinion of Lord Macnaghten in the case of *Fenton*,² where he says that if a workman has suffered an injury by breaking a limb or by a rupture while he is trying to lift a weight too heavy for him, then according to the ordinary uses of language one would say that that injury was caused by an accident which he met with while he was engaged at his work. I think the same rule of construction applies to the question before us, and that we should say that this man suffered from the bursting of a blood vessel while trying to lift a weight too heavy for him. That it might not have been too heavy for a man whose arteries were in a sound condition is nothing to the purpose. In the condition in which this man's arteries were he was undertaking a work which was too great for him.

The other question is whether on a sound construction of the Sheriff's findings we are to say that the hæmorrhage which occurred on the 10th November is or is not to be connected, like the hæmorrhage which occurred

¹ 5 F. 120.

² [1903] A. C. 443, at p. 446.

on the 6th November, with the accident, and I agree with your Lordship June 23, 1908. in the chair that we must so hold, because when the Sheriff has found that the effect of the man's over-exertion was to bring on an attack of cerebral hæmorrhage, and that he thereupon was put to bed and remained there for four days, when the second attack occurred which caused the paralysis, it lies upon the party who alleges that that second attack was disconnected with the first attack altogether to prove it. We must hold that the Sheriff was right in holding that they were connected. His decision that the respondent received personal injury in the sense of the Act could not have been come to unless his opinion was that the hæmorrhage which caused the paralysis was itself caused by over-exertion.

LORD MACKENZIE.—I agree. I think that the facts found by the Sheriff shew plainly that the respondent was engaged in an operation which involved the use of a considerable physical force. The Sheriff has found that as the result of those exertions the claimant had an attack of cerebral hæmorrhage upon the 6th of November. I think it is impossible, taking the term "accident" in the sense in which it should be applied in the construction of the Workmen's Compensation Act, to say that the injury which the man sustained on the 6th November was not an injury by accident arising out of and in course of the employment. When it is seen that the Sheriff further finds that on the same day the man did not continue at his work but that he was taken home and put to bed, where he remained until the 10th of November, and that on the 10th of November there was a recurrence of exactly the same hæmorrhage from which he had suffered on the 6th November, the result being that his right side was paralysed, it is clear that he was suffering from the results of the same injury. In these circumstances I think there is sufficient to justify the conclusion at which the Sheriff has arrived, that the respondent had received injuries by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act.

The LORD PRESIDENT and LORD PEARSON were absent.

THE COURT answered the question of law in the affirmative, and dismissed the appeal.

OLIPHANT & MURRAY, W.S.—MORTON, SMART, MACDONALD, & PROSSER, W.S.—
Agents.

MRS JESSIE HARDIE OR RINTOUL, Pursuer (Respondent).—
W. Thomson.

THE DALMENY OIL COMPANY, LIMITED, Defenders (Appellants).—
Horne—Strain.

Master and Servant—Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 13—Dependant—"Wholly dependent."—A widow who had five sons, working miners, four of whom were married and had children, lived with and was entirely supported by her unmarried son.

In a claim at her instance for compensation under the Workmen's Compensation Act, 1906, in respect of the death of the son who supported her, held that notwithstanding her right to relief from the four other sons, who

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June 25, 1908. were able to contribute to her support, she was wholly dependent upon the earnings of the deceased at the time of his death within the meaning of the Act.

Rintoul v.
Dalmeny Oil
Co., Limited.

1ST DIVISION.
Sheriff of the
Lothians and
Peebles.

IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Linlithgow, in which Mrs Jessie Hardie or Rintoul, residing at Queensferry, claimed compensation from the Dalmeny Oil Company, Limited, in respect of the death of her son, George Gibson Gunn Rintoul, the Sheriff-substitute (Macleod) awarded compensation on the footing that the claimant was wholly dependent upon the earnings of the deceased workman at the time of his death,* and at the request of the defenders stated a case.

The case stated :—" On the issue whether at the time of the said deceased's death the respondent was wholly or partially dependent on his earnings (this being the only question in controversy between the parties), the following facts were admitted or proved to my satisfaction :

" Including the deceased, the respondent had five sons—Peter, Thomas, George (deceased), William, and James, all of whom were working miners. Of these, deceased alone was unmarried. Of the other four (who all survive), Peter and Thomas have each a wife and nine children, most of whom are dependent on them. William has a wife and four children dependent upon him, and James has a wife and two children dependent on him.

" For several years before her deceased son's death the respondent had lived with him and been entirely supported by his earnings. She did and could earn nothing herself, and no one else contributed to her support.

" But though as matter of fact the respondent derived her whole support from her said son during these same years her four other sons were all (a) able and (b) liable to contribute to her support, but her said deceased son had taken the whole burden of the respondent's support upon himself, and was *de facto* her sole support, the others not in fact contributing.

" I decided in law that the respondent was at the time of her said deceased son's death wholly dependent on his earnings, and accordingly I awarded her the sum of £300, there being agreement between the parties that that was the amount appropriate to my decision.

" Had I decided that the respondent was at the time of her said deceased son's death only in part dependent upon his earnings, I would have awarded her £160."

The questions of law for the opinion of the Court were :—" (1) Was respondent wholly dependent upon the earnings of her said deceased son at the time of his death, within the meaning of the Workmen's Compensation Act, 1906 ? (2) Was respondent only partially dependent upon the earnings of her said deceased son at the time of his death, within the meaning of the said Act ?"

Parties were heard on 25th June 1908.

Argued for the appellants ;—The question whether the claimant was dependent upon the earnings of the deceased workman was a

* The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 13, enacts :—" *Definitions.*—In this Act . . . 'dependants' means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death . . . 'Member of a family' means (*inter alios*) . . . mother . . ."

question of fact, and this was not disputed.¹ But when the facts had been ascertained, the question—a question of law—remained, whether the position of the claimant answered to the description of a total dependant or of a partial dependant, as defined by the statute. The relation of dependency had been held to exist where there was an obligation to support, even although no support had been actually given,² and a claimant had been held wholly dependent on her husband, although in fact he only contributed in part to her support.³ These cases shewed that the true test of dependency was the obligation to support. Applying this test to the present case, it was clear that the relation of total dependency could not exist between the claimant and her deceased son George. The obligation to support their mother was common to all the sons, and with respect to any one of them she could not be more than a partial dependant.

Argued for the respondent;—The legal obligation to support was a necessary element of dependency in respect that dependency could not exist where there was no legal obligation. But *per se* it did not constitute dependency, for in addition there must have been actual support given and received.⁴ Similarly total dependency was excluded when the claimant had other means of support than those derived from the deceased workman.⁵ Within the plain meaning of the words of the Act,⁶ the claimant in the present case was wholly dependent on the earnings of her deceased son, because they were, at the time of his death, her sole means of support.

LORD M'LAREN.—This is a claim by a mother as being a dependant upon one of her sons who met his death while in the service of the Dalmeny Oil Company. The applicant in this case, it appears, had five sons. The deceased was unmarried and lived with her, and as he defrayed the expenses of the household she was of course maintained by him. The other four sons were married, and had children, but apparently they were not asked to support their mother; the case does not state that they were asked, but it is stated that in fact they did not contribute to her support. In these circumstances the Sheriff-substitute of the Lothians decided that the respondent was at the time of her deceased son's death wholly dependent on his earnings. By desire of the parties, the Sheriff puts the alternative question to us, whether the respondent was wholly or partially dependent upon this deceased son. Now, the position of dependants under the statute of 1906 is not exactly the same as it was under the first Workmen's Compensation Act. Instead of defining the liability by a reference to the class of persons who would be entitled to sue for damages or *solatium*, I venture to think a much more natural definition is now made, and that definition is one founded on membership of the family. But there is superadded a provision in favour of persons who are relations in

June 25, 1908.
Bintoul v.
Dalmeny Oil
Co., Limited.

¹ Main Colliery Company, Limited, v. Davies, [1900] A. C. 358.

² Sneddon v. Addie & Sons' Collieries, Limited, July 15, 1904, 6 F. 994; Coulthard v. Consett Iron Co., Limited, [1905] 2 K. B. 869.

³ Cunningham v. M'Gregor & Co., May 14, 1901, 3 F. 775.

⁴ Robert Addie & Sons' Collieries, Limited, v. Trainer, Nov. 22, 1904, 7 F. 115; Moyse v. William Dixon, Limited, Jan. 13, 1905, 7 F. 386.

⁵ Baird & Co., Limited, v. Birsztan, Feb. 2, 1906, 8 F. 438.

⁶ Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), section 13.

June 25, 1908. blood, although not in law : I mean the relation of an illegitimate child to his father or mother is recognised. These variations in the phraseology of Rintoul v. his father or mother is recognised. These variations in the phraseology of Dalmeny Oil the new statute do not seem to me to affect the present question, because Co., Limited. that depends upon the definition clause which defines "dependant." The Lord M'Laren. only general observation that I can make upon that definition is that I have always in reading it felt that the definition was a historical one. The test of dependency, according to the literal reading of the clause, is whether the person making the claim was in fact dependent upon the deceased in his lifetime. I just wish to quote the words which I think make that very clear,—"'Dependants' means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would but for the incapacity due to the accident have been so dependent." Now, it appears to me that under this definition there is no relevancy in the inquiry—what was the legal obligation to maintain?—because the obligation implied in the word "dependent" is made by the statute to depend upon whether the claimant was dependent at the time of his death wholly or in part. That can only mean a question of fact, whether the claimant in fact received complete maintenance or partial maintenance. It cannot depend upon legal obligation, because I do not know of any legal obligation which limits the claim against an individual to one for partial aliment. Any person standing in the necessary relation is entitled to receive full maintenance. Accordingly, if I were to follow my own view of the statute, without heeding the decisions, I should be inclined to think that, given the relationship described in the statute, the only question was whether the deceased had fully recognised his obligation and had given full maintenance, or whether in fact the claimant had received maintenance from other sources, either from relatives, it might be, who were not bound to maintain her, or it might be by the claimant's own exertion. But then the decisions both in England and Scotland seem to have put a construction upon this part of the definition clause which is not expressed upon the face of it, because the decisions come to this, that wherever the deceased person was the nearest relative and was liable in complete maintenance then it was not an answer to the claim founded on total dependency to say that he did not in fact recognise his obligation, and had, it might be for a time, been unable or unwilling to support the claimant at all. But I should wish to reserve my opinion as to how far that principle of decision should be carried. Certainly wherever it can be proved that the claimant had been supported partly by his or her own earnings, or had assistance from others, that would, in my opinion, reduce the case to one of partial dependency. But perhaps it is not an unreasonable presumption to say that where no other source of regular maintenance can be pointed to except that of the person who is bound to maintain, that is to be treated as a case of total dependency.

The present question is, however, entirely different, and I cannot say, as the quoted cases represent themselves to my mind, that they furnish any assistance towards the decision of the present question, which is, where there are several persons all by law equally bound to give aliment, and where in fact support is given only by one of them, whether that is to be treated as a case of total or partial dependency. The principle which I

venture to state as the one which commends itself to me is that the statute June 25, 1908. looks to the action of the deceased in maintaining his relative rather than ^{Rintoul v.} to legal obligation. Of course the legal obligation must be there. He ^{Dalmeny Oil} must be a person under the clause, because if he were a stranger in blood ^{Co., Limited.} and unconnected even by illegitimate ties, then, of course, there would be ^{Lord M'Laren.} no dependency at all under the statute. But, given the relationship, then I think the inquiry must always be, did the deceased in fact maintain his mother or child, or whoever the person may be who is making the claim, and if he did so I think it is irrelevant to consider whether there are others against whom a claim might have been made upon the same ground of relationship. In the present case the son George who was killed by the accident was the only unmarried son. He lived with his mother and supported her. That was a very natural arrangement. Each of the other sons had a wife and family to maintain, and apparently amongst themselves it was recognised that it was the part of the unmarried son to take his mother to live with him and to maintain her. Now, I think a case like this perhaps explains the motive of the framers of the statute in making the question of dependency contingent upon facts rather than upon legal obligations. Where there are relatives who are legally liable, but who in fact never gave any support, then it cannot be said that in consequence of the death of the one who gave support she has been deprived of anything except what she got from him, because the other relatives never contributed to her support at all. In all the circumstances I think that this is a reasonably clear case of total dependency, and that the award of the Sheriff is well founded.

LORD KINNEAR.—I agree. I think that the first question in law put to us by the Sheriff must be answered in the affirmative. I agree with Lord M'Laren, in the first place, that the question whether the respondent was or was not dependent upon the allowance of her deceased son is truly a question of fact, and in the second place, that that question of fact is to be determined with reference to the point of time fixed by the statute when it says "'dependants' means such members of the workman's family as were wholly or in part dependent upon the earnings of the workman *at the time of his death.*" Now, upon the question of fact there can be no difference of opinion. In his statement of facts the Sheriff tells us that this respondent had several sons, but that all of them were married and had children except the son George whose death has given rise to this action. Then he says that for several years before this son George's death the mother had lived with him and had been entirely supported by his earnings. She did not, and could not, earn anything for herself, and nobody else contributed to her support. And then he goes on to add that none of the other children contributed, which indeed was implied in the statement he had made that nobody but George had contributed anything. I am unable to see how it can be held in the face of these statements that this poor woman was not wholly dependent upon the earnings of her deceased son. A question of law might arise over and above the question of fact if it were disputed that there was any legal liability on the part of the son to support his mother. But nobody disputes that. It appears to me to be immaterial that now

June 25, 1908. that the son who did support her has died she may have a claim for contributions to her support from other children, because the point of time the statute says we are to consider is not the time subsequent to the deceased man's death but the time at which his death happened. How was she supported up to that time? The answer is, by the deceased son, and by him alone. With reference to the other cases that were cited, they do not appear to me to be directly in point, and consequently do not require detailed examination.

LORD MACKENZIE.—I agree that the first question should be answered in the affirmative. The case here is one where there was the existence of a legal obligation on the part of the deceased workman to support the claimant. That obligation was implemented, and implemented by him alone. Accordingly, I think that the conclusion to which the Sheriff-substitute has come is entirely right. I do not think that we are prevented from reaching that conclusion by the fact that there are cases in which a construction has been put upon the Act to the effect that the existence of a legal obligation alone, without its implement, may form a ground for holding that the person claiming was in the position of a dependant of the deceased workman.

The LORD PRESIDENT and LORD PEARSON were absent.

THE COURT answered the first question in the case in the affirmative, affirmed the determination of the Sheriff-substitute, and dismissed the appeal.

J. DOUGLAS GARDINER & MILL, S.S.C.—W. & J. BURNES, W.S.—Agents.

No. 152.

ROBERT MARTIN, Claimant (Appellant).—*Hunter, K.C.*—*J. A. Christie.*

June 30, 1908.

JOHN FULLERTON & COMPANY, Defenders (Respondents).—*C. D. Murray*—*J. H. Henderson.*

Martin v.
Fullerton &
Co.

Master and Servant—Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1, subsec. (1)—Accident arising out of and in course of employment.—A workman engaged in overtime work on a vessel went ashore at night, against the orders of his foreman, to purchase bread. The vessel was moored 6 or 7 feet from the quay, and a gangway was to the knowledge of the workman placed between the vessel and the quay. The deck of the vessel was 3 feet above the quay. The workman in returning went past the end of this gangway, and attempted to jump from the quay to the vessel, but fell into the water and was drowned. It was a rule of the employment (which, however, was frequently broken) that men should not jump between the vessel and the quay, and the deceased had been warned against this practice.

Held that the accident did not arise out of and in the course of the deceased's employment.

2D DIVISION.
Sheriff of Ren-
frew and Bute.

IN an arbitration brought in the Sheriff Court at Paisley under the Workmen's Compensation Act, 1906, by Robert Martin, father of the deceased Robert Martin, labourer, in which the applicant claimed compensation from John Fullerton & Co., shipbuilders, Paisley, on account of the death of his son, the Sheriff-substitute (Lyll) refused compensation, and at the request of the applicant stated a case for appeal.

The case for appeal set forth that the following facts were proved:—

"The deceased Robert Martin was a labourer in the employment of June 30, 1908. the respondents, and on Thursday, 31st October 1907, he was sent as ^{Martin v.} one of a squad, consisting of a foreman painter, a journeyman painter, ^{Fullerton & Co.} and three labourers, to do painting work on a vessel, 'The Pine,' then moored at Irvine harbour. They wrought all Thursday after breakfast time, and before dinner time on Friday the foreman asked the men whether they were willing to work overtime all Friday night, in order that they might finish the job and return home to Paisley at 12 noon on Saturday, 2d November. To this the men agreed. The three labourers, of whom the deceased was one, provided and cooked their own food, and, by permission of the owners, slept on board on the Thursday night. On the Friday evening, during the tea-meal, the deceased said that they must get some bread, in order to have something to eat during the night; but, though the bread shop was only a hundred yards distant from the place where the vessel was moored, none of them took advantage of the meal time to go ashore and buy provisions. Between 9.30 and 10 P.M. the deceased asked the youngest labourer, Whyte, to go and buy bread, who refused. The deceased then told the foreman that he was going himself to get a loaf, who forbade him to go, and told him to send the boy, Whyte, because the deceased was the most useful man at his work. The deceased, however, persisted in going, saying that he would not be long, and the foreman made no further remark. The deceased accordingly went ashore to get bread. He was, however, unsuccessful, as the stock was sold out, and he immediately returned to the ship. He attempted to jump on board, but failed, fell into the water and was drowned. The night was dark. The vessel was moored some 6 or 7 feet from the quay, and her deck at the place where the deceased attempted to jump was some 3 feet higher than the surface of the quay. A safe and sufficient gangway was to the deceased's knowledge placed between the vessel and the quay, for the use of the workmen. It was against the rules of the employment for a man to jump between the vessel and the pier, though that rule was frequently disregarded. The foreman generally checks the men when he finds them doing this, and in particular, he had frequently warned the deceased against the practice.

"Just before the deceased attempted to jump, Irvine Johnstone, a fellow-workman, who was on the quay, shouted to him not to attempt it; but in spite of this he persisted in doing so, after shouting back something which Johnstone did not catch. Before reaching the place where he attempted to leap, the deceased had passed the end of the gangway which was resting on the quay. Where he jumped was nearly abreast of the engine-room, in which he had been working."

Upon these facts the Sheriff-substitute held "(1) that, in going ashore to buy bread, the deceased was acting contrary to the orders, or at least without the permission of his foreman; (2) that, in any event, there was no necessity arising out of his employment for his leaving his work to go ashore at the time he did, seeing that he knew early in the day that he was to work all night, and should have made provision for the refreshment in his own time; and (3) that in attempting to jump on board, he was deliberately breaking a rule after sufficient warning, it being no part of his employment to attempt to go on board by this dangerous method, when a safe gangway was, to his knowledge, provided for his use"; and therefore found that the

June 30, 1908. accident did not arise out of and in the course of the deceased's employment, and dismissed the application.

Martin v.
Fullerton &
Co.

The question of law was:—"Whether the arbitrator was right in holding that the accident did not arise out of and in the course of the deceased's employment?"

Argued for the appellant;—In going ashore to obtain food the appellant was acting in the course of his employment.¹ It was his duty to return to the vessel, and this accident which befel him while on his way back must be held to arise out of and in the course of his employment. The fact that the deceased did not use the gangway but adopted another means of returning was not sufficient to deprive him of compensation.² The question of "serious and wilful misconduct" did not arise, seeing that the injury had resulted in death.³

Counsel for the respondents were not called on.

LORD JUSTICE-CLERK.—I have no difficulty in this case. In many cases which have come before the Courts troublesome questions have arisen as to whether the particular accident for which compensation was sought did or did not arise out of and in the course of the injured person's employment. But the line must be drawn somewhere, and I think it clear that here the claim for compensation is excluded.

On the evening on which the accident occurred the deceased workman left the vessel on which he was working and went ashore contrary to the orders of the foreman. On his return he attempted to jump from the quay to the vessel but fell into the water and was drowned. It was against the rules of the employment for a workman to jump between the vessel and the pier, and on the occasion in question there was a gangway in position for the use of the workman. The deceased might have used this gangway, but instead of doing so, he went along the quay passing the end of the gangway and met his death, as I have said, while attempting to jump to the vessel. His passing the gangway and going further than he required to do in order to go on board by the proper means provided, does to my mind make it clear that when he went to where he did, and tried to jump on board, which he had been warned not to do, he was not acting in the course of his employment, and that the accident did not arise out of his employment. I am clearly of opinion that the question of law must be answered in the affirmative, and I move your Lordships accordingly.

LORD STORMONTH-DARLING and LORD ARDWALL concurred.

LORD LOW was absent.

THE COURT answered the question in the affirmative.

ST CLAIR SWANSON & MANSON, W.S.—MORTON, SMART, MACDONALD, &
PROSSER, W.S.—Agents.

¹ Blovelt v. Sawyer, [1904] 1 K. B. 271; Mullen v. D. Y. Stewart & Co., *ante*, p. 991.

² Keenan v. Flemington Coal Co., Limited, Dec. 2, 1902, 5 F. 164; Robertson v. Allan Brothers & Co., April 1, 1908, *The Law Times*, vol. 124, p. 548.

³ Workmen's Compensation Act, 1906, sec. 1, subsec. 2 (c).

JANE CURLE OR LAMONT AND OTHERS, Petitioners.—*Dickson, K.C.*— No. 153.
Deas.

CHARLES LAMONT, Respondent.—*Spens.*

June 30, 1908.

HENRY CHARLES LAMONT, Respondent.—*Carment.*

Lamont v.
 Lamont.

Trust—Nobile Officium—Removal of Trustee—Appointment of New Trustees.—It is within the power of the Court, in the exercise of its *nobile officium*, to appoint new trustees in room of a sole trustee removed from office.

THIS was a petition at the instance of the widow of the deceased ^{2D DIVISION.} Henry Lamont and of his whole children (with the exception of Henry Charles Lamont, his eldest son), in which the petitioners craved the Court to remove the deceased's brother, Charles Lamont, from the office of trustee under the marriage-contract between Mr and Mrs Henry Lamont, and to appoint Henry Lamont's testamentary trustees to be trustees on the marriage-contract estate.

By the marriage-contract, Mr and Mrs Henry Lamont appointed four persons, and any other person or persons who might be assumed into the trust, as trustees for the purposes therein set forth. Under these purposes the petitioners and Henry Charles Lamont above-mentioned were the sole beneficiaries.

By his trust-disposition and settlement Henry Lamont appointed trustees, and directed them to implement all obligations incumbent on him under the marriage-contract. These testamentary trustees were his widow, his son Gerald, one of his daughters, and three other persons.

The respondent Charles Lamont was the sole survivor of the trustees appointed under the marriage-contract.

The petition set forth (and it was admitted) that Charles Lamont was an undischarged bankrupt. In the course of the argument counsel for the petitioners referred to certain letters written by Charles Lamont as shewing that, in respect of peculiarities in his temper, and his views as to the conduct of the trust business, he was an unsuitable person to act as sole trustee.

Answers were lodged by Charles Lamont opposing the petition.

Answers were also lodged by Henry Charles Lamont, in which he objected to the appointment of the testamentary trustees as trustees in the marriage-contract trust. He averred that he was dissatisfied with the course of administration pursued by the testamentary trustees in regard to his father's affairs, and suggested that a judicial factor should be appointed. At the Bar it was stated on his behalf that he did not oppose the removal of the respondent Charles Lamont, but left this matter to the Court.

The case is reported only on the question as to whether new trustees or a judicial factor should be appointed.

Argued for the petitioners;—It was competent for the Court in the exercise of the *nobile officium* to appoint new trustees.¹ This being so, the trustees suggested should be appointed. They were nominated by all the parties beneficially interested in the trust, save one, and they had no feeling or interest adverse to that beneficiary. The deceased truster had directed them to fulfil the marriage-contract

¹ M'Laren on Wills, 3d ed., vol. 2, p. 1132, *et seq.*; Menzies on Trustees vol. 1, p. 36; Aikman, Dec. 2, 1881, 9 R. 213.

June 30, 1908. purposes, and their appointment would entail less expense than the appointment of a judicial factor.

Lamont v.
Lamont.

Argued for the respondent Henry Charles Lamont;—It was in accordance with the usual practice to appoint a judicial factor, and there was no precedent for appointing new trustees in circumstances such as the present. The *nobile officium* could not be invoked in favour of a course of action which was opposed to that sanctioned by previous authority.¹ Section 12 of the Trusts (Scotland) Act, 1867, made it plain by implication that, save under that statute, the Court had no power to appoint new trustees in this case, and that statute did not apply here.² In the case of *Aikman*,³ the appointment of new trustees was made with the consent of all parties.

The respondent Charles Lamont maintained that no sufficient ground had been shewn for his removal, and it was stated that he was now willing to assume new trustees.

THE COURT (The LORD JUSTICE-CLERK, LORD STORMONTH-DARLING, and LORD ARDWALL) granted the prayer of the petition, removed the trustee, and appointed the trustees under Henry Lamont's trust-disposition and settlement to be the trustees under the marriage-contract.

BOYD, JAMESON, & YOUNG, W.S.—BRYSON & GRANT, S.S.C.—BRUCE & BLACK, W.S.—
Agents.

No. 154.

DUNCAN STEVENSON, Pursuer (Respondent).—*J. A. Christie.*

THE CORPORATION OF THE CITY OF GLASGOW, Defenders (Reclaimers).

July 2, 1908.

—*Cooper, K.C.*—*A. Crawford.*

Stevenson v.
Corporation of
Glasgow.

Reparation—Negligence—Burgh—River adjoining Public Park—Duty to fence—Child.—A father brought an action against the Corporation of Glasgow for damages for the death of his infant son, who had been drowned in the River Kelvin while playing in one of the public parks adjoining the river. The pursuer averred that at the place the bank of the river, which was unfenced, was worn away; that the river was liable to sudden floods, during which its flow became swift and violent, and its depth increased from 1½ to 4 feet; that the accident occurred during one of these floods; that the river was thus a danger to the public, and especially to children; that it was the duty of the defenders to have had it fenced; and that the accident was due to their negligence in failing to perform this duty.

Held (rev. judgment of Lord Johnston) that there was no relevant averment of fault on the part of the defenders, and action *dismissed*.

1ST DIVISION.
Ld. Johnston.

DUNCAN STEVENSON, iron-turner, Glasgow, brought this action against the Corporation of the City of Glasgow for damages for the death of his infant son.

The pursuer averred:—(Cond. 2) "On or about 10th October 1907 Duncan Stevenson junior, the infant son of the pursuer, while playing in the Botanic Gardens, Glasgow, fell into the River Kelvin near the iron footbridge which crosses the River Kelvin under Kirklee Railway Station. The defenders are proprietors of the said gardens, which adjoin the River Kelvin, and are used as a public park. At the time when the said accident happened the pursuer's said child was playing there with a number of other children of about the same age. It was

¹ Stair, iv. 3, 1; Mackay's Manual, p. 82.

² Graham, June 26, 1868, 6 Macph. 958.

³ 9 R. 213.

well known to the defenders that large numbers of children resorted July 2, 1908.
to the said place for the purpose of recreation." (Cond. 3) "The said
accident was due to the fault and negligence of the defenders in Stevenson v.
failing to have the bank of the River Kelvin fenced at the spot in Corporation of
question, where the bank has been worn away by the action of the Glasgow.
water. The River Kelvin in normal conditions is about a foot and a
half in depth at the place in question. Said river, however, particu-
larly during the winter season, is subject to sudden and violent floods,
during which the depth of water at said place is between 3 and 4
feet. The said river, particularly when in flood, is swift and violent,
and was so on the occasion of the accident to and drowning of pur-
suer's said son, and in these conditions the place where the accident
happened is one of extreme danger to members of the public, and
particularly to children resorting there. There is an iron railing
which extends from Kirklee Bridge in a southerly direction along the
banks of the river for about 257 yards or thereby, but from the end
of said fence there is a distance of about 75 yards which is wholly
unprotected. It was the duty of the defenders to have continued the
said iron railing along the banks of said river as far as the iron bridge
mentioned in article 2. Had they done so the accident to the pur-
suer's child would have been avoided."

The defenders pleaded, *inter alia*, that the pursuer's averments were irrelevant.

On 21st May 1908 the Lord Ordinary (Johnston) repelled this plea, and allowed an issue.*

* "OPINION.—In this action Duncan Stevenson, iron-turner, Glasgow, sues the Corporation of the City for damages for the death of his infant son, who fell into the River Kelvin, while playing in the Botanic Gardens, Glasgow, through which that river runs, and which are admittedly the property of the Corporation and are used as a public park.

"The pursuer alleges that his child was playing at the time of the accident with a number of other young children in the Botanic Gardens, and fell into the river at a place where it is unfenced, and he adds that 'it was well known to the defenders that large numbers of children resorted to the said place for the purpose of recreation.'

"The ground of liability alleged is the failure of the Corporation to have the banks of the River Kelvin fenced at the spot in question. The river is said to be in normal condition about one and a half feet in depth there, but to be subject to sudden and violent floods, during which its depth increases to between three and four feet. When in flood the river is said to be swift and violent, and to have been so on the occasion of the accident to and drowning of the pursuer's son. In these conditions the place where the accident happened is said to be one of danger to members of the public, and particularly to children resorting there. I discard the reference to the existence of a railing along an adjoining part of the river's bank, but not continued along the part of the bank where the accident happened, as that fact is adequately explained by the Corporation, and has nothing to do with the protection of the public. But the allegation remains that it was the duty of the defenders to have protected the bank of the river by a railing at the place where the accident happened.

"To this action the defenders plead, first, to the relevancy; second, contributory negligence on the part of the deceased child; and third, that the accident was caused through the fault and negligence of the pursuer himself in respect that he allowed his child 'to go unattended by some person taking care of him, to the said park,' his residence being at a considerable distance from the scene of the accident.

July 2, 1908.

The defenders reclaimed.

Stevenson v.
Corporation of
Glasgow.

The case was argued on 24th June 1908.

Argued for the defenders;—There was no duty on the defenders to fence the bank of the river.¹ The river was a danger which the defenders had not created, and one which was patent to everyone who came to the park. In such circumstances the defenders had no higher duty towards a child than towards an adult. The cases relied on by the Lord Ordinary were not in point, for they dealt either with the danger arising from the proximity of railway lines to public places,² or with dangers created by the owners.³ The case of *Gibson v. Glasgow Police Commissioners*⁴ was distinguishable, for it dealt with a danger in a public street, where no danger was to be expected, and where those using the street had a right to be protected against any latent danger.

Argued for the pursuer;—The case could not be decided without

“On these pleas I have heard argument, with an exhaustive citation of authorities, and in respect of one or other of them the Corporation maintain that the action should be disposed of on the record as it stands, without sending the case to a jury.

“As was pointed out by Lord Trayner in the case of *Gibson v. Glasgow Police Commissioners*, 20 R. 466, it is not easy to reconcile in the application the authorities on the subject of liability for accidents to children. There are three questions involved—(1) the duty of the person alleged to be liable; (2) the contributory negligence of the child; and (3) the responsibility of the parents. And it is hardly possible to keep these questions distinct. Perhaps they may be otherwise stated thus:—Does the alleged wrongdoer owe a different duty, at least in degree, to the child, from that which he owes to the adult? or is the child, unattended, to be regarded as conventionally an adult? and is the want of care on the part of the parent attributable as contributory negligence to the child?

“I doubt whether any general rule can be deduced from the authorities, and whether circumstances can be eliminated from consideration. But I was much pressed by counsel for the Corporation with the two cases of *Grant v. Caledonian Railway Company*, 9 Macph. 258, and *Hastie v. Magistrates of Edinburgh*, 1907, S. C. 1102, and it was maintained that these decisions establish clearly, that, if parents send out their children of tender years unattended, they must accept the consequences of their being regarded as impliedly able to take care of themselves, or *in pari casu* with adults. There is no doubt that in *Grant's* case, Lord Ardmillan's statement, that the child was either so young as not to be able to take care of herself, in which case she ought not to have been permitted to be at the place in question, a dangerous level railway crossing, or she was capable of taking care of herself and so on an equal footing with other passengers crossing the line, and therefore that in either view the company were not liable, was generally accepted by the Court. And the expressions used in the decision

¹ *Hastie v. Magistrates of Edinburgh*, 1907, S. C. 1102; *Ross v. Keith*, Nov. 9, 1888, 16 R. 86.

² *Grant v. Caledonian Railway Co.*, Dec. 10, 1870, 9 Macph. 258; *Morran v. Waddell*, Oct. 24, 1883, 11 R. 44; *Haughton v. North British Railway Co.*, Nov. 29, 1892, 20 R. 113; *Innes v. Fife Coal Co., Limited*, Jan. 10, 1901, 3 F. 335.

³ *Campbell v. Ord and Maddison*, Nov. 5, 1873, 1 R. 149; *M'Gregor v. Ross and Marshall*, March 2, 1883, 10 R. 725; *Sharp v. Pathhead Spinning Co., Limited*, Jan. 30, 1885, 12 R. 574; *Findlay v. Angus*, Jan. 14, 1887, 14 R. 312.

⁴ March 23, 1893, 20 R. 466.

inquiry. A public park was in the same position as a public street, in July 2, 1908. so far as the responsibility of the defenders was concerned, and if there was a hidden danger they were liable if they had failed to take precautions to obviate it.¹ The special circumstances with regard to the river which placed on the defenders the duty of fencing it were, its liability to flood, the rapidity of its flow when flooded, and the fact of its bank being worn away.

Stevenson v. Corporation of Glasgow.

At advising on 2d July 1908,—

LORD M'LAREN.—The Lord Ordinary has given a very careful and full exposition of the authorities bearing on this question, and other cognate questions of liability in cases where there is a duty to the public to give protection against possible accidental injury.

I am unwilling to differ from the Lord Ordinary on a question of relevancy, where the effect of his decision is only to send the case to trial. On the

of *Hastie's* case, though more general, are if anything even stronger in favour of the duty of parents to attend their children or to keep them at home. Yet I cannot think that either of these cases can be founded on as determining as a general proposition, independent of circumstances, that the child of tender years must go attended, under the sanction of being treated as an adult if it is not so attended. A large number of cases have occurred which cannot possibly be explained consistently with such a general proposition, and it must, I think, be admitted that circumstances modify the answer to be given to the above question in every case, and prevent the adoption of any general rule.

"I would refer particularly to the case of *Morran v. Waddell*, 11 R. 44, where the Lord President (Inglis), who had taken part in the decision in *Grant's* case *supra*, with reference to 'doubts which appear to exist in certain quarters as to the sort of liability which attaches to children and adults, in different sets of circumstances, in regard to cases of this kind,' thus explains the decision in *Grant's* case,—'In *Grant v. The Caledonian Railway*, we held that there was no distinction between the case of a child and of an adult in the circumstances then occurring, because at the level crossing, where the child was killed, the railway company were, in the exercise of their undoubted right, in use to run trains at a very high rate of speed, and the business of the railway company could not have been conducted if they had not been so entitled to run them. The result was that it was impossible to take precautions for children of a different kind from those taken for adults; and therefore when an accident arose from the passing of a train at a high rate of speed it was impossible to make a distinction between the two cases. But that law is not of universal application, and if I had been directing a jury in the present case, I should not have given them the law of the case of *Grant*. In this case it was, in the first place, not necessary for the train to travel at a high rate of speed, and it was not the practice so to travel—in fact, four miles an hour seems to have been the ordinary rate; and, in the second place, it is evident that a great many children are in the habit of playing about near the line; and, therefore, combining these two facts, there was a duty on the part of the defenders to keep a look out, and to avoid the chance of accident.' But then upon the evidence, his Lordship found that there was no negligence or want of due care on the part of the owner of a private railway, while, on the other hand, there was carelessness on the part of parents in allowing a child of tender years to wander about in a dangerous place unattended.

"The cases where the accident could not have occurred but for trespass,

¹ *Gibson v. Glasgow Police Commissioners*, 20 R. 466.

July 2, 1908. other hand, it must be remembered that in our practice the presiding Judge at a trial has not the same powers as are exercised by Judges in the English Courts, in relation to withdrawing a case from the jury where the evidence of the plaintiff does not amount to a *prima facie* case of liability.

Stevenson v. Corporation of Glasgow. It is, however, within our province to examine the relevancy of the pursuer's averments, and to consider whether, if these were proved, liability would attach to the defender. In both countries the control of the Court is maintained on the general question of liability, though the forms of process are different.

Lord M'Laren.

In this case the Corporation of Glasgow are proprietors of the Botanic Garden, which is a place of recreation open to the public, and I do not doubt that the Corporation, as proprietors, are bound to give reasonable protection to members of the public against unusual or unseen sources of

even though the trespass was that of children, may I think be disregarded—*Galloway v. King*, 10 Macph. 788, and *Ross*, 16 R. 86.

"The case of *Grant, supra*, where it was the business of the railway company to run its trains at high speed, and its statutory right to have a level crossing over an occupation road, may be contrasted with *Morran, supra, Haughton*, 20 R. 113, and *Innes*, 3 F. 335, where the proximity of dwellings to railway sidings, and the known habit of children to frequent these sidings, were held to impose a certain degree of responsibility on the railway company in conducting shunting operations for the safety of such children, though there is considerable diversity of opinion expressed by members of the bench on this branch of the subject.

"Then there is the series of cases regarding dangerous machinery left unfenced, a consideration of which must, I think, result in the conclusion that it is one of the duties of the owner of such machinery to regard the probability of children tampering with it, and also the fact that children can neither be always in leading strings, nor be credited with the sense of the adult. I refer to *Campbell v. Ord & Maddison*, 1 R. 149; *M'Gregor*, 10 R. 725; *Clarke v. Chambers*, L. R., 3 Q. B. D., per Cockburn, L. C.-J., at p. 339; *Sharp v. Pathhead Spinning Company*, 12 R. 574; and *Findlay v. Angus*, 14 R. 312. The latter case is, I think, particularly deserving of consideration with reference to the present. On a waste piece of ground where a fish curer was allowed to put up a shed without objection, and where the public were tolerated and children allowed to play, and where consequently there was the possibility of children tampering with the shed, its owner was held bound to take this into consideration in providing for its secure closing—while had trespass been necessary to enable the children to get at the shed, it was indicated that the result of the case might have been different.

"Lastly, there are the cases where the duty of local authorities in fencing dangerous places, as for instance dangers along the sides of roads, has been in question. *Greer v. Stirlingshire Road Trustees*, 9 R. 1069; *Forbes*, 15 R. 323; and *Gibson v. Glasgow Police Commissioners, supra*, which cannot be read without reaching the conclusion that the question what is a sufficient fence is not a general question, but a question dependent entirely on surrounding circumstances, and that these same circumstances may require special precautions for the safety of children to be taken, on the assumption that it is impossible to expect that children of tender years are never to be allowed to go at large unattended. In this connection I may also refer to *Martin*, 14 R. 814, where children were driven over on the public road, and it was held to be the duty of a driver to anticipate that children do frequent the public roads and streets unattended.

"I come then to the present case. The Corporation's Botanic Gardens

danger, should such exist. But in a town, as well as in the country, there are physical features which may be productive of injury to careless persons or to young children against which it is impossible to guard by protective measures. The situation of a town on the banks of a river is a familiar feature; and whether the stream be sluggish like the Clyde at Glasgow, or swift and variable like the Ness at Inverness, or the Tay at Perth, there is always danger to the individual who may be so unfortunate as to fall into the stream. But in none of these places has it been found necessary to fence the river to prevent children or careless persons from falling into the water. Now, as the common law is just the formal statement of the results and conclusions of the common sense of mankind, I come without difficulty to the conclusion that precautions which have been rejected by common sense as unnecessary and inconvenient are not required by the law. If it could be shewn that there was any special danger at the place where the child fell into the water, the case would be different, but I am unable to find in the averments anything more definite than this, that the garden is bounded by a running stream which it was the duty of the Corporation to fence. If there is no such duty in general, then the action must fail. I think this case is ruled by the case of *Hastie v. Magistrates of Edinburgh*,¹ recently decided by this Division of the Court in regard to the obligation to fence a piece of ornamental water. The suggested distinction between the case of standing water and that of running water is not one that commends itself to my mind.

LORD KINNEAR.—In this action the question is stated quite clearly in

are admittedly a public park, where children are in use to play,—I think I may say, are intended and impliedly invited to play. If so, I think that the Corporation are bound to take all necessary precautions that they shall be able so to play in safety. Though there may be cases, *e.g.*, *Grant's*, *supra*, where the parent may have the duty of tending the child, if it is sent to the place of danger, I do not think that the Corporation can expect children to be always tended when playing in a public park, or that any blame attaches to parents for sending them there unattended. It may be that in the Edinburgh case (*Hastie, supra*) the circumstances did not on the face of them call for any special protection, and that there was therefore no relevant case to send to trial. But in the present case the circumstances bear just such a different complexion that I think there is issuable matter. A running stream liable to flooding is a different thing from an artificial sheet of stagnant water. And therefore here it is a fair question for a jury, whether the circumstances called for special measures for protection of children, who it must have been known would be unattended, being taken, and whether such precautions were in fact taken. The case is *in pari casu* with that of the *Magistrates of Clydebank*, 15 S. L. T. 886, to my judgment in which, to avoid repetition, I refer.

“As to the possibility of contributory negligence on the part of a child, that is a question of fact which cannot be decided on the relevancy. I think it is as much a question of fact for the jury in the case of a child as in that of an adult, and depends, *inter alia*, on the capacity of the child—*Campbell v. Ord & Maddison, supra*, per L. J.-C. Moncreiff, and *Fraser v. Edinburgh Street Tramways Company*, 10 R. 264.

“I shall therefore repel the defenders' plea to the relevancy, and allow an issue.”

¹ 1907, S. C. 1102.

July 2, 1908. the first sentence of the Lord Ordinary's opinion, where he says,—“Duncan Stevenson v. Stevenson, iron-turner, Glasgow, sues the Corporation of the City of Glasgow for damages for the death of his infant son, who fell into the River Kelvin, while playing in the Botanic Gardens, Glasgow, through which

Lord Kinnear. that river runs, and which are admittedly the property of the Corporation, and are used as a public park. The pursuer alleges that his child was playing at the time of the accident with a number of other young children in the Botanic Gardens, and fell into the river at a place where it is unfenced, and he adds that ‘it was well known to the defenders that large numbers of children resorted to the said place for the purpose of recreation.’ The ground of liability alleged is the failure of the Corporation to have the bank of the River Kelvin fenced at the spot in question.” That is the fault attributed to the Corporation. The Lord Ordinary has held that that is a relevant ground of action, and has accordingly allowed an issue.

I am sorry to say that I am unable to agree with his Lordship. I cannot see any ground in law for casting upon the Corporation the duty which they are said to have neglected. It was said that this is a question of negligence, and that this is always a question for a jury, which is the only proper tribunal by which it can be tried. I cannot assent to that view. Whether the defender has or has not been negligent in point of fact in a particular case is a question for a jury, but there is, first of all, upon the relevancy of the record a question whether the negligence alleged constitutes a ground of legal liability, and that is a question for the Court. The distinction is stated by Lord Cairns in the case of *Metropolitan Railway Company v. Jackson*¹ in the House of Lords. His Lordship says there with reference to a case of negligence,—“The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence, from which negligence may be reasonably inferred; the jurors have to say whether from these facts, when submitted to them, negligence ought to be inferred. It is, in my opinion, of the greatest importance, in the administration of justice, that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred, and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner if they were at liberty to hold that negligence might be inferred from any state of facts whatever”; and then his Lordship figures various cases in which, if this liberty were allowed to them, juries might go wrong, and he points out that in such cases an application to the Court on the ground that the verdict was against evidence would be a very imperfect remedy, because such an application, even if successful, could only result in a new trial, and on a second trial, or even on subsequent trials, the same thing might happen again. Then at a later part of his opinion he repeats the rule which he had already laid down, and says, after considering a previous decision which

¹ 1877, 3 App. Cas. 193.

had been cited to the contrary,—“It is, indeed, impossible to lay down any rule except that which at the outset I referred to, viz, that from any given state of facts the Judge must say whether negligence can be legitimately inferred, and the jury whether it ought to be inferred.” Stevenson v. Corporation of Glasgow.

Now, the law so laid down is common to both countries, and binding upon us, but in its application to the procedure in a particular case we must, of course, refer to our own practice, and not to the entirely different procedure in the course of which the question arose which the House had to determine. The opinion of Lord Cairns assumes that a case has been brought to trial, and determines the conditions upon which it may be withdrawn from the jury by the presiding Judge. But it would appear that the learned Judges in England have a power of withdrawing cases from juries after the cases have gone to trial which this Court has not been accustomed to exercise, and it must be observed that a Judge of this Court is not at liberty to adopt of his own authority a new form of procedure, however useful in itself, and however it may be justified by English practice. Trial by jury in civil causes is introduced into our system by comparatively recent statutes, and the procedure is fixed by statutory enactments which the Court is bound to follow. Therefore in the application of the law laid down by the Lord Chancellor we must consider it at the stage in the procedure where we can give it full effect, and that is in the consideration of the relevancy of the pursuer's ground of action, because when this Court has once allowed an issue on the ground that the facts averred by the pursuer are relevant, we have decided that if these facts and no more are proved in evidence, there is a question of negligence for the jury, and no Judge at the trial can, contrary to that decision, say that, assuming the facts as alleged to be true, there is no case for a jury. That is decided, and therefore it must be decided with due care and deliberation at the proper stage, before we allow an issue at all. We must assume, for the purpose of the decision, that the facts are true and that they are all the facts that the pursuer is prepared to prove, and upon that assumption we have to say whether he has made a good case of legal liability for what he alleges to be the negligence of the defender.

Now, that question involves two factors. In the first place, before we can say there is negligence we must say that the law, in the circumstances alleged, imposes a duty on the defender to take precautions for the safety of others, and, in the second place, that there has been, according to the allegations, a breach of that duty. Considering the first of these two points, I am unable to hold that there is any allegation of duty on the part of the Corporation which they can be said to have neglected. The duty supposed is that wherever there is a public park, through which a small stream of a kind with which we are familiar may flow, it is the duty of the owners and managers of such park to protect the stream by fences so that anybody using the park or garden cannot fall into it. No authority was cited for that proposition, and for myself I know no rule or principle of law upon which it can be maintained. The proposition, on which it is sought to raise a duty against the defenders, is that they are the owners and managers of a public garden. But they are not bound in that character to insure the safety of persons who resort to their garden. I see no ground for extend-

July 2, 1908. ing the liability of the occupiers of real property as such beyond the limits defined in the case of *Indermaur v. Dames*.¹ That concerned the duty of Stevenson v. Corporation of Glasgow. of the occupiers of property with reference to persons resorting thereto upon their invitation, expressed or implied, and I assume that that is the position Lord Kinnear. of the present pursuer, or of his child. I think it would be quite unreasonable to treat his child, or anybody else resorting to the Botanic Gardens in Glasgow, as if they were trespassers or mere licencees, but I think they belong to the class which is defined in *Indermaur v. Dames*¹ as including persons who go upon the property, not as mere licencees or volunteers or guests, or as persons whose employment is such that the danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied, and with reference to such visitors the law laid down in the case is this,²—"We consider it settled law that" such visitor, "using reasonable care on his part for his own safety, is entitled to expect that the occupier shall, on his part, use reasonable care to prevent damage from unusual danger which he knows, or ought to know"—and which the other party does not know—"and that where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."

There are two points in that statement of the law which require consideration. The first is this, that a person going upon property, even by invitation, express or implied, is expected to use reasonable care for his own safety. He is to look out for all the ordinary risks that are necessarily incident to the kind of property that he is going upon, but, on the other hand, it is held that he is not to be exposed to any unusual danger known to the proprietor, and not known to people who may come upon premises with which they are not familiar. If that be the law, it seems to me clear enough that it imposes no duty upon the owners or managers of public parks to fence every stream of water or every pond which may happen to be found in a public garden. Everybody resorting to the garden knows about these things as well as the owner and occupier himself. They are very obvious and patent, they are on the surface, and if there is any danger attached to them it is a danger from which the people resorting to the garden may reasonably be expected to protect themselves. There is probably no appreciable danger for ordinary people, but then the first point of the judgment to which I have already adverted, to wit, that the owner of the property is entitled to expect his visitors to take reasonable care of themselves, serves to shew that the precautions that he has to take in the construction and arrangement of his property are such as he ought to take on the assumption that the people coming to it are persons of average intelligence and average capacity for looking after themselves. If there be a special danger arising from the want of intelligence, or immature intelligence, of the visiting persons, the principle laid down in *Indermaur v. Dames*¹ will not serve to impose upon occupiers liability for such exceptional risk as that. I do not suppose that in this case anybody would maintain

¹ 1866, L. R., 1 C. P. 274.

² P. Willea, J., 288.

that a full-grown person would have an action of damages against the Corporation of Glasgow because he had fallen into the Kelvin in the Botanic Gardens, or that he was entitled to expect that so dangerous a stream should be fenced for his protection. Cor- July 2, 1908.
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But then it was said that this was not the case of a man, but the case of a child who is naturally helpless, who has not sufficient intelligence to know of the danger to which it is exposed, or sufficient capacity to protect itself if it did know of it. But there is no authority for imposing on the proprietors or managers of public parks a duty to protect children from such risks as are incident to their childhood. The only cases cited which have a direct bearing upon the question are those of *Grant v. Caledonian Railway Company*¹ and *Hastie v. Magistrates of Edinburgh*,² both of which are directly in favour of the defenders in this case. In *Grant v. The Caledonian Railway Company*¹ there was a question as to whether a railway company had been guilty of negligence in running trains over a level-crossing, where an accommodation road crossed, so that a child of five or six years of age was run over. The Court held that the company had taken all the precautions which they could be required to take for the safety of persons of average intelligence and capacity, and that it was impossible to lay upon them the further duty of running their trains in such a way that a child of five or six years old who had not intelligence enough to look up and down the line so as to see whether a train was coming, or to get off the line when a train was obviously coming, might be made safe from harm, because the only way in which children of these tender years can be protected is by the constant supervision of their elders, who are charged with the duty of caring for them. It is obvious enough that no structural precautions will be sufficient to protect a child of two years old or three years old if it is left by itself in a public place. The only real security is that children who are too young to take care of themselves should be taken care of by somebody else. The question is whether the duty to take care of them is laid by law upon the Corporation of Glasgow, and I apprehend it is not.

The Lord Ordinary refers to a number of cases which he thinks are inconsistent with the case of *Grant*,¹ and supports the view that an exceptional duty is laid upon persons in the position of the defenders for the protection of children. But there is a clear distinction between the cases cited and the present. The law recognises that certain things are a source of extreme danger. A man who uses them must take care to avoid harming his neighbours, and for that purpose he must take precautions which are proportioned to the amount of danger. I have no doubt that persons charged with a duty of that kind must consider, so far as they have opportunity, the ability of those whom they put in danger to escape the harm to which they are exposed. The simplest cases and most quoted are those of danger arising from horses and carts or carriages. I have no doubt that if a driver of a carriage sees somebody crossing a road who is helpless from any cause, either from infirmity or old age, or blindness, or lameness, or from infancy, he is bound to take an especial precaution for the protection of such a person, because he sees a risk and it is in his power to protect against it, and if he runs

¹ 9 Macph. 258.

² 1907, S. C. 1102.

July 2, 1908. over such a helpless person, it is no defence to say that an active young man would have come to no harm. That is not the measure of his obligation. His duty is to avoid doing harm to people whom his own conduct has exposed to danger. It may or may not be an answer to say that if a child is in a place where it is run over its being there was due not to the carelessness of the driver but to the carelessness of somebody else. As at present advised I should think that not a good answer in the case supposed; but it is not a question that arises in this case. The difference is that in the case supposed, a man for his own purposes, however lawful, creates a danger for everybody who may be in the way, but a danger that may easily be avoided by one person, and only with difficulty, or not at all, by another. An analogous responsibility arises from the use of things in themselves dangerous, when they are not under the immediate control of those who use them. That has been held in a number of cases—where a man has left a horse and cart in a public street unattended and children have been hurt. He takes the risk of the danger arising from his neglect of the ordinary precaution to look after his horse and cart. There are a great many dangerous things of different kinds which raise the question in the same way—firearms, explosives, dangerous machines of all kinds. People who use these things are bound to take precautions to prevent their doing harm, because it is in the very nature of the thing that it will do harm, and I think the cases to which the Lord Ordinary refers as establishing a rule that greater precautions have to be taken in the case of children than in the case of adults, are all cases of that kind. The mere fact that a child was concerned in an accident does not make two cases in which it occurs so identical that any rule of law can be deduced from the decision without reference to the particular ground of liability which was found to be established in each case. The cases which the Lord Ordinary refers to, at the top of page 4, are cases where dangerous machines or dangerous instruments were left in public places without sufficient precaution being taken; therefore there is, to begin with, a wrong. Nobody is entitled to leave a dangerous machine in a public street or public market without taking good care that others are not to be hurt by it. Lord M'Laren suggests a wild animal. If you have anything that is dangerous under your control, you must take care that it does no harm. I do not consider it necessary to examine in detail all these cases. I believe they will all be found to rest upon that consideration, and that the question whether children or adults were hurt was quite immaterial to the decision, except in so far as a question may be raised of contributory negligence in the case of an adult which may not be raised in the case of a child. The negligence in these cases was such that the party charged with a duty to take due care would have been responsible whether the person actually injured was a child or an adult.

His Lordship refers especially to an opinion of Lord Chief-Justice Cockburn in *Clarke v. Chambers*,¹ and I do not think in the decisions you could find a clearer statement of the true principle than in the passage to which the Lord Ordinary refers. The case itself has really no bearing upon this question, not only because the person injured was an adult, but also because

¹ L. R., 3 Q. B. D., at p. 339.

the case in question was of a kind with which we are not concerned. The July 2, 1908. owner of property had put upon his private road, upon which, however, Stevenson v. other persons were entitled to be, a barrier, part of which was armed with Corporation of spikes, so as to constitute what is called in the report *chevaux de frise*. Glasgow. Somebody passing at night took this part of the barrier from the centre of Lord Kinnear. the carriageway, where it had been placed by the owner, and put it upon the footpath, and a man, entitled to use the road, fell over it and was seriously injured by falling upon the spikes. The real question for decision there was one with which we have no concern, namely, whether the intervention of a third person, who removed the spikes from one part of the road to another, and so led to the risk which formed the ground of complaint, relieved the original wrongdoer. The Court held it did not, because he was not entitled to leave things on the road which might be tampered with by other persons so as to expose persons to danger. The Lord Ordinary refers to the case, I rather think, for the observations of Lord Chief-Justice Cockburn, and the passage to which he refers deals with a decision from which the Lord Chief-Justice dissents in the case of *Mangan v. Atherton*.¹ In that case it had been held that there was no liability maintainable against a man who had left an oilcake crushing-machine in a public place without throwing it out of gear, or fastening the handle, or leaving anybody to take care of it. Some children playing about the place began to move it—tampered with it. One of them began to turn the wheels, and another put his fingers into the cogs of the wheels and was crushed. The Court of Exchequer, before whom that question came, held there was no liability, because the children had no business there, and there was no negligence. The Lord Chief-Justice dissents from that, and I think he does so upon grounds which have been fully established. In the passage to which I understand the Lord Ordinary refers his Lordship says this:—"A man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to anyone who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorised act of another may be necessary to realise the mischief to which the unlawful act or negligence of the defendant has given occasion." I think nothing can bring out more clearly the distinction in question, because, to begin with, the man was doing an unlawful act when he put his dangerous machine there, and he must be responsible for all natural and probable consequences of his wrongdoing.

But that is not the condition of liability in the present case. There is nothing unlawful in making a public garden or in opening a garden to the public in a place where there are streams or ponds, and if the place is made safe for persons of average intelligence I know of no rule of law which requires the proprietors to take further precautions. It is impossible to lay upon the defenders a duty to protect children from risks which arise only from their own childishness and helplessness. That is the office of their parents or guardians.

¹ 1866, 35 L. J. (Exch.) 161.

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LORD MACKENZIE.—I agree with your Lordship. I think there is here no case to try. In my opinion this is one of the cases in which the defenders have succeeded in demonstrating that, assuming everything that the pursuer says on record is proved, there is no actionable wrong. The duty which is alleged to be incumbent on the defenders is to fence the River Kelvin, a natural stream, flowing through a public park. I think that there is less obligation to fence a natural stream than there is to fence an artificial pond, because an artificial pond is the creation of the owner of the ground. It has already been held in this Court that, in circumstances similar to those of the present case, there is no obligation to fence an artificial pond. The reason why there is no obligation to fence is because the danger is an obvious one. There may be cases in which it might be proper for a jury to say whether the danger was obvious or not—disused quarries and the like—but in the case of an artificial pond, or in the case of a natural stream, I do not think there is any case for a jury to pronounce upon.

It sufficiently appears that the proximate cause of the accident in the present case was not the existence of the river at all, but the fact that a child of tender years went there unattended. Now, upon that question it appears to me that if the child was in a position to take care of itself the same standard must be applied as would be applied in the case of an adult. If the child was so young as not to be able to take care of itself, it should never have been allowed to go there unattended, and the defenders cannot be made liable for an accident, the proximate cause of which was the fact that the child went there without an attendant. The only other observation I have to add is, that the case of *Gibson*,¹ which I understood to be pressed upon us on behalf of the pursuer, was one in which it was held the defenders had failed to discharge their duty to fence one of the public streets of Glasgow. The place there in question was a dangerous one, under certain conditions, for all who resorted there, adults as well as children, and, accordingly, that case was different from the present.

I am of opinion with your Lordships that no issue should be allowed in this case.

The LORD PRESIDENT and LORD PEARSON were absent.

THE COURT recalled the Lord Ordinary's interlocutor and dismissed the action.

ST CLAIR SWANSON & MANSON, W.S.—SIMPSON & MARWICK, W.S.—Agents.

No. 155.

July 2, 1908.

Mitchell's
Executor v.
Mitchell's
Trustee.

WILLIAM HYSLOP MITCHELL (Mrs Mitchell's Executor), Claimant
(Respondent).—*Clyde, K.C.—Morton.*

JAMES R. HODGE, C.A. (William Hyslop Mitchell's Trustee),
Respondent (Appellant).—*Cullen, K.C.—Murray.*

Husband and Wife—Bankruptcy—Loan to husband by wife out of her separate estate—Sequestration of Husband—Claim by Wife's Executor—Married Women's Property (Scotland) Act, 1881 (44 and 45 Vict. cap. 21), section 1 (4).—The Married Women's Property (Scotland) Act, 1881, sec. 1 (4), enacts—"Any money or other estate of the wife lent or entrusted to the husband, or immixed with his funds, shall be treated as assets of the

¹ 20 R. 466.

husband's estate in bankruptcy, under reservation of the wife's claim to a July 2, 1908. dividend as a creditor for the value of such money or other estate after, but not before, the claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

Mitchell's
Executor v.
Mitchell's
Trustee.

A wife lent to her husband a sum of money out of estate acquired by her under a deed of settlement, which excluded his *jus mariti* and right of administration. A year after the wife's death the husband was sequestrated, and, the loan not having been repaid, his wife's executor lodged a claim in the sequestration as an ordinary creditor for the amount of the debt.

Held (1) that section 1 (4) of the Married Women's Property Act, 1881, applied to money lent by a wife to her husband out of her separate estate, whether the *jus mariti* was excluded by deed or by the operation of the statute; (2) that the wife, at the date of her death, had merely a *jus crediti* liable to be defeated in the event of her husband's bankruptcy, and that her executor took no higher right; and, accordingly (3) that the claim by the wife's executor to an ordinary ranking fell to be disallowed, under reservation of the claimant's right to participate in any balance of the husband's estate after the claims of other creditors for value had been satisfied.

THE estates of William Hyslop Mitchell, draper, Aberdeen, were sequestrated on 2d October 1907. A claim was lodged in the sequestration by the bankrupt as executor-dative of the deceased Mrs Margaret Whyte or Mitchell, to be ranked as an ordinary creditor for the sum of £1405.

1st DIVISION.
Sheriff of
Aberdeen,
Kincardine,
and Banff.

The claim arose under the following circumstances :—The deceased Mrs Mitchell, who was married to the bankrupt in 1900, inherited a sum of money from her father, which, by his deed of settlement, was directed to be paid to and held by her "for her separate use, and exclusive of the *jus mariti* and right of administration, and debts and deeds of her husband." The greater part of this money was lent by Mrs Mitchell to her husband, who, in return, granted a deed of acknowledgment, dated 31st January 1903. Mrs Mitchell died intestate on 17th December 1906, and was survived by her husband and by three children, the husband being appointed her executor. The claim put in by the bankrupt, as executor of his wife, was for the amount advanced by her to him, with interest.

On 27th February 1908 the trustee in the sequestration, Mr James R. Hodge, C.A., pronounced this deliverance :—"Rejects the claim to an ordinary ranking, but under reservation of the claimant's rights to participate in any balance of the estate remaining after the claims of the other creditors for money or money's worth have been satisfied." *

The claimant appealed to the Sheriff.

On 1st May 1908 the Sheriff-substitute (Young) recalled the deliverance, and appointed the trustee to rank the claimant in terms of his claim.†

* See the Married Women's Property (Scotland) Act, 1881, sec. 1 (4), quoted in rubric.

† "NOTE.—The ground upon which the trustee has . . . rejected the claim is, that Mrs Mitchell's funds were immixed with the funds of her husband, the bankrupt, and that consequently, in view of section 1 (4) of the Married Women's Property Act, 1881, no claim in respect of her advances can be admitted until the claims of the ordinary creditors have been met. This deliverance seems to me to be mistaken. We are not here dealing with a wife's claim to a dividend as a creditor in bankruptcy. When Mrs Mitchell died, on 17th December 1906, one-third of the funds to which she had right vested in her children as legitim, and one-third as dead's part, while the remaining third fell to her husband in virtue of his *jus relictii*. The claim,

July 2, 1908.

—
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Trustee.

The trustee appealed to the Court of Session.

Parties were heard on 24th June 1908.

Argued for the appellant;—The Sheriff-substitute had erred in holding that section 1 (4) of the Act was inapplicable. That section was general in its terms, and applied to property belonging to a wife, whether the *jus mariti* was excluded by deed or by force of the statute. The heirs in whom the wife's estate had vested had no higher right than their author,¹ and took her right to claim for the amount of the debt subject to the qualifications imposed by section 1 (4) of the Act.

Argued for the respondent;—(1) Section 1 (4) of the Act only applied to property of a wife from which the husband's rights were excluded by the operation of section 1 (1), and not to property held by her from which these rights were excluded by a private deed. The object of the Act was to remove disabilities, not to impose them, and it was not to be supposed that it intended to affect property over which the wife had absolute power independently of the Act. (2) The point of time at which to consider whether there was any "estate of the wife lent to the husband," within the meaning of subsection (4), was the date of the husband's sequestration. In the present case at that date there was no such estate, for all the wife's estate had vested in her heirs. The section only applied to cases where the husband was sequestrated in the wife's lifetime.*

At advising on 2d July 1908,—

LORD M'LAREN.—The question raised by this appeal is the construction of the 4th subsection of the 1st section of the Married Women's Property (Scotland) Act, 1881.

[After a narrative of the facts.] The provision of the Married Women's Property Act, sec. 1 (4), on which the appeal depends has reference to "money, or other estate of the wife, lent or entrusted to the husband, or immixed with his funds." Such money or estate, it is said, "shall be treated as assets of the husband's estate in bankruptcy" under the reservation, which the trustee has allowed, of a right to participate in the surplus, if the estate should prove to be solvent.

The Sheriff-substitute in his note explains his view of the statute, which seems to be that the statute only puts the wife under a personal disability to rank on her husband's estate, but does not affect the right of her representatives to rank on the husband's estate for their shares of legitim and dead's part.

I am unable to agree with the learned Sheriff-substitute in his suggested limitation of the statutory provision. If the provision had been that a claim *by the wife* in bankruptcy should be postponed to that of other

which the trustee has declined to admit, is put forward on behalf of those who, by operation of law, acquired a vested beneficial interest in her estate long before the bankruptcy. In my judgment, then, the provisions of the Married Women's Property Act, on which the trustee rests his deliverance, have no application to the case, and the executor ought to be ranked *pari passu* with ordinary creditors for the amount due on account of the said advances and interest, the right to the one-third which belongs to the bankrupt *jure relictæ* being reserved to the trustee."

¹ *Cochrane v. Lamont's Trustee*, Jan. 24, 1891, 18 R. 451.

* [The case of *Laidlaw v. Laidlaw's Trustee*, 1882, 10 R. 374, does not seem to have been referred to.]

creditors, there would be room for the argument that the provision was July 2, 1908.
 personal to the wife, and did not affect her representatives. But what the
 statute says is that money lent to the husband shall be treated as assets of
 his estate in bankruptcy, and if the money in question is assets of his estate
 it is of no consequence whether the claim to repayment is made by the wife
 herself or by her heirs or assignees, because in either case the money is
 affected by the statutory condition under which it is to be treated as
 husband's estate in a question with creditors for "money or money's worth."

Mitchell's
 Executor v.
 Mitchell's
 Trustee.
 Lord M'Laren.

If the defender were solvent, it would be open to the wife's executor to bring an action and to recover payment of the loan. But if the husband becomes insolvent, with the wife's money in his hands, the statute takes effect upon it, and fixes the quality of assets in bankruptcy upon the money lent, entrusted, or immixed with the husband's funds.

In the present case the wife's money was separate estate in her person in virtue of her father's will, and she did not need the aid of the statute to secure it to her independent of the *jus mariti*. I only mention this point that it may not be supposed that it was overlooked. In my opinion the provision of the 4th subsection is perfectly general and applies to all the wife's separate estate which she had power to retain or to lend to her husband, whether the estate came to her separate use *vi statuti*, or as a condition of a will or private grant.

I am therefore of opinion that we should sustain the appeal and affirm the deliverance of the trustee in the sequestration.

LORD KINNEAR.—I am of the same opinion, and for the same reasons as those given by your Lordship.

Two points are made by the respondent—the first being that to which your Lordship last referred. It is said that this lady's estate was expressly exempted from the *jus mariti* not by force of statute, but by the provisions of her father's settlement, and that accordingly she does not require to appeal to the statute, and is not bound by the conditions with which it qualifies the right which it confers. I agree that the answer is that the fourth subsection of section 1 is general in its terms, and applicable to the separate estates of all married women, irrespective of the sources from which that estate may have been derived. I assent to the observation which was made by the learned counsel for the respondent that you are not to read subsection (4) as if it stood by itself, but that it must be construed with reference to the context, and the whole scheme of the Act. But there is nothing in the purpose or general scheme of the Act to force any other than their natural meaning upon perfectly plain words.

The general purpose of the Act is to give married women in general the same exclusive right in their separate estate as was already secured to those whose estates were settled by deed upon themselves to the exclusion of the *jus mariti*. That being the primary purpose of the Act, I see no reason for presuming any intention to introduce a limitation of the right to the disadvantage of the particular class of married women whom the Act was specially intended to favour. The terms of all the other subsections of section 1 are plainly of general application. The first applies to all cases where "a marriage is contracted after the passing of this Act." The second

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Trustee.

Lord Kinnear.

subsection provides that "any income of such estate shall be payable to the wife on her individual receipt or to her order, and to this extent the husband's right of administration shall be excluded. . . ." That the words "such estate" refer to the moveable or personal estate of a wife acquired before or during a marriage contracted after the passing of the Act seems to me to be clear, and I cannot doubt that if a married woman's estate were settled by deed without express mention of the *jus administrationis* of the husband, that right would be excluded to the extent specified. Subsection (3) enacts—"Except as hereinafter provided, the wife's moveable estate shall not be subject to arrestment, or other diligence of the law, for the husband's debts, provided that the said estate . . . is invested, placed, or secured in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband." That again plainly applies to the estates of all married women. I see no reason why the fourth subsection, on which the present question depends, should be more restricted in its application. The ground, in policy, whatever it may have been, on which it was thought that a wife should not be allowed to compete with her husband's creditors in bankruptcy must be the same whether, as between the spouses themselves, the husband's rights are excluded by a deed of settlement or by operation of law. But at all events, the words of the Act cover both cases.

The second point rested on an argument of some subtlety, but I think fallacious. It was said that we were not concerned with the wife's money, but with the money of the children, and that the purpose of the Act was to regulate the patrimonial rights of the spouses during the marriage, but that it had nothing to do with the rights arising to either party on its dissolution—in this case by the death of the wife. It is common ground, however, that the wife's right to claim repayment of her advances is transmissible, and that it passes to her representatives or to her legatees. Now, if the statute makes no provision to the contrary, the legal character and effect of the transmission must be regulated by the ordinary rules of law, and her representatives must take her estate exactly as it stood in her, and not otherwise. The question therefore is what was the extent of the wife's claim upon the sequestrated estate, because that is the claim which has passed to her representatives or to her children exactly as it stood in her. The respondent sought to enforce his argument by a somewhat confused assumption that what passed to the children was the money. But the money remains at her death exactly where it was before—in the hands of the husband or of his trustee in bankruptcy. The representatives do not take a real right by mere survivance. What passes to them is a *jus crediti*. If the husband had been solvent, the wife's representatives would have had a good action for repayment of the money, but on his sequestration the right to the money passed to his trustee in bankruptcy; the right of the wife and her representatives was converted into a claim for a dividend, and she and they alike must take that claim under the condition which the statute imposes. If a similar condition had been stipulated by contract when the money was advanced, no one would doubt that the wife's stipulations would have been binding upon her representatives, and I think it makes no difference that the conditions of her claim are fixed by statute.

I am therefore entirely of the same opinion as your Lordship. I think July 2, 1908.
 the rights of the children are no higher than the rights of this lady herself,
 and that accordingly the trustee is entitled to deal with the claim exactly as
 if it had been made by the wife herself in her lifetime.

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LORD MACKENZIE.—I am of the same opinion, and upon the same grounds.

The LORD PRESIDENT and LORD PEARSON were absent.

THE COURT recalled the interlocutor of the Sheriff-substitute and affirmed the deliverance of the trustee.

CHARLES GEORGE, S.S.C.—CAIRNS, M'INTOSH, & MORTON, W.S.—Agents.

GEORGE RENNIE, Appellant.—*F. C. Thomson.*
 W. L. REID, Respondent.—*D. P. Fleming.*

No. 156.

July 3, 1908.

Master and Servant—Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 13—Casual Employment—Employment for the purposes of the employer's trade or business.—A jobbing window cleaner was in use about once a month to clean the windows of the house of a medical practitioner, who used a portion of the house in connection with his professional practice. There was no formal contract between the parties, and the window cleaner called and did the work without receiving on each occasion a special invitation or special permission to do so. On one occasion while cleaning the window of the dining-room he fell and was injured.

Held that the window cleaner's employment was of a casual nature, and that he was not employed for the purposes of the employer's trade or business, and that he was, therefore, not entitled to compensation.

GEORGE RENNIE, window cleaner, Glasgow, instituted arbitration proceedings in the Sheriff Court of Glasgow under the Workmen's Compensation Act, 1906, in which he claimed compensation from Dr W. L. Reid, medical practitioner, Glasgow. The Sheriff-substitute (Boyd) having assoilzied Dr Reid, Rennie appealed.

2D DIVISION.
 Sheriff of
 Lanarkshire.

In the stated case for appeal, the Sheriff-substitute found it proved:—“(1) That the respondent resides with his family at 7 Royal Crescent, Glasgow, and also uses a portion of the premises in connection with his professional practice. (2) That the appellant is a jobbing window cleaner, and that on 27th December 1907 he was cleaning the dining-room window in the respondent's said house, when he fell into the area, and sustained injuries which have since incapacitated him for pursuing his usual employment. (3) That his average weekly earnings were £1. (4) That for some years the appellant has been in the habit of cleaning the respondent's windows about once a month. (5) That the work occupied about three or four hours, and the appellant was paid 3s. 4d. on each occasion, being at the rate of 2d. per window. (6) That he did not wait for a special invitation on each occasion, nor did he ask special permission, but he called, was admitted, and did the work. (7) That there was no formal contract between the parties, and that the respondent might have engaged any other person to clean his windows, or might have refused the appellant admittance whenever he came prepared to clean the windows.”

On these facts the Sheriff-substitute found “that the appellant was a person whose employment was of a casual nature, and who was employed otherwise than for the purposes of the employer's trade or

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business"; and therefore assolzied the respondent, and found him entitled to expenses.*

The question of law for the opinion of the Court was:—"Was the appellant a workman in the employment of the respondent within the meaning of the Workmen's Compensation Act, 1906, so as to entitle him to compensation under said Act?"

Argued for the appellant;—The Sheriff-substitute's decision was erroneous. The employment was not of a casual nature. The appellant called regularly to clean the windows of the respondent's house, and there was an implied contract that he should do so. He came to do the work without being specially summoned, and the service did not depend on anything said or done on each particular occasion. These features of the case distinguished it from *Hill v. Begg*.¹ Further, even if the appellant's employment were held to be of a casual nature, he was nevertheless entitled to compensation. The appellant was engaged to clean all the windows of the house, and among these were the windows of a room used as a surgery. These facts were sufficient to satisfy the condition that the employment was for the purpose of the employer's business. This was illustrated by the fact that in the case of a house containing a surgery the Inland Revenue authorities allowed a deduction in the duties paid on the ground that the surgery was used in connection with a business or profession.

Counsel for the respondent was not called on.

LORD STORMONTH-DARLING.—The question of law in this case is whether the appellant was a workman in the employment of the respondent within the meaning of the Workmen's Compensation Act, 1906, so as to entitle him to compensation under that Act. The Sheriff-substitute before whom the case came assolzied the respondent from the conclusions of the petition, and I am of opinion that he was right in so deciding the case.

The solution of the question depends upon the definition of "workman" contained in the thirteenth section of the Act. That section provides that "workman" "does not include . . . a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business." Under this section, therefore, in order to entitle the appellant to compensation it is essential (first) that his employment should not have been of a casual nature, and (second) that it was for the purposes of the respondent's business. Both of these conditions must be present.

Now, with reference to the first of these requirements, the facts as found in the case are that the appellant did not wait for a special invitation on each occasion, nor did he ask special permission, but called at the respondent's house, was admitted, and did the work. There was no formal

* The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 13, enacts:—"In this Act, unless the context otherwise requires, . . . 'Workman' does not include any person employed otherwise than by way of manual labour whose remuneration exceeds two hundred and fifty pounds a year, or a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business. . . ."

¹ June 4, 1908, T. L. R., vol. 24, p. 711.

contract between the parties, and the respondent might have engaged other persons to clean the windows, and might have refused the appellant admittance whenever he came prepared to clean the windows. Could there be a more typical example of employment of a casual nature than this? The appellant went to the respondent's house on each occasion on the chance of being permitted to clean the windows. That chance was no doubt a good one, but it cannot possibly be said that the employment was, to use the words of Buckley, L. J., in *Hill v. Begg*,¹ either permanent or periodic. Accordingly, I think that the appellant has failed to shew that his employment was other than of a casual nature.

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LdStormonth-Darling.

Further, I am of opinion that the appellant was not employed for the purposes of the respondent's business. It was argued that the fact that the appellant cleaned the windows of the rooms in the house used by the respondent in connection with his medical practice was sufficient to satisfy this requirement. I cannot agree with this argument, and in my opinion it would be absurd to make the respondent's liability to compensate the appellant turn upon the question whether the appellant had or had not, on the particular occasions on which he went to the house, cleaned the windows of the surgery as well as the other windows of the house. Essentially the employment was in connection with the respondent's private residence, and not for the purposes of his business. On the whole matter, I am of opinion that we should answer the question of law in the negative.

LORD LOW.—I am of the same opinion. The facts stated by the Sheriff in the case shew clearly that there never was a standing contract or one for the future between the appellant and the respondent, but that on each occasion upon which the former called at the latter's house an implied contract was entered into between them applicable only to that particular occasion. It is no doubt true that the appellant had reasonable grounds for believing that he would be employed when, in ordinary course, he called at the respondent's house. That he was probably justified in expecting, but certainly he had no right to demand employment. It appears to me that, strictly regarded, his calling at the house was on each occasion an application for employment, and his admission by the respondent's servant an acceptance on the respondent's part of his application. I therefore have no hesitation in holding that the employment was of a casual nature.

Mr Thomson, however, contended further that, even if that was so, the appellant was none the less a "workman" within the meaning of section 13 of the Act, because he was employed "for the purposes of the employer's trade or business." It seems to me that to say that a window cleaner who cleans the windows of a doctor's house, among them being the windows of his surgery or consulting-room, is employed for the purposes of the doctor's trade or business, is straining the language of the Act beyond all sense and reason.

I will only add that I concur in the opinions delivered by the learned Judges in the English case of *Hill v. Begg*,¹ which was cited to us, and

¹ 24 T. L. R. 711.

July 3, 1908. which seem to me to apply in terms to the circumstances of the case now before us.
 Rennie v. Reid.

LORD ARDWALL concurred.

The LORD JUSTICE-CLERK was absent.

THE COURT answered the question in the negative.

WEIR & MACGREGOR, S.S.C.—MITCHELL & BAXTER, W.S.—Agents.

No. 157. MISS ALEXANDRINA DUNBAR, Pursuer (Respondent).—*Dickson, K.C.*—*D. M. Wilson.*

July 4, 1908. MRS ELIZABETH WEBSTER MACDONALD or GILL, Defender (Appellant).
 Dunbar v. Gill. —*D.-F. Campbell—Munro.*

Lease—Long Lease—Right in security—Assignment in security of long lease—Action of mailles and duties—Competency—Statute—Registration of Leases (Scotland) Act, 1857 (20 and 21 Vict. cap. 26), secs. 6 and 20—Heritable Securities (Scotland) Act, 1847 (10 and 11 Vict. cap. 50), sec. 2.—The Registration of Leases (Scotland) Act, 1857, which provides for the recording of long leases, and for the granting of assignments in security of such recorded leases, enacts, sec. 6, that the creditor or party in right of such assignment in security “shall be entitled, in default of payment” of capital or interest, to apply to the Sheriff for a warrant to enter on possession, and that such warrant, if granted, “shall be a sufficient title for such creditor or party to enter into possession of such lands and heritages, and to uplift the rents from any subtenants therein.”

Held that as the statute, in giving to the person in right of such assignment in security a right to enter on possession and uplift the rents, had provided a special procedure for his doing so, it by implication excluded any other mode of procedure, and that an action of mailles and duties at his instance was incompetent.

Sheriff of Inverness, Elgin, and Nairn. By lease, dated August 1866, the Earl of Seafield leased to James M’Gillivray, certain subjects in Grantown, known as Parkburn House, for the period of nineteen years from Whitsunday 1850, with an obligation to renew the lease for seven further periods of nineteen years each, and the lease was duly recorded. In 1874, James M’Gillivray, by a recorded assignment and conveyance, assigned the lease to Marmaduke Gill. In 1894 Marmaduke Gill sold the lease to Dr William Gill, who died in 1906, leaving as his sole executor and trustee, his widow, Mrs Elizabeth Webster Macdonald or Gill.

By a duly recorded bond and assignment in security, dated March 1877, which contained an assignment of the rents, Marmaduke Gill had assigned the lease to William Grant, in security of a loan of £700, and in 1882, by a recorded translation and assignment, William Grant transferred his rights as creditor under that bond and assignment to Miss Alexandrina Dunbar.

In May 1907 Miss Alexandrina Dunbar brought an action of mailles and duties, in ordinary form, in the Sheriff Court at Elgin, against Mrs Elizabeth Webster Macdonald or Gill and the subtenant in occupation of the subjects of the lease, in which the pursuer averred that the principal sum due under the bond had not been repaid, and that the interest had fallen into arrear, and craved the Court to ordain the subtenants to pay their rents, mailles, and duties to Miss Dunbar. The pursuer’s condescendence contained a reference

to the original lease, and to the assignations and translations thereof, July 4, 1908. but contained no averment that the original lease had ever been renewed by the Earl of Seafield or his representatives.

Dunbar v.
Gill.

The subtenants did not appear to defend the action, but defences were lodged for Mrs Gill, in which she averred:—"Explained that the lease specified in said deeds was a lease for the space of nineteen years from the term of Whitsunday 1850, and it had lapsed and come to an end prior to the date of the bond and assignation in security founded on. The pursuer was never in possession of the subjects, and never had any real right, and she has no valid right or title to uplift the rents of the subjects." She also lodged a statement of facts which, besides containing statements dealing with the merits of the cause, contained this averment:—"This defender is the executrix and trustee of the deceased Dr William Gill, who resided at Beech House, Radcliffe, Lancashire, and who, at the time of his death in the year 1906, was owner of heritable subjects at Grantown-on-Spey, known as Parkburn House, and of which subjects the other defenders are tenants."

The pursuer pleaded, *inter alia*;—(1) The pursuer being entitled, in virtue of said bond and assignation in security, to enter into possession of said subjects and uplift the rents thereof, decree should be pronounced in terms of the conclusions of the summons.

The defender pleaded;—(1) The pursuer has no title to sue. (3) The averments of the pursuer are irrelevant, and insufficient to support the prayer of the petition. (7) The pursuer not being entitled, in virtue of the bond and assignation in security libelled, to enter into possession of the subjects and uplift the rents thereof, the action should be dismissed, and this defender found entitled to expenses.

On 8th July 1907 the Sheriff-substitute (Webster), after a debate on the relevancy, allowed a proof, and on appeal the Sheriff (Wilson) affirmed that interlocutor. Thereafter the defender lodged a minute departing from the defences which involved matters of proof, and on 5th November 1907 the Sheriff-substitute pronounced an interlocutor decerning against the defenders in terms of the prayer of the petition.*

The comparing defender appealed to the Court of Session, and the case was heard before the First Division on 1st July 1908.

Argued, *inter alia*, for the defender and appellant;—(1) The pursuer had failed to set forth any relevant averment that she was entitled to uplift these subrents. She could only do so as the assignee of a security validly created, by virtue of the Registration of Leases Act, 1857,† over a registrable long lease, viz., a lease for

* In his note the Sheriff-substitute referred to the defences raising matters of proof being departed from, and stated that, in his opinion, the other defences were irrelevant.

† The Registration of Leases (Scotland) Act, 1857 (20 and 21 Vict. cap. 26), which in section 4 makes provision for assignations in security of long leases recorded under the Act, enacts,—Sec. 6. "All such assignations in security as aforesaid shall, when recorded, be transferable, in whole or in part, by translation in the form as nearly as may be of the Schedule (D) to this Act annexed; and the recording of such translation shall fully and effectually vest the party in whose favour it was granted with the right of the granter thereof in such assignation in security to the extent assigned; and the creditor or party in right of such assignation in security, without prejudice to the exercise of any power of sale therein contained, shall be entitled, in default of payment of the capital sum for which such assigna-

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thirty-one years. The lease here was *ex facie* only for nineteen years, and was only registrable on the ground that there was an obligation to renew which would bring it over the necessary thirty-one years.¹ But at the date of the assignation in security in question here—viz., 1877—the original nineteen years had expired, and the lease had presumably lapsed, and there was no averment on record that the lease had been renewed, nor was there any averment from which such a renewal could be inferred. In the absence of such averments it was not to be presumed that this was either a validly registered lease, or that there was any lease whatever in existence at the date of the alleged assignation in security, and therefore the pursuer had failed to set forth a relevant title. (2) Even if the pursuer had a right to uplift these subrents she could not enforce that right by an action of mails and duties, but must follow the statutory procedure for attaching subrents provided by section 6 of the Registration of Leases Act. The pursuer here was not founding on a common law right of security, but solely on a statutory right, and if she desired to take the benefits of the statute she must strictly follow the procedure laid down by the statute.² The provisions in the statute of a particular method of attaching subrents excluded by implication the ordinary method, and it had been held that the assignee of a security over a long lease could not have recourse to the remedy of poiding the ground.³ The reference in section 20 of the Registration of Leases Act to certain clauses in the Heritable Securities Act, 1847, did not help the pursuer, for in the clauses referred to there was no mention of an action of mails and duties. This action therefore should be dismissed.

Argued for the pursuer and respondent;—(1) There was no question that the pursuer was validly in possession of this security. This was not a lease for nineteen years, but a lease for seven times

tion in security has been granted, or of a term's interest thereof, or of a term's annuity, for six months after such capital sum or term's interest or annuity shall have fallen due, to apply to the Sheriff for a warrant to enter on possession of the lands and heritages leased; and the Sheriff, after intimation to the lessee for the time being, and to the landlord, shall, if he see cause, grant such warrant, which shall be a sufficient title for such creditor or party to enter into possession of such lands and heritages, and to uplift the rents from any subtenants therein, and to sublet the same, as freely and to the like effect as the lessee might have done: Provided always, that no such creditor or party, unless and until he enter into possession as aforesaid, shall be personally liable to the landlord in any of the obligations and prestations of the lease."

Sec. 20. "The several clauses in the Schedules to this Act annexed shall be held to import such and the like meaning, and to have such and the like effect as is declared by the Act of the 10th and 11th of Queen Victoria, chapter 50, sections second and third, to belong to the corresponding clauses in the Schedule to the said recited Act annexed . . ."

The Heritable Securities (Scotland) Act, 1847 (10 and 11 Vict. cap. 50), sec. 2, enacts:—"The clause of assignation of rents to become due or payable shall be held to import an assignation to rents from and after . . . (a certain term) . . . including therein a power to the creditor, on default in payment, to enter into possession of the lands disposed in security and uplift the rents thereof subject to accounting. . . ."

¹ Registration of Leases (Scotland) Act, 1857, sec. 17.

² Russell v. Campbell, July 25, 1888, 26 S. L. R. 209.

³ Luke v. Wallace, March 13, 1896, 33 S. L. R. 474.

nineteen years, and as soon as this tenant had entered under the original lease he had a real right for the whole period.¹ The lease here, being renewable for a definite period of years, was distinguishable from cases where the period was indefinite. Further, in case of a lease with an obligation to renew, if the tenant remained in possession after the expiry of the original period, the renewal was implied.² The pursuer's averments clearly inferred the continued subsistence of this lease. The defender's statements also clearly inferred it, for the whole nature of her defences on the merits was based on the supposition that the lease still continued. In any event, if the defender had intended to press this point, it should have been raised in the defences by a clear statement that the lease had not been renewed, and any such statement was carefully avoided here. (2) An action of mails and duties at the instance of a holder of a security over a long lease was competent, being imported into the 1857 Act by the reference in section 20 thereof to the 1847 Act. That reference gave the assignation of rents the same effect that it had under the 1847 Act, and one effect of it under that Act was that it could be enforced by an action of mails and duties.³ The fact that another remedy was, in special circumstances, provided by section 6 of the 1857 Act did not affect the question. Both remedies were given by the statute, and there was no reason why they should not exist concurrently.⁴

At advising on 4th July 1908,—

LORD M'LAREN.—This is an appeal from the judgment of the Sheriff-substitute of Inverness, Elgin, and Nairn, in an action in the form of an action of mails and duties, instituted by the assignee (in security) of a tenant under a long lease granted by the Earl of Seafield of subjects in Grantown. The action is directed against subtenants, and concludes against them for payment of their rents to the secured creditor.

The title founded on is a lease or tack, dated 14th August 1866, which narrates that the Earl's predecessors had let to the deceased John Steuart the subjects in question with entry at Whitsunday 1812, and that for the space of nineteen years, with a promise to renew the said tack or lease for a space of other nine nineteen years. On this narrative Lord Seafield lets to James M'Gillivray (then in right of the obligation), and his heirs and assignees, the subjects as therein described, and that for the space of nineteen years from the term of Whitsunday 1850, which was thereby declared to be the commencement of a third nineteen years' lease, with obligation to renew in terms of the original grant.

The condescendence states that this lease was by James M'Gillivray assigned to Marmaduke Gill, through whom the present tenant, Mrs Elizabeth Macdonald or Gill, derives right. The said Marmaduke Gill assigned the leasehold subjects to William Grant in security of a loan of £700, and the pursuer, Miss Dunbar, has acquired the creditor's right in the bond and assignation in security. These facts are undisputed.

The first objection to the action is that the lease, which, as I have said,

¹ Rankine on Leases, 2nd ed., p. 133; Wight v. Earl of Hopetoun, (1763) M. 10,461; Scott v. Straiton, (1771) M. 15,200.

² Bell's Prin., sec. 1190.

³ Bell's Com., i. 793.

⁴ The case of Edmond v. Magistrates of Aberdeen, Nov. 16, 1855, 18 D. 47, was also referred to.

July 4, 1908. is for nineteen years from Whitsunday 1850, has not been renewed. This objection if tabled in the record in the Sheriff Court would probably have been fatal to the diligence. But the objection is purely technical, because Lord Seafield is under obligation to renew the lease, and as it does not appear on the face of the record that the lease has not been renewed, the objection is not raised in a form which makes it necessary for a Court of Appeal to dispose of it.

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—
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The next objection is that an action of mails and duties is not a species of diligence which is open to a creditor who has no higher security than an assignation of a leasehold interest.

It has not been, and could not seriously be, disputed, that the right of a heritable creditor to compel the tenants to pay their rents to him when the proprietor is in arrear, is a right which, at common law, is only competent to a creditor who holds a security over a feudal estate. But, on behalf of the pursuer it was maintained that the Act of Parliament which provides for the registration of long leases in the Register of Sasines (20 and 21 Vict. cap. 26) had put creditors holding securities over registered leases in the same position as proper heritable creditors.

The 20th section of this Act provides that the several clauses in the schedules to this Act annexed shall have the same meaning and effect as is declared by the Act 10 and 11 Vict. cap. 50, secs. 2 and 3, to belong to the corresponding clauses in the schedule to the said recited Act, and also that the procedure for a sale at the instance of a heritable creditor shall be applicable to a sale of any such lease assigned in security. I am here giving only the substance of the clause. Now, the first and second schedules to the Long Leases Act, which are the forms for an absolute assignation and an assignation in security respectively, contain the words, "I assign the rents." I do not doubt that this abridged clause is capable of expansion in terms of the Act 10 and 11 Vict. cap. 50, and that it imports an effective assignment of the benefit of the rents in favour of the creditor. It seems to follow (but I do not wish to express an unqualified opinion on a point which is not before us) that if this assignment were properly intimated to the tenants, the bondholder would have a preference in bankruptcy. But I do not find in either of the statutes referred to anything importing a declaration that the diligence known as an action of mails and duties is to be open to a creditor holding a security over a registered lease.

But for section 6 of the Long Leases Act there might be room for the argument that the power of compelling the subtenant to pay to the secured creditor was given by implication. But as in general an express power will exclude an implied power, where the conditions are different, I must hold that the argument is displaced by the 6th section, which gives a remedy to the creditor *ejusdem generis* with an action of mails and duties, but under different conditions. The substance of the provision is that where there is default of payment of the capital sum or interest for the period of six months, the creditor may apply to the Sheriff for a warrant to enter on possession of the lands and heritages leased, and that the Sheriff, after intimation, shall, if he see cause, grant such warrant, which, as the statute explains, will empower the creditor to uplift rents from subtenants. Now, an action of mails and duties is a proceeding under which the pursuer may

obtain, as matter of right, a decree in absence, but this is a very different right from that of obtaining a warrant *causa cognita* from a Judge. It is impossible to suppose that the Legislature intended that these rights should subsist concurrently, and I therefore come to the conclusion that the pursuer has been wrongly advised as to her remedy, and that her right to the rents payable by subtenants could only be made effectual by means of a special warrant in terms of the 6th section of the statute. The appeal must therefore be sustained, and the action dismissed.

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LORD KINNEAR.—I agree, and I think that the ground your Lordship has stated is sufficient for the decision of the case. We had a variety of criticisms from the Dean of Faculty on the whole procedure before us which, if it were necessary, would require consideration in detail. I am disposed to think that the greater number of the defects pointed out by the learned Dean are mere apparent anomalies which do not go to the substance of the matter at all, and are perhaps necessarily consequent upon the main provisions of the statute. The purpose of the statute, so far as we are concerned, is to enable the holders of leasehold ground to give a real security to their creditors which may be effectual notwithstanding that there is no immediate change in the natural possession; and in order that that design may be carried out the statute authorises, with reference to leases, proceedings which are more properly applicable to rights of property in land, and uses language which is more appropriate to titles of property than to leases. But then it is just because that is so that I think we must be cautious, in reading particular instruments, against being over critical, in case we should thereby be going against the plain design and purpose of the statute. The main purpose of the statute is in itself simple enough, and the methods prescribed seem to me to rest upon perfectly sound analogies, and I am disposed to think that there is no difficulty in carrying out the purpose of the Act.

But there remain two objections which appear to me to be formidable. The first, upon which I desire to express no decided opinion, and I think your Lordship in the chair has expressed none, is that the pursuer has not established any sound statutory basis for the procedure at all, because she has not disclosed upon the face of her proceedings that she does hold a statutory security over an existing lease recorded in the Register of Sasines. That is the fundamental basis of the whole proceeding, and if it be so, there is an end of the question. I am not satisfied that the answer to this question which was maintained by Mr Dickson is perfectly sound, because it is a fundamental condition of the pursuer's right to an action of this kind that it should be shewn to be based upon the real right which the statute requires in order to support the proceedings at all. The criticisms upon the defender's record may be formidable enough, but an *ad hominem* argument will not support a diligence in execution against land, and therefore I am not satisfied that the Dean's objection on this point has been met.

But I do not desire to express any final opinion on the subject, which would require an examination of the whole series of instruments, because the other ground upon which your Lordship has proceeded is sufficient. The pursuer's case in support of this proceeding is rested upon the importing of the second section of the Heritable Securities Act, 1847, into the

July 4, 1908. *Registration of Leases Act, 1857*, by the terms of the 20th section of the latter, and the argument is that if these two enactments are read together there is statutory authority for enforcing the right by an action of mails and duties. Now, the second section of the *Heritable Securities Act* says nothing about an action of mails and duties. The 20th section of the *Registration of Leases Act* says that the several clauses in the schedules annexed to the Act, which have been followed in the instruments now before us, "are to import such and the like meaning, and to have such and the like effect, as is declared by the Act of 10 and 11 of Queen Victoria, chapter 50, sections 2 and 3," to belong to the corresponding clauses in the schedule to that Act. Now, section 2 of the *Heritable Securities (Scotland) Act* is the section with which we are concerned, and all that it says, so far as applicable to the present question, is that the clause of assignation of rents shall be held to import an assignation to rents from and after a certain term in the fuller form generally in use, "including therein the power to the creditor, in default in payment, to enter into possession of the lands disposed in security and uplift the rents thereof." Now, if that were the enactment upon which the present pursuer had to proceed, I could see a very sound argument for saying that that must mean an action of mails and duties, because no other process is prescribed for entering into possession, and therefore it might be said that the ordinary procedure known to the law is that which is to be followed. But when we read that provision as part of the *Registration of Leases Act*, we find that the statute itself provides a special proceeding for entering into possession, because the sixth clause sets out in terms the specific method by which a creditor is to enter upon possession of the lands and heritages and to uplift the rents from any subtenant. I take it to be a general rule of law that when an Act of Parliament creates a new right, and at the same time prescribes a new method of procedure for giving effect to it, anyone who desires to take advantage of the Act must follow strictly the prescribed procedure. The pursuer has not followed the procedure, but has gone outside the terms of the statute, and has adopted a form of procedure which it does not recognise, and therefore I am of opinion with your Lordship that this proceeding falls.

LORD DUNDAS.—I am of the same opinion.

The LORD PRESIDENT and LORD PEARSON were absent.

THE COURT sustained the appeal and dismissed the action.

MORTON, SMART, MACDONALD, & PROSSER, W.S.—CLARK & MACDONALD, S.S.C.—Agents.

No. 158.

WILLIAM BELL, Claimant (Appellant).—*Morison, K.C.*—*Jameson.*
JOHN GORDON GRAHAM, Respondent.—*Johnston, K.C.*—*Inglis.*

June 16, 1908.

Bell v.
Graham.

Lease—Compensation for Improvements—Agreement—Fair and reasonable Compensation—Arbitration—Powers and Duties of Arbitrator—Agricultural Holdings (Scotland) Act, 1883 (46 and 47 Vict. cap. 62), sec. 5, and Agricultural Holdings Act, 1900 (63 and 64 Vict. cap. 50), secs. 1 and 2 (1).—The Agricultural Holdings (Scotland) Act, 1883, sec. 5, enacts that where "any particular agreement in writing secures to the tenant" for certain

improvements "fair and reasonable compensation, having regard to the June 16, 1908. circumstances existing at the time of making such agreement, then in such case the compensation in respect of such improvement shall be payable in pursuance of the particular agreement and not under this Act." Bell v. Graham.

The Agricultural Holdings Act, 1900, sec. 1, enacts that, subject to the above enactment, a tenant shall, on quitting his holding, be entitled as compensation to such sum as represents the value of the improvement to an incoming tenant, and by sec. 2 (1) enacts that when landlord and tenant do not agree as to compensation, the question must be settled by arbitration.

In an arbitration between a landlord and an outgoing tenant as to the amount of compensation for improvements to which the tenant was entitled, the tenant objected to the scale of compensation fixed by the lease at the commencement of his tenancy on the ground that it was not fair and reasonable, and claimed compensation on the scale fixed by the Act of 1883.

Held by a majority of a Court of seven Judges (Lord President, Lord Justice-Clerk, Lord M'Laren, Lord Kinnear, and Lord Low, *diss.* Lord Stormonth-Darling and Lord Ardwall), that the arbiter, in order to explicate his jurisdiction, was bound to decide whether the scale of compensation fixed by the lease was, at its date, fair and reasonable and so fell to be applied.

Observed that the decision of the arbiter on this question would not be final, and might be challenged in a process of interdict or of reduction.

By written offer dated 3d November 1899 William Bell offered to become tenant of the farm of Wyseby Mains in the county of Dumfries, the property of Major-General John Gordon Graham, upon certain conditions prefixed to the offer, which conditions he bound himself to fulfil; and by written acceptance dated 9th November 1899 Major-General Graham accepted this offer. The conditions referred to were in writing, and were enumerated in twenty-two clauses, each of which was separately signed by both landlord and tenant. Clause 16 provided:—"The landlord hereby undertakes to execute all the improvements specified in the first and second parts of the Schedule to Agricultural Holdings (Scotland) Act, 1883, on such terms as may from time to time be agreed upon in writing; and the tenant agrees that the landlord shall have the sole right to execute said improvements at such times and whenever the landlord considers them necessary. As to the improvements specified in the third part of the Schedule to Agricultural Holdings (Scotland) Act, 1883, it is hereby agreed that the tenant shall be entitled, on quitting his holding at the termination of his tenancy, to obtain from the landlord compensation only in accordance with the following scale." Then followed a long scale (described by Lord Stormonth-Darling, *infra*, p. 1068) applicable to various classes of improvements of the kinds specified in the third part of the Schedule to the Agricultural Holdings (Scotland) Act, 1883, and in Part III. of the First Schedule to the Agricultural Holdings Act, 1900.* 2d Division. with three consulted Judges. Sheriff of Dumfries and Galloway.

At the expiry of the lease the tenant gave notice of a claim for compensation, and instituted arbitration proceedings under the Agricultural Holdings Act, 1900. The arbiters appointed by the landlord and by the tenant having declined to act, the arbitration devolved upon the oversman, Mr Robert Francis Dudgeon, of Cargen, who had been appointed by the Board of Agriculture and Fisheries.

William Bell, the tenant, maintained that the compensation pro-

* The sections of the Acts of 1883 and 1900 which are relevant to this case are quoted in the opinions of the Lord President and Lord Stormonth-Darling.

June 16, 1908. *vided* by the agreement contained in clause 16 of the provisions prefixed to the offer and acceptance above mentioned was unfair and unreasonable, and that the said agreement was therefore void, and ought to be ignored by the oversman, and that the oversman should award compensation under the Agricultural Holdings Act, 1883.

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The landlord, on the other hand, contended that the said agreement provided compensation such as was, by said Act, permitted to be substituted for the compensation thereunder, and that the oversman should give effect to it in his award; and further, that the oversman was not entitled, at his own hand, to set aside or ignore said agreement, but must give effect to it.

The oversman had difficulty in deciding between these two contentions, and in particular as to whether he had the power or right to consider the tenant's contention that he should ignore said agreement as being void, in respect it was unfair and unreasonable.

He therefore, in terms of section 2 (6) and section 9 of Part I. of the Second Schedule to the Agricultural Holdings Act, 1900, stated a case for the opinion of the Sheriff upon the following question of law:—"Whether the oversman is entitled to set aside or ignore as void the agreement contained in said lease providing compensation to the tenant for improvements on the scale and as therein specified, in lieu of compensation under the third part of the Schedule to the Agricultural Holdings (Scotland) Act, 1883, if in his opinion 'fair and reasonable' compensation is not thereby substituted for the compensation exigible under said Act, or must the oversman give effect to this agreement and scale of compensation unless or until the same is set aside or reduced by a competent Court?"

On 6th December 1907 the Sheriff (Fleming) pronounced this interlocutor:—"Finds, in answer to the question put, that the oversman must give effect to the agreement and scale of compensation therein mentioned unless and until the same is set aside or reduced by a Court of law."*

* "NOTE.—The Agricultural Holdings (Scotland) Act gives to a tenant farmer compensation for improvements. The value of this right is, if possible, to be ascertained by agreement between the landlord and tenant. This agreement may be entered into not only at the termination of the lease after the claim for compensation is lodged, but also at any earlier stage even in the lease itself. It may be complete in that it contains all the factors for ascertaining the money value of the compensation, or partial, containing only certain of such factors.

"When the parties have not been able to come to any agreement either before or after the termination of the lease, or when the agreement is only partial, the Acts provide for the ascertainment of the value of the compensation by a statutory reference. What the reference includes is the ascertainment of the said value, with or without any factors that may have been agreed upon. But the Acts provide that the agreement, if entered into in anticipation of the claim, shall only be held as substituting the particular factors agreed upon for these which the parties themselves or the referee may adopt if they will result in 'fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement.'

"It may be that such an agreement is challenged by one or other of the parties, but that challenge does not extend the limits of the reference. The factors to be used by the referee are agreed upon, and until that agreement is set aside the referee has no option but to use them.

"I was asked to interpret the Acts by what, it was argued, was their obvious

William Bell, the tenant, appealed to the Court of Session. The case was heard before the Second Division on 28th January 1908, and was taken to *avizandum*. Thereafter on 25th February 1908 the case was appointed to be heard before the Second Division with three Judges of the First Division. The hearing before the seven Judges took place on 10th March 1908.

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Argued for the appellant;—There had to be an arbitration under the Act here in any case, whether compensation was to be awarded in accordance with the agreement or in accordance with the Acts.¹ The arbiter could not proceed in the arbitration without deciding the question whether the agreement was fair and reasonable. Where a jurisdiction was conferred by statute, all powers necessary to give effect to it were implied. Section 20 (2) of the Act of 1883, which, although repealed by the Act of 1900, might still be referred to for purposes of interpretation, also shewed that the question of fairness and reasonableness was one for the arbiter's decision. It was not enough that there was an agreement in existence. There was a sharp contrast between the question arising under sections 3 or 4, or the first paragraph of section 5 of the Act of 1883, and the question arising under the second paragraph of section 5. In the former cases the only question was as to the existence of the consent, notice, or agreement. In the latter there was a question as to the quality as well as the existence of the agreement. Before the arbiter could proceed to award compensation under such an agreement he must be satisfied that it was fair and reasonable. Unless the agreement provided fair and reasonable compensation it was void. The arbiter was therefore bound to consider the terms of the agreement, and was only entitled to give effect to it in so far as it provided fair and reasonable compensation. It made no difference whether the agreement was formal or informal. If the arbiter decided wrongly on the question as to the fairness and reasonableness of the compensation provided by the agreement, his decision was subject to review. Such a decision was a decision on a question of mixed fact and law, and upon any question of law or mixed fact and law there was a right of appeal.

Argued for the respondent;—The arbiter had no jurisdiction to determine the question whether an agreement provided "fair and reasonable compensation." All that he was given jurisdiction to determine was the amount, time, and mode of payment of the compensation, failing agreement upon these points between landlord and tenant. He was really only a valuer. He was quite unfitted to decide a question such as the present, involving proof and questions

intention, viz. : that the tenant should be free from any obligation which he had undertaken unless it was approved of by the referee. I cannot do so. In the first place, it seems to me that a much more obvious intention of the Acts is to retain the binding effect on obligations solemnly entered into, unless there are substantial grounds for setting them aside. In the second place, I am not prepared by presuming the intention of an Act to hold that it has altered the law of the land. If the Legislature wished to make the referee under these Acts the judge of the validity of the agreement as to what was to be referred, and thus the judge of the extent of his own jurisdiction, it could easily have said so, but it has not."

¹ Agricultural Holdings (Scotland) Act, 1883 (46 and 47 Vict. cap. 62), secs. 5, 8, 16; Agricultural Holdings Act, 1900 (63 and 64 Vict. cap. 50), secs. 2 (1) and 7.

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of law, and there was no case in which he had been held entitled to do so. No jurisdiction to sit in judgment upon the contract of parties could be reasonably inferred by implication from a power to determine a question of amount of compensation. If an agreement as to compensation was tabled, the arbiter must give effect to it. The presumption was that an agreement concluded by two rational men was fair and reasonable. That presumption could only be rebutted by a decree of reduction or declarator. If the agreement was challenged by either party on the ground that it did not provide fair and reasonable compensation, then the proper course for the arbiter was to sist the arbitration until that question had been determined by a competent Court. Except in so far as expressly superseded by the Acts, the common law of the land must still receive effect, and the jurisdiction of the arbiter could not be held by implication or upon ambiguous expressions to be extended so as to oust the common law.¹ It was for a Court to say whether the freedom of contract, which the Acts left to parties, had or had not been validly exercised.²

The LORD PRESIDENT referred to *Newby v. Eckersley*.³

At advising on 16th June 1908,—

LORD PRESIDENT.—(After stating the facts)—The question is one of considerable practical importance in the working of the Act, and as I am aware that there is a difference of opinion among your Lordships, I do not wonder at finding that it is not of easy solution. Nevertheless, the solution must depend on the terms of the statute, and the question of what consequences will follow is not, I think, one for which this tribunal is responsible.

I think it will conduce to clearness if I, for the moment, leave on one side the judgment of the learned Sheriff and approach the matter from the outset.

The Act of 1900 partly repeals and partly embodies the earlier Act of 1883. We must, therefore, read the Act of 1900 with the unrepealed clauses of the Act of 1883 written into it.

The right to compensation is given by the 1st section of the Act of 1900—"Where a tenant has made on his holding any improvement comprised in the First Schedule to this Act, he shall, subject as in the Agricultural Holdings (England) Act, 1883 (in this Act referred to as the principal Act)"—this is by the application clause to be read for Scotland as Agricultural Holdings (Scotland) Act, 1883—"and in this Act mentioned, be entitled, at the determination of a tenancy, on quitting his holding, to obtain from the landlord as compensation under the said Acts for the improvement such sum as fairly represents the value of the improvement to an incoming tenant," and then follows a proviso which does not apply to the present case. That is the charter of the tenant.

Logically, the section that next follows is the 36th of the Act of 1883—"Any contract or agreement made by a tenant by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement specified in the schedule hereto (except an agreement pro-

¹ Agricultural Holdings (Scotland) Act, 1883, sec. 40.

² *Hamilton Ogilvy v. Elliot*, 1905, 7 F. 1115; *Sinclair v. Clyne's Trustees*, 1887, 15 R. 185; *Roddan v. McCowan*, 1890, 17 R. 1056.

³ L. R. [1899] 1 Q. B. 465.

viding such compensation as is by this Act permitted to be substituted for June 16, 1908. compensation under this Act), shall, so far as it deprives him of such right, ^{Bell v.} be void." That maintains the charter of the tenant. ^{Graham.}

I now assume that the tenant has made an improvement mentioned in the Schedule. The question of the position of agreements as to improvements outside the Schedule, to which some of the cases cited referred, is a different one, and really does not touch the present question. ^{Ld. President.}

What, then, is the tenant to do? That is fixed by section 2 (1) of the Act of 1900—"If a tenant claims to be entitled to compensation, whether under the principal Act or this Act, or under custom, agreement, or otherwise, in respect of any improvement comprised in the First Schedule to this Act, and if the landlord and tenant fail to agree as to the amount and time and mode of payment of such compensation, the difference shall be settled by arbitration in accordance with the provisions, if any, in that behalf in any agreement between landlord and tenant; and in default of and subject to any such provisions, by arbitration under this Act in accordance with the provisions set out in the Second Schedule to this Act."

Now, reverting to section 1, it will be remembered that the right to compensation is "subject to the principal Act." That lets in as one of the conditions the unrepealed section 5, and the bit of section 5 which applies to the matter in hand is the second paragraph, which is as follows:—"Where, in the case of a tenancy under a lease beginning after the commencement of this Act, any particular agreement in writing secures to the tenant for any improvement specified in the third part of the schedule hereto, and executed after the commencement of this Act, fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement, then in such case the compensation in respect of such improvement shall be payable in pursuance of the particular agreement and not under this Act."

Taking, now, the phrase in section 2, "whether under the principal Act or this Act, or under custom *or agreement* or otherwise," I come to the clear conclusion that the result is that in default of provision in the agreement itself for arbitration (which is the case here) *there must be an arbitration under the Act to determine the compensation.* I emphasise this because I understand that at least one of your Lordships is of opinion that the true operation of an agreement such as we have here is to take the matter out of the arbitration clauses altogether, leaving the tenant to recover by an action at common law, founding upon an arithmetical calculation of the sums due and reckoned in accordance with the factors set forth in the agreed-on scale calculated according to averred facts of expenditure. I do not hold that view, but I remark, in passing, that if it were right, the question would not fall to be answered as the Sheriff has done, and, indeed, could not, in the terms put, be answered at all.

There being then (to revert to my own opinion) an arbitration, what is the arbiter to do? He has presented to him an agreement which substitutes an agreed-on scale of compensation for the scale which, so to speak, resides in his own breast and which he would apply in an ordinary case. Such substitution is not against the terms of the Act. It is expressly recognised and legalised by the terms of section 36: "An agreement providing such

June 16, 1908. compensation as is by this Act permitted to be substituted for compensation under this Act."

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But it is not every substituted scale which is "permitted." It is only one in terms of, *inter alia*, section 5, and that is not absolute, it is conditional; conditional on being "fair and reasonable, having regard to the circumstances at the time of making" the agreement.

Now, I will revert in a little to an examination of what is the true meaning of this condition, but for the moment I pursue the duty of the arbiter. He has got to go on with the arbitration. He has tabled to him an agreed-on scale. He is told by the statute that he is to take that scale and not any notions of his own, but only if that scale is fair and reasonable, having regard to the circumstances existing at the making of the agreement. The agreement is challenged by one of the parties as not fulfilling these conditions. I ask how is it possible that the arbiter should not be obliged to make up his own mind on the subject in order to see what he is to do next?

The learned Sheriff says no. There is the agreement. It gives the factors of computation, and the arbiter must take those, and not those of his choice, unless and until the agreement is put out of existence by appropriate process of law. That reasoning seems to me simply to cut out of the section of the Act of Parliament all the words (if I may coin an expression) of conditionality. It might well have been so. One might well think that if parties of full age set their minds to an agreement, that that might be allowed to stand. But that is not what the Act says. It does not say "If an agreement duly signed"; it says, "If an agreement which secures fair and reasonable compensation having regard to," &c.

Accordingly, I reluctantly am compelled to differ from the Sheriff, and to hold that the arbiter, if a tabled agreement is challenged, must proceed to determine the question whether such agreement is, as the 36th section phrases it, a "permissible" agreement, in order to explicate his own jurisdiction to give or not to give compensation under the Act according to a scale deemed right by himself.

But now I hasten to say that the opposing contention, which seems, from the learned Sheriff's note, to have been pressed upon him as the proper alternative to his judgment, and which he repelled, is, in my opinion, entirely wrong and fallacious. The learned Sheriff says: "I was asked to interpret the Acts by what, it was argued, was their obvious intention, viz., that the tenant should be free from any obligation which he had undertaken unless it was approved of by the referee. I cannot do so," and then he gives his reasons.

Perhaps it was the horror against such an obviously unjust result which was partly the reason which led the Sheriff to his judgment. But in my view not only is the contention that the tenant should be freed from any obligation which he has undertaken unless it is approved of by the referee wrong, but it is fallacious, because it does not present itself as a necessary alternative.

Let me now revert to the true meaning of the condition. It really is quite plain, and it is difficult to find words to make it plainer than the words used. The criterion of fairness is not what the arbiter would apply as his scale now, or what anyone else would apply now, but it is, Was it

fair when entered into? i.e., in view of what was known and expected June 16, 1908. then; not what has happened since. But I go farther. If parties of full age sign an agreement the presumption of fact is very strong that it is fair and reasonable. Take the agreement in the present case with its careful wording and its signature to each clause. If ever agreement bore upon the face of it the marks of careful consideration, this one does. And the matter was one in which the tenant was probably more rather than less of an expert than the landlord. In such a case not only is the presumption of fact in favour of the agreement being fair and reasonable one of enormous strength—I do not hesitate to use the epithet—but I have no hesitation in saying that an averment in mere general terms that it is not fair and reasonable is an irrelevant averment, because wanting in specification. In other words, I say that the arbiter here would be wrong in considering the challenge of the agreement at all unless the tenant should particularise on the exact points in which the agreement was not fair and reasonable, and should condescend upon the reasons for so holding. I trust that arbiters who hereafter may be appointed in such cases will bear these words—which I hope I have expressed so clearly as not to admit of misunderstanding—steadily in mind; for if they do not, and merely—to use what I consider the unhappy phrase used here in the question—“ignore” the agreement, because *its* scale is not the same as *their* scale, they will not be doing their duty.

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 Ld. President.

I will add a further word which may, perhaps, if what I have said is not sufficient, induce caution.

It is a clear corollary from my judgment so far—in the result of which I am aware the majority of your Lordships concur—that though the arbiter must, as I have said, decide this question upon the agreement if challenged—yet his judgment will not be final. If he holds the agreement not fair and reasonable he will then proceed to award compensation according to his own scale. But to do so, if the agreement is really fair and reasonable, is to do something *ultra vires*, because the statute says that the agreement compensation is to be substituted for the ordinary compensation. Nothing, therefore, short of a positive enactment that on the point of the reasonableness of the agreement the arbiter's judgment was to be final,—and no such enactment is to be found,—could save his proceeding from the ordinary fate of a proceeding *ultra vires*. In other words, I am clear that if an arbiter treats as void a signed agreement as being not fair and reasonable, he may be interdicted from proceeding further, so that a Court of law may forthwith determine whether the agreement is fair and reasonable in regard to the circumstances under which it was entered into or not.

The question was mooted as to whether this point could not be raised by appeal on case stated. I think not; such appeal seems to me to be given on points arising within the jurisdiction, not for determining the limits of the jurisdiction. Further, I do not see how it could be conveniently tried in a form of process which does not allow the reviewing Court to have an inquiry into facts, for the “having regard to circumstances existing,” &c., necessitates an inquiry into fact, and the question on the merits is one in which fact and law are, in my opinion, inextricably involved. But even if it could be raised, I do not think that, viewing the question as I do as being

June 16, 1908. one of *ultra vires*, the common law jurisdiction of the Supreme Court could be held as excluded.

Bell v.
Graham.

Ld. President.

The result on the whole is that I think we should answer the question, but not exactly in the terms put, which, as I have indicated, are, I think, badly chosen, and apt to be misleading, and that we should say:—

That the arbiter, if the agreement tabled is challenged by the tenant as not being fair and reasonable under the circumstances existing at the time of making such agreement, is bound to decide that question for himself in order to determine his further procedure, but that he must bear in mind, first, that the criterion is the fairness and reasonableness of the agreement as viewed in the light of the circumstances at the time of making, and not the question as to whether it does or does not tally with the scale which the arbiter if left to himself would now apply; and second, that the agreement being signed by both parties, it is necessary for the party seeking to hold it not fair and reasonable to condescend specifically on the provisions objected to and the reasons for holding these provisions not fair and reasonable.

LORD STORMONTH-DARLING.—Major-General Graham of Moesknow is the landlord, and William Bell is the outgoing tenant of the farm of Wyseby Mains in Dumfriesshire. The lease of the farm by clause 16 contains an agreement entitling the tenant, “on quitting his holding at the termination of his tenancy, to obtain from the landlord compensation *only* in accordance with the following scale,” and then follows a scale defining for the last few years of the lease certain allowances for lime and bones and artificial manures and feeding stuffs, coupled with an obligation on the part of the tenant, whenever required by the landlord or his agent, to give a detailed account of the quality and quantity of the manures and feeding stuffs, and a corresponding right on the part of the landlord or his agent to take samples of such manures or feeding stuffs and to get them analysed. All this is described as “agreed to and signed” by both landlord and tenant.

The Agricultural Holdings (Scotland) Act, 1883, provides by section 5 that “where in the case of a tenancy under a lease beginning after the commencement of this Act, any particular agreement in writing secures to the tenant for any improvement specified in the third part of the schedule hereto, and executed after the commencement of this Act, fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement, then in such case the compensation in respect of such improvement shall be payable in pursuance of the particular agreement, and not under this Act.”

The unrepealed portion of section 16 of the Act of 1883 must be read along with section 5. It provides that “in any case provided for by sections 3, 4, or 5, if compensation is claimed under this Act, such compensation as under any of those sections is to be deemed to be substituted for compensation under this Act, if and in so far as the same can, consistently with the terms of the agreement, if any, be ascertained by the referees or the oversman, shall be awarded in respect of any improvements thereby provided for.” The important words which are thus left standing are “if and in so far as the same can, consistently with the terms of the agreement, if any, be ascertained by the referees or the oversman”; and the question

arises whether the determination of fairness and reasonableness of the June 16, 1908. agreed-on compensation can, consistently with the terms of the agreement, Bell v. be left to the referees or the oversman, or whether the mere fact of the Graham. compensation having been agreed on excludes all inquiry into the fairness and reasonableness of the compensation. Ld Stormonth-Darling.

The only other section of the Act of 1883 requiring to be noticed is the 36th section, which provides that "any contract or agreement made by a tenant by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement specified in the schedule hereto (except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act) shall, so far as it deprives him of such right, be void." But it is not maintained that this lease contains any contract or agreement which deprives the tenant of his right to claim compensation under the Act, so the 36th section does not seem to have any application to this case.

An arbitration was instituted under the Agricultural Holdings (Scotland) Acts, 1883 to 1900, for the purpose of settling certain differences which had arisen between the landlord, General Graham, and the outgoing tenant, Mr William Bell, and the arbiters appointed by the landlord and tenant having declined to act, Mr Dudgeon of Cargen was appointed by the Board of Agriculture and Fisheries to be oversman in the reference, and the arbitration devolved upon him.

In the course of the arbitration Mr Dudgeon stated this case for the opinion of the Sheriff on a question of law, and the question of law which he stated is appended to the case. The oversman, after setting out the opposing contentions of parties, stated that he had difficulty in deciding between these two contentions, and practically referred the question to the Sheriff without indicating any opinion of his own. The Sheriff, Mr Fleming, found, "in answer to the question put by the oversman that the oversman must give effect to the agreement and scale of compensation therein mentioned, unless and until the same is set aside or reduced by a Court of law." The tenant has now appealed to this Court under the 6th subsection of section 2 of the Act of 1900.

The question which we have to decide—and which must, equally with the question put to the Sheriff, be a question of law—is whether the Sheriff was right or wrong in the answer he gave.

There is perhaps not much practical difference between the opinion expressed by the majority of your Lordships and the learned Sheriff, for I do not understand that your Lordships, any more than the Sheriff, give any countenance to the notion that the opinion of the oversman can be a final opinion, or indeed any opinion at all, on a question of law. That must always be, in the end, a question for a Court of law. The oversman may have to apply the scale of compensation to the facts as he finds them, and work out the figures accordingly. The only relevant ground on which he could find that the compensation "secured" by the agreement was not fair and reasonable would be by holding that it was illusory and therefore void under the 36th section of the Act of 1883. But that, as I have said, is not alleged with regard to this agreement; and therefore I do not see what there is to prevent our getting at once to the real question of law, and

June 16, 1908. answering it as the Sheriff has done ; that is, by telling the oversman that he must give effect to the agreement and scale of compensation therein mentioned, unless and until the same is set aside by a Court of law.

Bell v.
Graham.

LdStormonth-Darling. When the landlord or tenant, as the case may be, has once put his hand to an agreement bearing, in all its several particulars (including the scale of compensation) that it had been "agreed to and signed" by both landlord and tenant, what did or could that mean but that each of them, being *sciens et prudens*, and taking all the terms on either side into consideration, thought the particular stipulation a fair and reasonable one to make as between man and man ? It is the first and most cardinal rule of all written contracts. And it clearly implies, not that somebody else thinks it fair and reasonable in itself, but that the party to the contract himself is satisfied with it as being fair and reasonable. If he is not so satisfied is there any rule more firmly established than this, that the party to a contract who proposes to repudiate it must be prepared to allege some reason for his repudiation, which will be judged of by the ordinary laws of relevancy ? That would have to be done if the tenant in the case raised the action which the Sheriff invites. Here the only introduction of the element of fairness and reasonableness of the proposed compensation is to be found in the statute itself, and the statute nowhere declares, or even indicates, that the judge of the fairness and reasonableness is to be the arbiters or oversman. Indeed, every indication in the statute is that agreement between landlord and tenant is favoured wherever it can be reached ; and it is only where the determination of fairness and reasonableness can be left to the referees or the oversman, consistently with the terms of the agreement, that they are invoked at all. In my view it is not consistent with the terms of the agreement that they should be so invoked. Moreover, I do not see how the question of law which, everybody admits, must be decided in the end, could be raised better or more sharply than it is in this case. So far as raised on the present averments of the tenant, these are plainly irrelevant for want of specification.

I should therefore be for refusing the appeal, and answering the question substantially as the Sheriff has answered it.

LORD LOW.—The Agricultural Holdings Acts provide that a tenant at the determination of a tenancy, on quitting his holding shall, subject to certain conditions, obtain from the landlord, as compensation for the improvements specified in the first schedule, such sum as fairly represents the value of the improvements to an incoming tenant.

The third part of the schedule comprises improvements in respect of which consent of, or notice to, the landlord is not required, and it is with such improvements only that the present case is concerned.

It is provided by the second section of the Act of 1900, which your Lordship has read, that if the landlord and tenant fail to agree in regard to the amount and time and mode of payment of compensation, the difference shall be settled by arbitration. Accordingly, in regard to all of these matters, the jurisdiction of the ordinary Courts is excluded ; and if the parties cannot agree, the only way in which their difference can be settled is by arbitration.

In this case there is an agreement between the landlord and the tenant ^{June 16, 1908.} (of a kind which I believe to be very common), fixing the scale upon which compensation for certain improvements of the kind enumerated in the third ^{Bell v. Graham.} part of the schedule is to be calculated. Of course, under such an agree- ^{Lord Low.} ment, the amount of money to be paid to the tenant as compensation depends upon the quantity of lime or other substance which has been applied to the land, and the time at which it has been so applied. If the parties cannot agree upon these points, and therefore cannot arrive at the amount of compensation to be paid, it is necessary for them to go to arbitration. That is what happened in this case; and if the only question had been the ascertainment of the amount of the compensation, by applying the agreed-on scale to such quantities of fertilising material as might be found to have been put into the land, the duty of the arbiter and the procedure to be adopted by him would have been clear enough.

The tenant, however, founding upon the fifth section of the Act of 1883, maintains that the agreement does not secure to him "fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement," and, accordingly, he asks the arbiter to settle the amount of compensation to be paid to him, not in accordance with the agreement, but according to the rule which the statute enacts for cases in which there is no agreement. The statute makes no express provision as to the tribunal which is to determine whether or not an agreement is fair and reasonable, and accordingly the question arises whether it is the duty and within the province of the arbiter to consider and dispose of the tenant's objection, or whether he is bound to give effect to the agreement unless and until it is set aside or reduced by a competent Court?

In the ordinary case, the first thing which an arbiter has to do is to ascertain what is the extent of the jurisdiction committed to him, or, in other words, what precisely is the question which he has to determine. In this case that depends upon whether or not the agreement is one to which the arbiter is bound to give effect. If the agreement is to rule, his jurisdiction is confined to ascertaining the quantities of lime and the like, put into the land, and, by applying thereto the agreed-on scale, arriving at the amount of compensation to be paid; while, on the other hand, if the agreement is not to rule, his jurisdiction is to fix the compensation due under the Act—that is to say, the fair value of the improvements to an incoming tenant. Therefore, until the tenant's objection to the agreement is disposed of, the arbiter cannot tell what is the precise extent of his jurisdiction.

Now, it is a well-established rule that a Judge has an implied power to do what is necessary to explicate his jurisdiction, and can therefore determine incidentally any question which is necessary for that purpose, even although that question be one which is not in itself within his jurisdiction.

It therefore seems to me that it is presumably in the power, and therefore the duty of the arbiter in this case, for the purpose of explicating his jurisdiction, to deal with the tenant's objection, and I am unable to find anything in the statutes which, either expressly or by implication, deprives him of that power.

June 16, 1908. It is said, however, that if the arbiter can deal with the question at all, his decision must be final, because the only review of an arbiter's decision which the statutes allow is upon a question of law to be formulated in a stated case; and the question whether an agreement is fair and reasonable could not be made the subject of a stated case, because it is a question of fact.

Bell v.
Graham.

Lord Low.

I entirely dissent from the view that the question is only one of fact. It is a question of mixed fact and law—a question of the inference in regard to the rights and obligations of parties which may legitimately be deduced from certain facts. I am therefore of opinion that the contention that the decision of the arbiter upon the question could not be made the subject of a stated case, because there is no question of law to be stated, is untenable. In the next place, although it is true that the only procedure in the nature of an appeal against the decision of an arbiter in performing his statutory duties, is by way of stated case upon a question of law, I cannot read the statutes as depriving a party to a statutory arbitration of the remedies which the law allows to a party to an arbitration in the event of the arbiter having exceeded or mistaken his jurisdiction.

The question, however, suggests itself (and a very important question it is), whether the provisions of the statute in regard to a stated case are applicable to the decision of an arbiter in regard to the fairness and reasonableness of an agreement? If that question were answered in the affirmative, a somewhat anomalous state of matters would result, if I am right in thinking that the common law remedies of a party to an arbitration are not excluded. If the procedure were by way of stated case the facts would be supplied by the arbiter, and the only question left to the Court would be what was the sound legal inference to be deduced from these facts; while, if the procedure were by way of suspension and interdict or reduction, the ascertainment of the facts, as well as the determination of the legal inference, would be for the Court. Again, if the question were raised by stated case, the decision of this Court would be final, whereas a suspension and interdict or a reduction could be carried to the House of Lords. That would be a somewhat unfortunate state of matters, although, of course, if it be the result of a sound construction of the statutes, the Court cannot give effect to considerations of convenience. Such considerations may, however, legitimately be taken into account when the question arises, what is the sound construction of the statutes?

My first impression was that a stated case was a competent mode of bringing under review the decision of an arbiter upon the question of the fairness of an agreement, and I confess that I was largely influenced by the apparent analogy furnished by the Workmen's Compensation Act, under which the question whether an accident was due to the serious and wilful misconduct of a workman has been held to be a question of law. Upon consideration, however, I have come to the conclusion that the analogy is by no means complete. In the first place, the question of serious and wilful misconduct falls within the jurisdiction of an arbiter under the Workmen's Compensation Act, and is not, like the question of the fairness of an agreement under the Agricultural Holdings Acts, one with which the arbiter has no power to deal except incidentally and for the purpose of

explicating his own jurisdiction. In the next place, it seems to me that June 16, 1906. there is, or is likely to be, a material difference in the nature of the facts and circumstances which require to be ascertained in the one case and in the other. The facts upon which the question of serious and wilful misconduct depends are, I should think, in the general case pure questions of fact. All that requires to be ascertained is what was the nature of the accident, and how it happened. The question of the fairness of an agreement, on the other hand, is to be determined upon a consideration of the circumstances existing at the time of making the agreement; and I imagine that nice questions would be likely to arise as to what circumstances were relevant to the issue, or what circumstances could competently be taken into consideration. It therefore seems to me that, from the outset, fact and law would be likely to be (as your Lordship has put it) inextricably involved. I think that the typical case which the Legislature had in view in providing that questions of law might be raised by a stated case was a case where, upon the one hand, there were matters of fact only, and upon the other hand, a question of law only. No doubt an absolutely pure case of that sort may seldom arise, and it may be a matter of difficulty to determine in a particular case whether there can be a sufficiently clear separation of the question of law from the matters of fact to bring the case within the scope of such an enactment. In the present case, however, I have come to the conclusion, although not without hesitation, that facts and law would be likely to be so immixed that no Court could safely decide whether or not the agreement was fair and reasonable within the meaning of the statutes unless it had control of the whole proceedings in which that question fell to be determined.

I therefore agree with the result arrived at by your Lordship in the chair; and perhaps I may be permitted to emphasise my concurrence with the remarks which have fallen from your Lordship in regard to the duty of the arbiter in dealing with the question whether the agreement is or is not fair and reasonable.

LORD ARDWALL—This case raises a question of general importance and, I venture to think, of considerable difficulty.

The question for decision has arisen in the course of an arbitration under the Agricultural Holdings (Scotland) Acts, 1883 and 1900, between William Bell, lately tenant of the farm of Wyseby Mains, Dumfriesshire, and Major-General John Gordon Graham of Mossknow, landlord of the said farm. The tenant (the appellant) contended before the oversman that an agreement regarding the compensation which he was to receive for certain improvements specified in the third part of the schedule of the Agricultural Holdings (Scotland) Act, 1883, did not secure to him fair and reasonable compensation for such improvements, and he accordingly desired the oversman to disregard it altogether, and to fix the compensation due to him without reference to it. It may be here noted that the agreement which is made by the lease is a carefully drawn one, and was entered into so recently as November 1899. The landlord, on the other hand, contended that the oversman was not entitled at his own hand to set aside or disregard said agreement, but was bound to give effect to it, unless and

June 16, 1908. until it was declared *not* to be fair and reasonable by a Court of law. The
Bell v. oversman, having difficulty in deciding between these two contentions, and
Graham. in particular whether he was entitled to disregard the agreement as being
Lord Ardwall. unfair and unreasonable without any legal process, stated the present question of law for the opinion of the Sheriff.

The Sheriff has found in answer to the question that the oversman must give effect to the agreement and scale of compensation therein mentioned unless and until the same is set aside or reduced by a Court of law. But as a summons of reduction seems to be inappropriate if not incompetent, the case may be taken as if the Sheriff had decided that a decree in an action of declarator or other competent legal process was needed in order to entitle the oversman to disregard the agreement.

The statutory provision which applies to this case is to be found in the second paragraph of the 5th section of the Act of 1883, which is in these terms :—"Where, in the case of a tenancy under a *lease* beginning after the commencement of this Act, any particular agreement in writing secures to the *tenant* for any improvement specified in the third part of the schedule hereto, and executed after the commencement of this Act, fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement, then in such case the compensation in respect of such improvement shall be payable in pursuance of the particular agreement and *not* under this Act."

Along with this may be read section 36, which provides as follows :—"Any contract or agreement made by a tenant by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement specified in the schedule hereto (except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act), shall, so far as it deprives him of such right, be *void*."

The Act of 1883 was introduced with a view to securing that tenants in every case should receive fair and reasonable compensation for improvements so far as these benefited the incoming tenant or landlord. With this view it introduced certain arbitration procedure with a view to the expeditious and economical determination of such matters. But at the same time it did not abolish, and was not intended to abolish, agreements for the settlement of compensation, especially for manorial improvements, which agreements were in vogue before the passing of the Act, and had proved useful in practice, and since the passing of the Act I believe it to be the fact that such agreements regulating the scale on which improvement outlay in the way of application of manures to land and the consumption of feeding stuffs not grown on the farm are to be compensated, are exceedingly common and in some parts of the country almost universal; and I see that in a recent legal work, Green's "Encyclopædia of Scots Law," in a form of a lease there is appended thereto what are supposed to be model forms for regulating such compensation, and similar schedules and tables of compensation in use upon various large estates throughout Scotland are to be found in Sheriff Johnston's edition of the "Agricultural Holdings Act." It may therefore be taken that such agreements and accompanying scales of compensation are carefully considered by the parties to them before being

entered into. The object of entering into them is manifest. An agreement ^{June 16, 1908.} allows the tenant to know how much compensation he may expect to get ^{Bell v. .} for improvements of the nature specified, and it allows the landlord to know ^{Graham.} what compensation he will require to pay; and I need hardly point out ^{Lord Ardwall.} that a scale of compensation arrived at between parties who are presumably on good terms with each other and in cool blood is likely to be much more just than a scale of compensation fixed by arbiters or overseamen who may possibly be swayed to partial judgments by sentiments or considerations which may arise at the time of a tenant leaving a farm and which ought to have nothing to do with the matter. Indeed, if the parties are reasonable, such agreements might enable them in numerous cases to dispense altogether with the expense and trouble of an arbitration, or in any view to restrict the scope of arbitrations.

Accordingly under the Act there are two methods for ascertaining compensation for any particular improvement or class of improvements; first, the arbitration under the Act; and second, agreement of the parties. But in order that a tenant should not be deprived of his compensation under the Act either by an agreement surrendering his rights altogether or by an illusory agreement, section 36 was enacted, and the clause was inserted in section 5 providing for compensation being payable according to the agreement only if the compensation so provided is fair and reasonable.

The only clause where the two methods of ascertaining compensation are brought together in the Act of 1883 is in section 16, and that section provides: "In any case provided for by sections 3, 4, or 5, if compensation is claimed under this Act, such compensation as under any of these sections is to be deemed to be substituted for compensation under this Act, if and so far as the same can, consistently with the terms of the agreement, if any, be ascertained by the referees or the oversman, shall be awarded in respect of any improvements thereby provided for; and the award shall, when necessary, distinguish such improvements and the amount awarded in respect thereof, and an award given under this section shall be subject to the appeal provided by this Act."

But from this I think it appears that the compensation is only to enter the referees' or oversman's award "if and so far as the same can consistently with the terms of the agreement, if any, be ascertained by the referees or the oversman." Accordingly, even in this section the validity and effective force of an agreement is maintained. But excepting this section there seems to be nothing in the Act to suggest that the arbiters or oversman are to be the judges of the validity of an agreement under the Act, except in so far as it may be said that when an agreement regarding certain improvements is tabled in a reference they must decide whether they are to give effect to the agreement or not.

The question that thus arises is one, I think, very much of *onus*. On the one hand, it is said that as the statute gives the tenant a right to compensation, he can only be deprived of that by the landlord producing an agreement by which fair and reasonable compensation is secured, and that if the arbitration tribunal do not think that the agreement so tabled to them does secure such compensation, they are bound to proceed to value the improvements themselves, and that it follows that they should, at all events

June 16, 1908. in the first place, be the judges of whether the agreement is fair and reasonable. On the other hand, it is said that unless an agreement is obviously void under the 36th section of the Act, or clearly inapplicable under section 5 of the Act, as not securing fair and reasonable compensation, it must be presumed that an agreement fixing a scale of compensation is fair and reasonable, otherwise the parties would not have entered into it, and that at all events it must be presumed to be fair and reasonable until the reverse is declared by a Court of law.

Bell v.
Graham.

Lord Ardwall.

I am of opinion that the latter contention is the right one. In interpreting statutes they must always be read, so far as possible, consistently with the rules of the common law unless these are expressly excluded. In the statute presently under consideration I do not think these rules are excluded, and accordingly an agreement deliberately entered into by persons under no legal or mental incapacity must be regarded as binding until it is set aside in some competent proceeding. To hold anything else I think would be practically to put a premium on dishonesty, and I am unwilling to believe that the statute intended to do this. But I may mention that it has come under my personal observation, as formerly Sheriff of Perthshire and otherwise, that there is an idea abroad that the statute did intend to do this, and that a tenant may sign any agreement he pleases, believing at the time he signs it that it is not fair and reasonable, and not intending to be bound by it, because he supposes that the Act puts it in the power of arbiters at the termination of the tenancy to say whether the compensation is in their view fair and reasonable or not, and that therefore it does not matter what agreement he signs, because in the long run everything must be determined by the arbiters or oversman. I think it would be very undesirable to give any countenance to this view of the Act; and if it be decided in this case that the question whether an agreement is fair and reasonable rests with the arbiters and the oversman, I fear that such a view will be countenanced. I fear also that such an interpretation will practically make agreements quite valueless and thus lead to their disuse altogether, and this certainly was not the intention of the Act, which very properly recognises and to a certain extent encourages them.

It is, however, I understand, suggested by the majority of your Lordships that the arbiters or oversman are inferentially constituted judges of the validity of an agreement in the sense of the Act, because in order to explicate their own jurisdiction it is necessary for them to decide whether or not any particular agreement is to be given effect to, and then if they decide wrongly, that their decision may be upset as illegal. I will say no more on this last point than that I think it open to doubt whether such remedy will be available when the arbiters have once decided the compensation payable in any case. In any view, however, I hold it more consistent with ordinary law and practice that the arbiters (except where an agreement is *ex facie* absolutely unjust or illusory) should hold it binding to the effect of ousting their jurisdiction on the matters dealt with by agreement till the agreement is decided by an ordinary Court of law not to secure fair and reasonable compensation in terms of the statute. This course will at once explicate the arbiters' jurisdiction and lay on the party who is repudiating his own agreement the *onus* of having it set aside, which appears to me to be more

in accordance with legal principle and practice than laying on the party June 16, 1908. founding on an agreement the *onus* of proving to the arbiters that it provides fair and reasonable compensation to the tenant. There would be no hardship in the course I venture to suggest, because no tenant would require to take legal proceedings to set aside an agreement unless he had himself been to blame for entering into an unreasonable one. And as to expense, a tenant could obtain a declarator in the Sheriff Court that the agreement was not fair and reasonable without much expense, whereas if an arbiter's award is, as suggested, to be challenged, the proceedings must be taken in the Court of Session.

Bell v.
Graham.
Lord Ardwall.

Another objection to its being left to the arbiters to decide whether an agreement is valid or not under the statute is that, supposing they erroneously reject an agreement, the arbitration proceedings, if not interdicted, will go on to completion, and all this will be thrown away should an action for reduction of the award be afterwards brought and carried to a successful issue.

On the whole matter, I am of opinion that the Sheriff's judgment is right in substance, though not in form, and that if a tenant who has signed an agreement wishes an arbiter and oversman to disregard it, he must bring and succeed in an action of declarator to the effect that the agreement does not secure to the tenant fair and reasonable compensation in terms of section 5, and is therefore void in terms of section 36 of the statute.

LORD M'LAREN.—I concur in the Lord President's opinion. I think that Lord Ardwall's opinion may fairly be said to represent what the Legislature ought to have enacted upon this subject, but I think the Lord President's opinion represents what it has enacted.

If I add anything it would only be an observation on the illustration suggested by Lord Low, when he compared the question of serious and wilful misconduct which arises under the Workmen's Compensation Act with the question which is raised by the present case. It is only an illustration, but the two provisions to be considered are so far analogous, in that they both are concerned with the mind and conscience of the person whose acts are under consideration. Now, I would apply the illustration in the following way, which, if not exactly, is at anyrate substantially the same as Lord Low's. This Court has never held that the question, whether a man's misconduct was to be regarded as serious and wilful or not, was, in any case, a question of law which the Court should determine. It has always been my opinion, and I think it is the opinion of the Courts who have considered these cases, that if there were a real question of fact, whether there was misconduct at the time of the accident, then it was for the arbiter to consider and determine finally that pure question of fact; but if he chose to state a case, in which facts were set forth, then the Court might inquire whether there was the minimum of fact in the case to warrant the arbiter's finding, because if there were no facts to warrant the finding, or fewer facts than the necessary minimum, which is the same thing, then we should be entitled to hold—and have held—that there was no question for the consideration of the arbiter any more than there is for the consideration of a jury when a pursuer has not adduced any evidence in support of his case.

June 16, 1908. Well, then, I think that we really proceed in the same way in regard to this matter, because in accordance with the Lord President's opinion, in which I concur, it is for the arbiter to consider whether this agreement between the parties was fair and reasonable having regard to the facts known at the time. The Court will only interfere with his award if it is satisfied that there was no serious consideration of this question by the arbiter, or if the circumstances upon which his judgment was based were such that no impartial person could have come to the conclusion at which he arrived on the facts. I should not be disposed to think that in every case the question of fairness and reasonableness is one for a Court of law; but in every case the arbiter himself must be fair and reasonable in his conduct, and if he ignores the statute and substitutes his own opinion as to the compensation to be awarded, then, undoubtedly, he has exceeded his jurisdiction, and can be corrected.

LORD KINNEAR.—I concur in the opinion of the Lord President.

LORD PRESIDENT.—The Lord Justice-Clerk also concurs in my opinion.

THE COURT pronounced this interlocutor:—"Find in answer to the question therein stated, that as the agreement tabled is challenged by the tenant as not being fair and reasonable under the circumstances, the arbiter is bound to decide that question for himself in order to determine his further procedure, but that he must bear in mind (1) that the criterion is the fairness and reasonableness of the agreement as viewed in the light of the circumstances at the time of making, and not the question as to whether it does or does not tally with the scale which the arbiter if left to himself would now apply; and (2) that the agreement being signed by both parties, it is necessary for the party seeking to hold it as not being fair and reasonable to condescend specifically on the provisions objected to, and to reasons for holding these provisions not fair and reasonable: Find and declare accordingly, and decern."

SCOTT & GLOVER, W.S.—FRASER, STODART, & BALLINGALL, W.S.—Agents.

No. 159. GEORGE MORISON PAUL (Guardian of Joseph Thomson's Mortification),
Petitioner.—*Grainger Stewart*.

July 4, 1908.

Guardian of
Thomson's
Mortification.

Charitable Trust—Failure of purpose—Cy près—Grant of additional powers—No formal scheme—Nobile Officium.—The administrator of a charitable trust, founded in 1786 for the purpose of supplying to poor householders in Edinburgh oatmeal, or oats to be made into meal, at 10d. per peck (which was approximately half the market price in 1908), presented a petition to the Court in which, on the narrative that for many years it had been impossible to expend the whole income of the trust on the trust purposes, he craved for a grant of additional powers.

Circumstances in which the Court, without formally approving of a scheme, granted additional powers to enable the administrator to supply coal, milk, oatcakes, bread, or flour, at half the market price.

1st DIVISION. By deed of settlement dated 11th July 1774, and registered on the 13th of February 1786, Joseph Thomson, saddle-tree maker in Edinburgh, conveyed his whole estate to trustees for the purposes therein

mentioned. The purpose with regard to the residue was declared to be as follows:—"And the whole residue of my estate, heritable and moveable, after payment of my debts, funeral charges, and the above-mentioned legacies, or such other legacies as I may afterwards give, and the expenses of carrying this settlement into execution, I mortify as a perpetual fund, the interest whereof is to be applied in manner after directed, for purchasing oatmeal, or oats to be made into meal, to be distributed only among poor householders within the city of Edinburgh when the price of oatmeal exceeds tenpence per peck, and which meal is to be sold out to these householders at tenpence per peck, be the current price ever so high; but I appoint that one family shall not get above two pecks of it in one week." By a subsequent deed of settlement he altered the foregoing provision as to the price of oatmeal exceeding tenpence per peck by declaring that the sales were not to be made unless the price exceeded one shilling per peck. A private Act of Parliament was obtained in 1846 to facilitate the sale of certain properties held by the administrators of the Mortification, but no alteration was made by that Act in the foregoing provision for the administration of the funds.

By the first mentioned deed of settlement the testator further provided that the securities in which the trust funds were to be invested should be taken in the names of certain persons holding official positions and their successors in office, among whom was mentioned the Depute-Keeper of the Signet. The other persons named having declined to accept the trust, the duty devolved upon the then Depute-Keeper of the Signet, who accepted office, and thereafter the trust was administered by him and his successors in the office of Depute-Keeper.

On 18th February 1908 Mr George Morison Paul, Depute-Keeper of the Signet, and as such guardian and administrator of the Joseph Thomson Mortification, presented a petition to the First Division craving for additional powers for the future administration of the trust.

The petitioner pointed out that, the current price of oatmeal being 1s. 8d. per peck, the beneficiaries of the Mortification were enabled to purchase it at half the market price, and stated:—"Of late years there has been a great decrease in the number of families applying for and receiving the benefit of the Mortification. . . . Every effort has been made to bring the existence of the charity under the notice of persons entitled to its benefits, and since he became guardian of the Mortification the petitioner has made every endeavour to increase the number of recipients of the charity. In 1906 he sent a circular explaining the benefits of the charity to every clergyman, missionary, parish sister, and bible woman, specially appointed by any church in Edinburgh, and he had the Mortification brought under the notice of the Charity Organisation Society and also of many of the ladies who work among the poor in the city. He has also kept the charity working during practically the whole year, but notwithstanding these efforts it has been found impossible to expend the annual income of the trust in the manner desired by the testator. . . . The capital of the trust in 1846, when the Act of Parliament above mentioned was obtained, was about £9550. The capital of the trust at 31st December 1907 amounted to £26,938, 10s. 9d." He also set forth figures shewing the decline in the number of families receiving the benefit of the Mortification for the last twenty-four years, and figures shewing the surplus income that it had been found impossible to expend on the purposes of the trust, the latter figures shewing that, for the

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last ten years, the net income had amounted, on an average, to £495 per annum, while it had only been possible to expend an average of £96 per annum in supplying applicants with cheap oatmeal.

The petitioner further averred:—"Notwithstanding the publicity given by the petitioner to the objects of the Mortification, the resources of the trust have not been taken advantage of to anything like the full extent, and the trust has thus for some time failed to carry out the benefits contemplated by the testator. This the petitioner believes is due to a complete change in the customs of the poor as regards the food which they give to their families, oatmeal for porridge or oatcakes being now comparatively little used. The petitioner believes that the testator desired both to benefit the necessitous poor and to encourage the consumption of oatmeal as an article of diet, and he thinks that both these intentions can now be carried out only if special attractions are extended to those making use of oatmeal. The supply of meal alone, even at a cheap price, has ceased to be a sufficient inducement. In these circumstances the petitioner makes the present application to the Court for an extension of his powers, with a view of more fully utilising the revenue of the trust, and of making it possible for the primary wish of the testator in regard to the supply of oatmeal to poor householders to be made effectual. He suggests that the main purpose of the Mortification might still be carried out if the guardian of the Mortification were empowered, in addition to supplying oatmeal to poor householders at a reduced rate as heretofore, to supply those families on the roll buying oatmeal also with a limited quantity of either coals or milk at a price below the current market price. Neither coals nor milk would be supplied except to those taking meal, and coals supplied at a cheaper rate could be used for the preparation of porridge, while milk supplied at a cheaper rate could be used along with the porridge. The present petition has been brought to obtain the authority of the Court to alter the conditions of the testator's deeds of settlement in the direction indicated. A statement of the new powers craved is appended hereto."

The petitioner prayed the Court "to grant to the petitioner and his successors in office the additional powers craved for the administration of the funds and estate of the said Joseph Thomson, now held by the petitioner, and to settle such other scheme as to your Lordships shall seem just," and the additional powers craved were stated in an appendix to the petition, as follows:—"Grant to the petitioner and his successors in office, as guardian or guardians of the funds and estate of the late Joseph Thomson, power in addition to the power to supply oatmeal to poor householders within the city of Edinburgh at the price of 10d. per peck of 8½ lbs., to supply to poor householders obtaining meal at said reduced rate coal at half the market price, or milk at half the market price, and that in such quantities and under such regulations and at such times as the guardian for the time being may appoint, and to defray out of the income from the funds of the Mortification the difference between the market price of said coals and milk and the reduced price."

The Court remitted to Mr James S. Leadbetter, advocate, to report. In his report, besides calling attention to the fact that the crave was for additional powers, and not, as was usual in such cases, for approval of a scheme, he reported in favour of the powers asked for, but also suggested that, in addition to these powers, the Court might grant

authority to the petitioner to expend the income of the trust in July 4, 1908. supplying bread, flour, and oatcakes at half the market price.*

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* In his report the reporter stated, *inter alia*.:—"The petition is not, as is usual in such cases, for approval of a scheme, but is framed as a crave for additional powers. The distinction is only one of form and not of substance, but as the form is not the usual form, I have thought it right to refer to it. My attention has, however, been drawn to a petition presented by the trustees of the Carnegie Park Orphanage, in which the crave was not for approval of a scheme, but merely 'to reduce the limit of age for orphans,' &c., which was granted by the First Division of the Court on 12th March 1892—(reported 19 R. 605). I have also been referred to two other petitions (unreported) in which the additional powers asked for were not embodied in a scheme. Subject to these observations, I have to report that the procedure has been regular, and that no answers have been lodged. . . .

"The extension craved by the petitioner is that he should be authorised to sell at a reduced price coals and milk to those purchasing the oatmeal; the belief being that if these additional benefits were provided a larger number of persons would be induced to purchase oatmeal for the purpose of making it into porridge. I am informed that this extension has been suggested to those interested in administering the charity not only by applicants themselves, but also by other persons engaged in distributing charitable relief throughout the city. Subject to the observation contained in the immediately succeeding paragraph of this report, I would respectfully suggest that these additional powers would tend to facilitate the carrying out of the original purposes of the trust, and that they are therefore worthy of the favourable consideration of your Lordships.

"The petitioner, however, bases his crave for these additional powers on the belief that 'the testator desired both to benefit the necessitous poor and to encourage the consumption of oatmeal as an article of diet.' I am not satisfied that the latter is a legitimate inference as to the intentions of the testator. As far as I have been able to ascertain from the writings of those who deal with the social life of the people of Scotland at the close of the eighteenth century, it would appear that at the time when the charity was founded—viz., 1774 and 1786—the consumption of wheaten bread in cities was comparatively small, and was confined to the well-to-do classes, while the poor subsisted almost entirely on oatmeal. It would seem then that a more legitimate inference as to the intention of the testator is that he desired to relieve the necessitous poor in times of distress by enabling them to obtain their staple article of diet—viz., oatmeal—at a reduced price. The petitioner attributes the present difficulty in administering the charity to a 'complete change in the customs of the poor as regards the food which they give to their families, oatmeal for porridge or oatcakes being now comparatively little used.' Their place has been largely taken by wheaten bread; and there is also, I am informed, the farther change of habit that these classes do not now buy their food in the form of meal, but buy it already prepared in the form of bread or oatcakes. I would therefore respectfully suggest for the consideration of your Lordships whether the primary object of the testator will not be more nearly attained by authorising the petitioner to expend the surplus income of the trust funds in supplying necessitous persons with bread and flour and oatcakes at a reduced price, rather than with coals and milk. At the same time, it is to be noted that those interested in charitable work among the poor greatly deplore the change of customs above referred to, by which porridge has so largely dropped out of the staple diet of the poorer classes, and that would appear to be a reason for giving a favourable consideration to the proposed supply of coals and milk, although these articles themselves are perhaps not so directly in line with the original purpose of the testator. The suggestion

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At the hearing in the Summar-roll on 4th July 1908, counsel for the petitioner moved the Court to grant the additional powers suggested by the reporter as well as those originally craved for in the petition.

LORD M'LAREN intimated that the Court (LORD M'LAREN, LORD KINNEAR, and LORD DUNDAS) would grant all the powers suggested, and, further, would not restrict the power to supply coals and milk to those householders only who were being supplied with meal.

The LORD PRESIDENT and LORD PEARSON were absent.

THE COURT pronounced the following interlocutor:—"Grant to the petitioner and his successors in office as guardian or guardians of the funds and estate of the late Joseph Thomson, in addition to the power to supply oatmeal to poor householders within the city of Edinburgh, at the price of 10d. per peck of 8½ lbs., power to supply to such poor householders coal, milk, oatcakes, bread, or flour, at half the market price; and all these in such quantities and under such regulations and at such times as the guardian for the time being may appoint, and to defray out of the income from the funds of the mortification the difference between the market price of said commodities and the reduced price: Ordain the additional powers hereby granted to be recorded in the Books of Council and Session for preservation, and decern."

JAMES H. NOTMAN, W.S., Agent.

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WILLIAM JOHN NORBRAY LIDDALL, Complainer (Respondent).—
Johnston, K.C.—Macmillan.

THE PARISH COUNCIL OF THE PARISH OF BALLINGRY, Respondents
(Reclaimers).—*Constable—Mercer.*

Sheriff—Jurisdiction—Administrative or Judicial—Expenses—Petition to designate land for burial ground—Power to award expenses against unsuccessful objector—Burial Grounds (Scotland) Act, 1855 (18 and 19

as to the supply of bread and flour and oatcakes, in addition to coals and milk, has been laid before the petitioner, and he acquiesces in it, and expresses himself as anxious to obtain any additional powers which will enable him to expend the income of the trust-estate for the relief of those for whose benefit it was intended, as he is not satisfied that the addition of coals and milk alone would enable him to exhaust the funds at his disposal. . . ."

The reporter submitted that if these views were approved effect might be given to them by granting authority to the petitioner in the following terms:—

"Grant to the petitioner . . . powers—in addition to the power to supply oatmeal to poor householders within the city of Edinburgh at the price of 10d. per peck of 8½ lbs.—to supply to poor householders obtaining meal at said reduced rate coal at half the market price, or milk at half the market price, and also power to supply to poor householders within the city of Edinburgh oatcakes at half the market price, or bread at half the market price, or flour at half the market price; and all these in such quantities and under such regulations and at such times as the guardian for the time being may appoint. . . ."

Vict. cap. 68).—A parish council presented a petition to the Sheriff, under July 4, 1908. the Burial Grounds (Scotland) Act, 1855, praying him to designate certain lands as a burial ground. Objections were lodged by a conterminous proprietor, whose lands were separated from the proposed burial ground by a burn, on the ground that the burn would be polluted by the drainage from the burial ground. The Sheriff repelled the objections, designated the ground, and awarded expenses against the objector. The objector, being charged for the expenses, brought a suspension of the charge, on the ground that the award of expenses was *ultra vires* of the Sheriff.

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Held (aff. judgment of Lord Johnston) that the proceedings were administrative and not judicial, and that, the objections not being vexatious, the Sheriff was not entitled to award expenses against the objector; and charge *suspended*.

Question, whether in a case of vexatious opposition expenses may be awarded by a Sheriff in an administrative proceeding.

County Council of Dumbarton v. Clydebank Commissioners, Nov. 14, 1901, 4 F. 111, *commented on*.

IN May 1906 the Parish Council of Ballingry, as coming in place of the old parochial board, presented a petition, under the Burial Grounds (Scotland) Act, 1855,* to the Sheriff of Fife and Kinross, praying the Court to designate and set apart a certain portion of ground, being part of the glebe lands of the parish of Ballingry, for the purposes of a burial ground for the parish, "and to find any person offering objections thereto liable in expenses."

1st DIVISION.
Ld. Johnston.

The Sheriff-substitute (Hay Shennan), having considered the petition, appointed intimation thereof to be made by advertisement and by handbills, calling upon any party interested, who might desire to oppose the application, to lodge a notice of appearance with the Clerk of Court at Kirkcaldy within ten days. A notice of appearance was lodged for William John Norbray Liddall of Navitie, whose property extended along the boundary of the ground proposed to be designated for the space of 517 feet 6 inches or thereby, being separated therefrom by a burn, which subsequently flowed through the lower portion of his estate. He lodged objections complaining of the proposed

* The Burial Grounds (Scotland) Act, 1855 (18 and 19 Vict. cap. 68), sec. 10, enacts, *inter alia*:—"Whenever any burial ground shall have been closed by order in council, the Parochial Board shall forthwith proceed to provide a suitable and convenient burial ground for the parish, and to make arrangements for facilitating interments therein; and in the event of a suitable burial ground not being provided by the Parochial Board within six months after such order or requisition as aforesaid, it shall be lawful for such Board, or for any ten or more persons assessed for relief of the poor in the parish, or any two or more members of the Parochial Board, to apply by summary petition to the Sheriff, to have a suitable portion of land designated for the purpose of a burial ground; and the Sheriff shall examine such witnesses and make such inquiry as he shall think proper, and shall keep a note of such evidence as may be adduced, and, if he thinks fit, shall thereupon proceed to designate and set apart such portion as he may deem necessary of any lands in such parish suitable for the purpose, not being part of any policy, pleasure ground, or garden attached to any dwelling-house; provided always that due intimation shall have been given of not less than ten days to the owner of such lands, that he may be heard for his interest before such designation is actually made, subject always to an appeal to any of the Lords Ordinary of the Court of Session, whose decision shall be final, such appeal always being presented within fourteen days of the date of the Sheriff's judgment."

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designation, for the reasons, *inter alia*, that the whole drainage of the ground proposed to be designated was into the burn, and that the burn would be rendered unsuitable for the primary purposes for which it was used if the drainage of the burial ground were allowed to run into it.

On 28th July 1906 the Sheriff-substitute, after an inquiry, and the examination of witnesses, pronounced this interlocutor:—"Repels the objections for the complaining objector: Designates the portion of ground described in the prayer of the petition as fitting for the purposes of a burial ground for the parish of Ballingry: Finds the petitioners entitled, as against the objector, to such expenses as have been caused by his appearance and opposition: Allows an account," &c.* The account of these expenses was taxed at £48, 4s. 3d., and decree for that amount was pronounced. The objector, having failed to make payment of these expenses, was charged under the extract decree on 11th March 1907.

Against this charge Mr Liddall presented a note of suspension, in which he averred, *inter alia*:—"In holding the said inquiry as to the suitability of the ground and examining the witnesses, the Sheriff-substitute was acting in a purely administrative capacity. He had no power or jurisdiction to award expenses against the complainer as comparing objector. The Burial Grounds (Scotland) Act, 1855, confers no power upon the Sheriff to award expenses; and the Sheriff, in making such an award, was acting outwith the scope of his powers. By section 26 of the said Act, it is, *inter alia*, provided that the expenses incurred by the parochial board of any parish, in carrying the Act into execution, in so far as not otherwise met, shall be levied by assessment. In consequence of the objections stated by the complainer, it is now settled that the drainage of the area of ground designated as a cemetery, and the filtration and purification of the water therefrom, will be properly seen to."

He pleaded, *inter alia*;—(1) The said decree for expenses having

* In his note the Sheriff-substitute stated, *inter alia*:—"As I have said, substantially the only question is whether the ground is suitable for a cemetery. The objector concedes that the upper part is suitable; but the lower part, he says, is not suitable, being clayey and waterlogged, and incapable of being efficiently drained. To a certain extent the objections are established, but not completely. The peculiarity of the case is that it does not seem possible to get better soil in a convenient situation in the parish, and, indeed, there is not direct evidence of better soil anywhere else in the parish. You have the additional consideration that the present cemetery is already there, so that if, by drainage and provision for filtration, the ground can be improved sufficiently in condition, the balance of convenience points to taking it. . . . I am not deciding that the suggested drainage scheme is sufficient. All I do decide is that the ground is suitable for designation as a burial ground, subject to efficient drainage operations and provision for filtration and purification. The petitioners must arrange for this before a portion of the ground could be used. It is, of course, possible that the lowest area to the north-east might be used for mortuary and for offices. That is for petitioners to consider. They have set before me a *prima facie* good case for the possibility of the necessary works being executed, and that is all I require here. Nothing that I decide just now will afford any justification for petitioners injuriously affecting the burn by introducing deleterious drainage from the cemetery into it. Having in view Mr Bennett's cogent criticism of the tentative scheme, they must see that an efficient scheme is provided."

been *ultra vires* of the Sheriff-substitute, the charge proceeding thereon ought to be suspended; (2) the Sheriff-substitute having acted in the said inquiry in an administrative capacity, and having had no jurisdiction to pronounce the said decree for expenses, the complainer is entitled to suspension, as craved.

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On 3d April 1907 the Lord Ordinary (Johnston) passed the note, and on 31st October 1907, after a hearing in the Procedure-roll, he pronounced an interlocutor suspending the charge.*

* "OPINION.—Mr Liddall of Navitie, under this suspension, complains that he has been charged, at the instance of the Parish Council of Ballingry, on an extract decree for expenses pronounced by the Sheriff-substitute of Fife, which the latter had no power to grant.

"The circumstances are these: The Parish Council of Ballingry, as coming in place of the old Parochial Board, in May 1906 presented a petition to the Sheriff of Fife, by virtue of the Burial Grounds (Scotland) Act, 1855, praying him to designate 4½ acres of the glebe lands of Ballingry for the purposes of a burial ground for the parish. The prayer of this petition concluded by craving the Sheriff to find any person offering objections to the petition liable in expenses. I am of opinion that neither were the Parish Council warranted in concluding for expenses, nor had the Sheriff-substitute power to award them under said petition. That he should have even done so on the merits, had he the power, is unintelligible, his whole reasoning leading to an opposite conclusion, and proving that Mr Liddall's opposition was not only necessary but advantageous, in the public interest as well as in his own, and amply justified by the result. But the question before me does not depend on the merits, but on the competency of the Sheriff's award.

"The Burial Grounds (Scotland) Act, 1855, provides for the closing of burial grounds which have become dangerous to the public health or offensive to public decency, and for the provision of burial grounds, whether existing burial grounds have been so closed or not. In relation to this matter, certain authority is given to the Sheriff, subject to an appeal to a Lord Ordinary of the Court of Session; but I think that the very subject-matter of the authority committed to the Sheriff raises the *prima facie* presumption that his action will be ministerial, and not judicial. This is amply confirmed by the provisions of the statute when these are examined in detail.

"The Sheriff is first called in by section 3, when it is proposed to put the statute into operation, where a parish is partly burghal and partly landward, to determine whether, for the purposes of the Act, such parish is to be deemed burghal or landward. And where application is made to him for that purpose, he is to hear 'any parties having interest.'

"In the next place, by sections 4 to 8, the Sheriff may be applied to not merely by the Parochial Board, but by any ten persons assessed for relief of the poor, or any two householders residing within 100 yards of an existing or proposed burial ground, to determine whether such burial ground is or would be dangerous to public health, or offensive to public decency. The provisions for the procedure on such application require the Sheriff 'to permit all parties whom he shall judge to have an interest to appear and be heard in such manner as he shall deem fitting.' He is to make inquiry; and if satisfied of the truth of the allegations of the applicants, he is to pronounce an interlocutor to such effect, and transmit a copy to the Home Secretary, whereupon an order in council is to be pronounced, closing the existing or prohibiting the opening of the proposed burial ground. In this branch of the statute there is no provision for appeal, but there is a prohibition of the renewal of the application to the Sheriff, except with the concurrence of the Procurator-fiscal, till after the lapse of five years. In both these provisions

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The respondents, the Parish Council, reclaimed, and the case was heard on 30th June 1908.

Argued for the reclaimers;—(1) The Sheriff-substitute here was acting in a judicial or *quasi* judicial capacity, and therefore had a right to award expenses. Every Court had an inherent right to award expenses, even Justices of the Peace,¹ and arbiters although no such power was given in the deed of submission.² Where the jurisdiction of the Sheriff was invoked by statute the presumption was that he was called in as Sheriff, *i.e.*, in his judicial capacity.³ That was emphasised by the procedure to be followed in such petitions as this, which was really judicial procedure, and especially by the existence of the right of appeal.⁴ The Court had dealt with the question of expenses in analogous applications.⁵ The comparison with the practice of Parliamentary Committees was of no weight; the fact that they did not award expenses was merely the result of a

it is quite clear that the Sheriff is acting ministerially, and this is accentuated by the clause to which I have last referred; to enable him to deal properly with such application, it is manifestly necessary and to the public advantage that all having interest should be heard.

“Then there follow in sections 9 to 14 enactments for the provision of burial grounds for parishes, and I think also of additional ground to be added to an existing burial ground, and that whether the burial ground of the parish has been ordered to be closed or not. So far as I am concerned, the important sections are 10 and 13. Section 10 provides for the Parochial Board, any ten ratepayers, or any two members of the Board, applying by summary petition to the Sheriff to have a suitable portion of land designated. And after examining witnesses, of whose evidence he shall keep a note, and making inquiry, the Sheriff is to proceed to designate and set apart such portion as he may deem necessary ‘of any lands in such parish suitable for the purpose,’ provided that due intimation is first given to the owner of such lands, that he may be heard for his interest before such designation is actually made. Then section 13 incorporates the Lands Clauses Act, 1845, which, in effect, makes the Sheriff’s designation of a parcel of land for the purpose of a burial ground the equivalent of a private Act or Provisional Order, and confers compulsory powers on the Parochial Board, as promoters of the undertaking, to acquire the land designated by the Sheriff. It is somewhat strange that the 10th section should only provide expressly for the owner of such lands being heard for his interest, but I think that the Sheriff-substitute, having regard to the provisions of the Lands Clauses Act, did right in giving a wide interpretation to the word ‘owner,’ and in holding it to include anyone who, as Mr Liddall, might be injuriously affected, in respect, for instance, that the land proposed to be taken marched with his estate, and was only separated therefrom by a burn, in the water of which he had the rights of a riparian proprietor, and which water was liable to be

¹ Ledgerwood v. M’Kenna, Dec. 18, 1868, 7 Macph. 261.

² Robertson v. Brown, Dec. 6, 1836, 15 S. 199; Ferrier v. Alison, Jan. 28, 1843, 5 D. 456.

³ Magistrates of Portobello v. Magistrates of Edinburgh, Nov. 9, 1882, 10 R. 130; Leitch v. Scottish Legal Burial Society, Oct. 21, 1870, 9 Macph. 40; Ledgerwood v. M’Kenna, 7 Macph. 261.

⁴ Binning v. Easton & Sona, Jan. 18, 1906, 8 F. 407; Magistrates of Portobello v. Magistrates of Edinburgh, 10 R. 130.

⁵ Dumbarton County Council v. Clydebank Commissioners, Nov. 14, 1901, 4 F. 111; White v. Magistrates of Rutherglen, Jan. 28, 1897, 24 R. 446; Lanarkshire County Council v. Corporation of Motherwell, July 7, 1904, 6 F. 962; Cuningham v. M’Gregor, July 7, 1904, 6 F. 955.

custom that had grown up. It was difficult to draw a distinction between administrative and judicial proceedings. Judicial capacity was constantly invoked in matters primarily administrative, and half the work of a Judge in judicial proceedings was really administrative. In such an application as this the strictly administrative proceedings only extended to questions with the owner of the ground proposed to be taken; the proceedings became judicial as soon as an outside objector appeared, as had happened here. (2) If it were competent for the Sheriff to award expenses, this was clearly a case for doing so. The objector had no right to appear in these proceedings on the grounds he had stated. His proper remedy was by an action against the Parish Council for pollution. It was wrong to say that he had come forward in the public interest; he had come forward purely in the private interest of his own estate. His appearance in these proceedings was unnecessary and vexatious, and having been unsuccessful.

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polluted by drainage from the proposed cemetery. I cannot understand the reasoning of the Sheriff-substitute's note, in which he indicates that he was prepared to be satisfied of the suitability of the ground, chiefly because it was the only ground possible, without satisfying himself that either there would be no injurious affection of the burn by pollution, or that proper precautions were to be taken to prevent it, and which led him to proceed to designate the land, with a mere warning that 'having in view Mr Bennett's (that is, Mr Liddall's adviser's) cogent criticism of the tentative scheme, they (the Parochial Board) must see that an efficient scheme is provided.' It is manifest that, but for Mr Liddall's appearance, whether statutorily entitled or not, the drainage question would never have been considered, and must have subsequently been raised between him and the Parochial Board, in the form of an action for nuisance.

"In this third class of applications to the Sheriff an appeal is given to a Lord Ordinary of the Court of Session, but, notwithstanding, I cannot hold the proceeding, either before the Sheriff or before the Lord Ordinary, to be anything but ministerial. Of this, I think it is sufficiently conclusive that by section 13 is committed to the Sheriff the functions of a Parliamentary committee on a private bill, and to the Lord Ordinary the functions of the House on report.

"As the statute makes no provision as to expenses, except by saying (section 26) that the expenses incurred by the Parochial Board in carrying the Act into execution, so far as not covered by burial fees, are to be raised by assessment, the complainer here maintains that the Sheriff-substitute, in his final deliverance on the Board's application, had no power to award expenses against him; while the respondents maintain that he was entitled to do so by virtue of his common law powers. I am of opinion that he had no such common law powers; and that having no statutory power, he was acting *ultra vires* in awarding expenses against Mr Liddall.

"That he was acting ministerially I think cannot be doubted, and I refer to *Binning v. Easton & Sons*, 8 F. 407, and to *Hughes v. Thistle Chemical Co.*, 1907, S. C. 607.

"The Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, is an Act of somewhat similar character. Though it provides for appeal to the Sheriff, and ultimately to the Lord Ordinary in teind causes, from proceedings in the Church Courts, and there is therefore rather more to be said for such an appeal being of a judicial character than for one under the statute in question, yet by section 15 of the Ecclesiastical Buildings Act it was thought necessary to give express power to the Sheriff and Lord Ordinary to award expenses.

"Two categories of cases were referred to as authorities on this subject. First, those in which summary complaints of a merely *quasi* criminal

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cessful he ought in ordinary course to make good the expense he had caused.

Argued for the complainer and respondent;—(1) Where a Sheriff was acting in an administrative capacity, as here, he had no common law power to award expenses. The inherent right to do so, which might be said to exist in Parliamentary Committees (though they did not exercise it), did not extend to a Sheriff, for in such cases he had merely a delegated authority to act in a legislative manner, and his powers were limited by the terms in which the function was delegated to him. He could only have the power to award expenses if it were clear from the statute that it was the ordinary jurisdiction of his Court that was invoked, or if the statute expressly gave him the power. The test of whether the Sheriff's ordinary jurisdiction was invoked was stated by Lord Adam in *Main v. Lanarkshire and Dumbartonshire Railway Company*¹ to be whether it could be shewn that the statute "intended to invoke the jurisdiction of the Sheriff Court with all its ordinary methods of procedure." Applying that test to the Burial Grounds Act, it was clear that it did not invoke the ordinary procedure of the Court, for it provided a special form of procedure and a special mode of appeal.² Nor was a power to award expenses expressly given, as was done in many statutes which delegated admini-

character were concerned, as in *Ledgerwood v. M'Kenna*, 7 Macph. 261, where opinions were expressed that Justices without any express power might competently award expenses in a complaint under that Act; but I think it is sufficient to say of that case that the Justices were assumed to be acting judicially. Then in the analogous case of *Nimmo v. Clark & Wilson*, 10 Macph. 477, being an appeal to the Court of Session from a conviction by the Sheriff for contravention of the Mines Regulation Act, 1860, the question was raised whether the Court of Session, to whom the appeal was taken, could award expenses even in the appeal, there being no provision for an award of expenses in the original complaint. There was no suggestion that the Sheriff could have awarded expenses in the Court below; and the Court held that, on the analogy of the practice in the Judiciary Court in appeals from convictions of a criminal character, they were entitled to award expenses in similar appeals from convictions of a similar character.

"The other category of cases to which I was referred was that in which the Sheriff acts, as in the Burgh Police Act, 1892, in the matter of extension of burgh boundaries, definition of drainage and water areas, &c., and it was pointed out that in *County Council of Dumbarton v. Commissioners of Clydebank*, 4 F. 111, the Court, on a statutory appeal from the Sheriff, had assumed the power of awarding expenses, both before them and in the Court below, of a successful opposition to the Magistrates' application, although the statute made no provision for expenses. I have some difficulty in understanding that decision; and, looking to what Lord M'Laren says, I cannot regard it as a considered judgment upon the point, and can only explain it to my own mind by assuming that, in the peculiar circumstances of the case, and to mark their sense of the improper and harassing conduct of the local commissioners, the Court used their *nobile officium* to do that which neither they nor the Sheriff had power under the statute or at common law to do. But this does not infer that the Sheriff had any power at his own hand to do the same; and in support of my view I refer to *White v. Magistrates of Rutherglen*, 24 R. 447.

"I therefore propose to suspend the charge, with expenses."

¹ Dec. 19, 1893, 21 R. 323.

² *Strichen Parish Council v. Goodwillie*, *supra*, p. 835.

strative or legislative functions to the Sheriff.¹ The fact that in these July 4, 1908.
 statutes the power was expressly given implied that without that Liddall v.
 authority it did not exist. The cases founded on by the reclaimers Ballingry
 were not in point. The opinion in *Ledgerwood v. McKenna*² was Parish
 merely *obiter*. The cases where the Court of Session had awarded Council.
 expenses did not apply, for such appeals came before the Court of
 Session in its ordinary capacity as a Court of Justice, and not in an
 administrative capacity. Although the expenses of the Sheriff Court
 proceedings had been awarded by the Court of Session in *Dumbarton*
County Council v. Clydebank Commissioners,³ that was specially done on
 the ground of oppression, and, further, it was no authority for the view
 that the Sheriff could have done so at his own hand. (2) In any
 event, the opposition of the objector here had not been such as to
 justify an award of expenses against him. He had appeared in
 response to an intimation ordered by the Sheriff calling for objec-
 tions. He had an interest to object to the pollution of the burn, not
 only on account of his own property, but on behalf of the inhabitants
 of the village through which the burn flowed. And he had been
 successful to this extent, that the Sheriff had condemned the tenta-
 tive drainage scheme of the Parish Council, and had indicated that a
 more efficient scheme must be provided.

At advising on 4th July 1908,—

LORD M'LAREN.—This is a reclaiming note against an interlocutor of the
 Lord Ordinary disposing of an application for suspension of a decree for
 expenses and of a charge following thereon. The case arose out of an
 application made to the Sheriff under the Burial Grounds Act by the Parish
 Council of Ballingry to have a certain piece of ground set apart as a burial
 ground. In the proceedings which followed Mr Liddall appeared as an
 objector. The Sheriff repelled his objections, and found the petitioners
 entitled as against him to such expenses as had been caused by his appear-
 ance and opposition. Mr Liddall has been charged for payment under this
 decree, and has brought this suspension, in which he prays the Court to
 suspend the charge and the whole grounds and warrants thereof. Opposi-
 tion was offered, I believe, by Mr Liddall upon the ground that the opening
 of a burial ground in this place would pollute a stream which flows through
 the parish, and in which Mr Liddall has an interest as a conterminous pro-
 prietor. I do not know that we are much concerned with the grounds of
 opposition except to see that they are not factious or vexatious. The Sheriff
 in the exercise of what he considered to be his jurisdiction made an award
 of expenses. The question is, had the Sheriff power to make such an
 award? The argument of the suspender is that the Sheriff was exercising
 an administrative jurisdiction to which the rules that regulate the awarding
 of expenses in ordinary actions do not apply. There are different ways in

¹ Private Legislation Procedure (Scotland) Act, 1899 (62 and 63 Vict. cap. 47); Public Health (Scotland) Act, 1897 (60 and 61 Vict. cap. 38); Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55); Roads and Bridges (Scotland) Act, 1878 (41 and 42 Vict. cap. 51); Ecclesiastical Buildings and Glebes (Scotland) Act, 1868 (31 and 32 Vict. cap. 96); Registration of Voters (Scotland) Act, 1856 (19 and 20 Vict. cap. 58).

² 7 Macph. 261.

³ 4 F. 111.

July 4, 1908. which this principle, which I think is a sound principle within certain limits, may be considered.

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In the first place, this is an administrative proceeding under which the Sheriff is asked to sanction the compulsory acquisition of land. If the local authority does not move, and it is necessary to apply to the Sheriff, then, even if the proprietor is willing to sell and every other necessary consent is obtained, the Sheriff must investigate the circumstances and must be satisfied that it is in the interests of the parish that the burial ground should be acquired. The cost of finding the evidence and of laying it before the Sheriff must be borne by the parish even where there is no opposition. Theoretically the expense of the promoters is just the same whether the application is opposed or unopposed. As a matter of fact the case of the promoters will be got up in a more careful, and therefore in a more expensive, way when opposition is expected than it would otherwise be. But it is difficult to distinguish between the cost of laying before the Sheriff evidence which is necessary to establish the case of the promoters and that which is required to meet adverse evidence, and this difficulty is an argument against treating the expenses of opposition as litigious expenses.

Next we have to consider that opposition is not necessarily of a litigious character. Where land has to be taken for the formation of a burying ground, a proprietor whose land is to be taken, but who objects to parting with it, may, if he wishes to be troublesome, insist that the value of his land be assessed by a jury, or he may in any case ask for an arbitration under the conditions of the Lands Clauses Consolidation Act. The same consideration applies to anyone who considers that his land will be injuriously affected. Mr Liddall made no pecuniary claim. He came in the interest of the parish to complain of the pollution of a stream in which all the parish was interested. Mr Liddall was not appearing for himself; he had a right to appear under the conditions of the statute. A person who appears to lay considerations before the Sheriff which the promoters might not be expected to put before him, is really coming forward in the public interest, and such a person should not be treated as a contentious litigant. I see nothing to shew that Mr Liddall appeared except to see that an object laudable in itself should not be made injurious to the public in other ways.

Again, in an ordinary action expenses are awarded on the ground that the party is entitled to be indemnified for the expense to which he has been put in defending his rights or enforcing his claim, but this ground of judgment is not available where the proceedings are administrative. I say nothing as to cases in which the right to appear is abused and as to whether expenses should be awarded in such cases.

The power of expropriating lands for purposes of public utility is an element of the sovereign right of the State, and can only be exercised by Parliament. According to the common law of Parliament expenses are not given to or against parties promoting private bills, but by the standing orders expenses may be awarded in cases of vexatious opposition. When Parliament delegates its powers to a local authority, without making provision as to expenses, the natural conclusion is that these powers are given under the same conditions which regulate the practice of Parliament.

Where the opposition to the power sought is confined within reasonable July 4, 1908.
 limits, I am unable to see that there is any authority for treating it as hostile litigation to be followed by an award of expenses to the successful party. But where opposition is vexatious, I should not be disposed to doubt that the local authority, in this case the Sheriff, would have authority to deal with the opposition in the same way as Parliament would deal with such a case. But it is not necessary to consider that question for the purposes of the present case, except in so far as it touches upon the points raised in the case of the *County Council of Dumbarton v. Clydebank Burgh Commissioners*,¹ which has been cited to your Lordships as an authority for allowing expenses in an administrative proceeding. This was the case of a second application by the burgh of Clydebank asking for an extension of its boundaries at the expense of the county. It was keenly contested, and large expenses were incurred. The second application, like the first, was refused, and the Lord President in giving judgment said—"It appears to me that the case of *White v. The Magistrates of Rutherglen*² is not an authority for the proposition that under no circumstances can or should expenses be awarded to the persons who have successfully resisted an application of this kind. A similar application was made by the burgh of Clydebank in 1890, and it was successfully resisted, the petition having been refused by Sheriff Blair in 1891, and the persons (or the interests) who were then successful have had to defend themselves again. I think it not doubtful that the Court has power to award expenses, and that this is a clear case for awarding them.

"Serious oppression might result if suburban owners or administrative bodies could be called upon to defend themselves again and again from such applications by a wealthy burgh.

"Whether this is a litigation or an administrative proceeding, the unsuccessful applicants shall in the circumstances of the present case pay the expenses of the parties whom they convened and who successfully defended themselves."

In that case I am reported to have said—"My only doubt is whether, seeing that this is a statutory proceeding, our jurisdiction extends to the awarding of expenses incurred in the inferior Court. That is a question on the terms of the statute, and it is never safe to express an opinion on the construction of a statute without having it read and hearing argument on it. As this point was not taken, I do not need to consider it for the purposes of the case." I do not refer to my opinion as bearing on the merits of the question, but only because it is there pointed out that the distinction between the expenses of the local inquiry and the expenses of the appeal had not been argued, and because I do not think the Court intended to lay down a rule of general application which had not been tabled in discussion. But whatever was the ground of the decision, it appears to me that the general question as to expenses following the event in such applications was not raised and argued at the bar. I have every reason to believe that the judgment in the circumstances of that case was sound, and that it is an authority for the proposition that in a case of vexatious opposition expenses may be awarded in an administrative proceeding.

¹ 1901, 4 F. 111.

² 24 R. 446.

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The ground upon which the Lord President's judgment proceeds is that the application was vexatious, being the second application upon grounds quite insufficient to support the proposed extension. I should like to consider it, if possible, an open question, whether the question of expenses is wholly a circumstantial question to be raised afresh in every case, or whether it is a general rule that parties appearing before the Sheriff in such proceedings are not liable in expenses. But in any case I am prepared to hold that in the absence of such special circumstances as justify the Court in coming to the conclusion that the party puts himself in the position of a contentious litigant there is no ground or authority for awarding expenses against such a party merely because his application has been unsuccessful. I therefore think that the Lord Ordinary is right, and that his judgment should be upheld.

LORD KINNEAR.—I concur.

LORD DUNDAS.—I agree generally with the Lord Ordinary, and with what has been said by your Lordship in the chair. I think the Sheriff-substitute was sitting in a purely administrative, and not in his judicial, capacity; and that he was not, in the circumstances, entitled to award expenses against Mr Liddall.

The LORD PRESIDENT and LORD PEARSON were absent.

THE COURT adhered.

SOMERVILLE & WATSON, S.S.C.—TAIT & CRICHTON, W.S.—Agents.

No. 161.

July 7, 1908.

Watson v.
Gibson & Co.

JAMES WATSON AND OTHERS (Owners of the "Hebe"), Pursuers
(Reclaimers).—*C. D. Murray—R. S. Horne.*

M. H. REDHEAD AND OTHERS (Owners of the "Thames"), Pursuers
(Reclaimers).—*C. D. Murray—R. S. Horne.*

GEORGE GIBSON & COMPANY (Owners of the "Eildon"), Defenders
(Respondents).—*Dickson, K.C.—Carmont.*

Ship—Collision—Compulsory Pilotage—Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), sec. 604 (1).—The Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), enacts:—Section 604 (1).—The master of every ship carrying passengers between any place in the British Islands and any other place so situate shall, while navigating within the limits of any district for which pilots are licensed under this or any other Act, employ a qualified pilot. . . ."

The steamship "Eildon" on a voyage from Leith to Dunkirk called at Middlesborough to complete her cargo. She carried a number of passengers, who were all booked for the voyage from Leith to Dunkirk. On arrival at Middlesborough the "Eildon" loaded cargo at Cochrane's Wharf and then proceeded up the Tees to Dent's Wharf, both within the port of Middlesborough, in charge of a licensed pilot, to take in further cargo. While in the river off Dent's Wharf she collided with the lighter "Hebe" and her tug the "Thames."

In an action of damages brought by the owners of the "Hebe" and of the "Thames" against the owners of the "Eildon," the defence was that the "Eildon" was carrying passengers between Leith and Middlesborough, and that when the collision occurred she was within a pilotage district and was compelled by the Merchant Shipping Act, 1894, sec. 604 (1), to employ a licensed pilot, and that, having done so, she was not responsible.

The pursuers contended that as the only passengers on board the "Eildon" July 7, 1908. were booked for the voyage from Leith to Dunkirk, the section did not apply.

The Lord Ordinary (Salvesen) held that the "Eildon" was carrying passengers between Leith and Middlesborough within the meaning of the Act, and that the section applied. Watson v. Gibson & Co.

The pursuers having reclaimed, the Second Division *repelled* the defenders' plea of compulsory pilotage:—Lord Stormonth-Darling and Lord Ardwall holding that the passengers booked for Dunkirk could not be regarded as passengers between places in the British Islands in the sense of the Act, Lord Low holding that although the Act applied to the voyage between Leith and Middlesborough, it ceased to do so when the vessel arrived at Middlesborough, and that even if the vessel were carrying passengers between Cochrane's Wharf and Dent's Wharf they could not be regarded as separate "places" in the sense of the Act, both being in the port of Middlesborough.

JAMES WATSON AND OTHERS, owners of the lighter "Hebe" of 2^D DIVISION. Newcastle, and Mark H. Redhead, owner of the steam-tug "Thames" of Newcastle, brought an action against George Gibson & Company, owners of the steamship "Eildon" of Leith, in which they concluded for damages for a collision, which took place in the River Tees off Dent's Wharf, Middlesborough, between the "Hebe" and the "Thames" on the one hand, and the "Eildon" on the other. Lord Salvesen.

The pursuers averred that the collision was caused by the fault of those in charge of the "Eildon."

The defenders stated that at the time of the collision the "Eildon" was in charge of a pilot whom they were compelled to employ.

The defenders pleaded;—(2) *Separatim*, the defenders' vessel being at the time of the collisions in charge of a pilot whose employment was compulsory, and the collisions, if due to the fault of anyone on board the defenders' vessel, being due to his fault, the defenders should be assoilzied.*

The pursuers pleaded;—(3) The defenders' averments as to compulsory pilotage being irrelevant, their second plea ought to be repelled.

The following narrative of the facts admitted is taken from the judgment of Lord Ardwall:—"The 'Eildon' was on a voyage from Leith to Dunkirk, but required to call at Middlesborough to fill up her cargo. She loaded at Leith and took on board part of her cargo and a number of passengers. The passengers were all booked to Dunkirk and paid their fares in respect of such booking. No passengers were booked from Leith to Middlesborough. When the 'Eildon' arrived at Middlesborough, she first proceeded to a wharf known as Cochrane's Wharf, where she took in further cargo. She then proceeded up the river under the charge of a pilot to take on board other cargo at Dent's Wharf, and it was while she was in the river off Dent's Wharf that the collision complained of took place. After taking in more cargo at Dent's Wharf the 'Eildon' proceeded to Dunkirk, where her passengers and cargo were all landed."

The place where the collision occurred is within the district for which pilots are licensed by the Tees Pilotage Commissioners.

On 18th March 1908 the Lord Ordinary (Salvesen) repelled the third plea in law for the pursuers, and allowed a proof.†

* See section 604 (1) of the Merchant Shipping Act, 1894, which is quoted in the rubric.

† "OPINION.—This is an action of damages arising out of a collision which took place between the lighter 'Hebe,' in tow of the steam tug 'Thames,' and the s.s. 'Eildon,' of Leith. The sole question argued was

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The pursuers reclaimed. The case was heard before the Second Division on 17th June 1908.

Argued for the pursuers and reclaimers;—It was clear that pilotage was compulsory under this subsection only in the case of vessels carrying passengers "between any place in the British Islands and any other place so situate."¹ At the time of the collision the "Eildon" was not in that position. No person could be a passenger unless he was carried under a contract with the owners.² Here the owners had not contracted to carry anybody from Leith to Middlesborough. All the passengers had booked from Leith to Dunkirk. Accordingly the "Eildon" was not carrying passengers between Leith and Middlesborough. The defenders' argument involved the consequence that every passenger ship navigating within the district must employ a licensed pilot. That was tantamount to reading the words "between

whether, under the circumstances narrated by the defenders, the defence of compulsory pilotage is open to them.

"The admitted facts are as follows:—(His Lordship stated the facts). These being the facts, the defenders contend that section 604, subsection 1, of the Merchant Shipping Act, 1894, required them to employ a qualified pilot in the Tees, and accordingly that they are not liable for any negligence which he may have committed in the course of the navigation of the 'Eildon.' The material part of the section is in the following terms:—(His Lordship quoted the subsection). In the case of the 'Osprey,' 5 F. (J. C.) 16, Lord Adam observed that this enactment was obviously made 'for the protection of human life.' It may have been so, but in that case it is singularly incomplete, because there is no enactment that, on the return journey from Dunkirk to Middlesborough, the vessel must employ a pilot in the Tees pilotage district, although the risk to the passengers from the vessel navigating these narrow waters is obviously the same whether the ship is approaching Middlesborough from Leith or from Dunkirk. I have, however, nothing to do with the anomalies of legislation, except in so far as they may have a possible bearing on interpretation; and I do not see how the purpose of the enactment can, in this case, afford any aid in construing the enactment itself. The 'Eildon' was admittedly carrying passengers between Leith and Middlesborough, and therefore the enactment would appear *prima facie* to apply. Does it then make any difference that none of the passengers were to be landed at Middlesborough; and is it implied in the section, as the pursuers argued, that a vessel is not carrying passengers between two British ports if the passengers are, in fact, booked to a foreign port, which is the ultimate destination of the ship? In my opinion it would be introducing an additional anomaly into this code of legislation if I were so to hold. The result would be that if a couple of passengers had booked from Leith to Middlesborough, the master would require to engage a pilot for the Tees; but if they were all going to Dunkirk, he would be exempt from compulsory pilotage. Whether the object of the enactment be to protect human life, or merely to secure employment for home pilots, such a distinction would be equally meaningless. I have accordingly no difficulty in repelling the pursuers' third plea in law, and as the case was sent on their motion to the Procedure-roll, I shall find them liable in expenses since the closing of the record. On the pleadings as they stand, I shall allow parties a proof, which will enable the pursuers, if they choose, to take the case further at this stage."

¹ Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), secs. 604 (1) and 605 (1); The "Temora," 1860, Lushington's Admiralty Reports, 17; The "Osprey," 1902, 5 F. (J. C.) 16.

² The "Hanna," 1866, L. R., 1 A. & E. 283; The "Lion," 1869, L. R., 2 P. C. 525.

any place in the British Islands and any other place so situate" as if July 7, 1908. they had been "navigating within the district." That was an inadmissible construction, and was inconsistent with section 596,¹ which contemplated the employment of unqualified pilots. The case of *The "Rutland"*² did not touch the present. It only decided that a ship did not lose her character as a trading ship because she did not put out or take in cargo at a particular port. Even if the "Eildon" were bound to carry a pilot on the voyage to Middlesborough, the obligation ceased as soon as she arrived at that port.³ She was an arrived ship as soon as she reached Cochrane's Wharf, and therefore she was not bound to have a pilot on board at the time when the collision took place. The contention that Cochrane's Wharf and Dent's Wharf were separate places within the meaning of the section was unsound. "Place" meant "port" or place *ejusdem generis* with port. But in any view, two different wharves in the same port were not separate places within the meaning of the section. *Dublin Port and Docks Board v. Shannon*⁴ was distinguishable. The two termini there were not in the same port.

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Argued for the defenders and respondents;—The defenders were bound to employ a licensed pilot if the "Eildon" was carrying passengers between two places in the United Kingdom. In the present case that condition was fulfilled. In the first place, the "Eildon" was carrying passengers between Leith and Middlesborough. It was immaterial that none of the passengers were to leave the ship at Middlesborough.⁵ The pursuers' argument on this head could not have been maintained if there had been even one passenger who was to disembark at Middlesborough, and it was unreasonable to suppose that the absence of this one passenger should deprive all the other passengers of the protection provided by the Legislature. Section 596⁶ merely provided that in certain circumstances no penalty should be exacted if an unqualified pilot were employed. It did not touch the obligation of a passenger ship to employ a pilot. Even if the "Eildon" was an arrived ship, she was still bound to carry a pilot, because she was carrying passengers between Cochrane's Wharf and Dent's Wharf. These were both places in the United Kingdom, and it was immaterial that they were both in the same port.⁷ The argument that "place" meant "port" was unsound. "Port" was defined as including "place."⁸ The "Servia"⁹ was not in point. It turned on the construction of another Act of Parliament. Counsel also referred to section 625 (5) of the Merchant Shipping Act, 1894.¹⁰

At advising on 7th July 1908,—

LORD STORMONTH-DARLING.—This action of damages arises out of a collision which took place in the River Tees between the lighter "Hebe"

¹ Merchant Shipping Act, 1894, sec. 596.

² L. R., [1897] A. C. 333, aff. [1896] P. 281.

³ The "Maria," 1867, L. R., 1 A. & E. 358; The "Servia," L. R., [1898] P. 36.

⁴ 1873, 7 I. R. Common Law Series, 116.

⁵ The "Rutland," L. R., [1897] A. C. 333.

⁶ Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), sec. 596.

⁷ Dublin Port and Docks Board v. Shannon, 1873, 7 I. R. Common Law Series, 116.

⁸ Merchant Shipping Act, 1894, sec. 742.

⁹ L. R., [1898] P. 36.

¹⁰ 57 and 58 Vict. cap. 60.

July 7, 1908. in tow of the steam-tug "Thames" and the s.s. "Eildon" of Leith. The sole question argued at this stage of the case was whether, under the circumstances narrated by the defenders the defence of compulsory pilotage is open to them. This question has been decided by the Lord Ordinary in the affirmative, and he has accordingly repelled the third plea in law for the pursuers and allowed a proof.

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Darling.

The admitted facts are that on the voyage in question the "Eildon" carried passengers as well as cargo, that she loaded at Leith, where she took on board part of her cargo and a number of passengers, that she proceeded in the first instance to Middlesborough to load further cargo there at Cochrane's Wharf and Dent's Wharf, but that the destination of the passengers and of the cargo was Dunkirk, none of the passengers having booked from Leith to Middlesborough, and that when the collision occurred she was in charge of a pilot licensed by the Tees Pilotage Commissioners, and was within the pilotage district over which their jurisdiction extends. The question turns on the true construction of section 604 (subsection 1) of the Merchant Shipping Act, 1894, which is recited in its essential points in the Lord Ordinary's opinion. His Lordship has decided that the compulsory pilotage is, in the circumstances, a good defence, chiefly on the ground, apparently, that the opposite view would introduce additional anomalies into this code of legislation, although in the earlier part of his opinion his Lordship says that he has "nothing to do with the anomalies of legislation, except in so far as they may have a possible bearing on interpretation." I regret to be unable to agree with this view. I prefer to follow the kind of construction adopted by Lord Halsbury when dealing with a different phrase in the same statute in the case of *The "Rutland."*¹ There the House of Lords had to construe the meaning of "Ships trading from any port in Great Britain within the London district to any port in Europe north and east of Brest," and it was argued that a ship laden with a cargo from the River Plate to Rotterdam, and with cattle for London, was not "trading" from London to Rotterdam, within the meaning of the statute, when she had discharged the cattle in London and was proceeding on her voyage from London to Rotterdam, without having taken in any fresh cargo in London. Lord Halsbury held that it was a very forced construction to "subdivide minutely" the act of trading into each particular thing that was being done, and he rejected the argument that the word "trading" must mean carrying goods from each port of departure to each port of arrival. The judgment was unanimous.

Now, applying the principle of reading words in a statute according to their ordinary and natural import (which Lord Watson, in the same case, laid down as the proper principle to apply), I ask what is the ordinary and natural import of the words "every ship carrying passengers between any place in the British Islands and any other place so situate"? Besides the statutory definition of "Passenger" as including "any person carried in a ship other than the master and crew, and the owner, his family and servants" (section 267 of the Act of 1894), we have the decision of the Privy Council in the case of *The "Lion"*² that the payment of a fare is necessary

¹ L. R., [1897] A. C. 333.

² 1869, L. R., 2 P. C. 525.

to constitute a passenger within the meaning of the Compulsory Pilotage July 7, 1908. sections of the Merchant Shipping Act of 1854, which are practically the same as in the later Act of 1894, and therefore that where certain persons were on board a vessel by invitation from the captain without the privity of the owners, but these persons had not paid, or agreed to pay, any fare before a collision took place, they were not passengers within the meaning of the Act, so as to exonerate the owners from the damage occasioned by the pilot's default (section 633, Merchant Shipping Act, 1894). I deduce from this that to make a man a passenger you must have a contract with the owners, made before the collision takes place. Then comes the statute, which speaks of "passengers between any place in the British Islands and any other place so situate"; so it is not passengers in general, but a particular class of passengers that are intended—passengers, that is to say, "between" two places, each in the British Islands. Can that in the ordinary use of language mean anything else than the place of departure and the place of arrival? And if the place of arrival be not a place in the British Islands, but a foreign port, can section 604 apply at all? There may be no breach of contract in carrying the passenger to any number of ports in Britain so long as he knows and agrees to the terms of the contract, but can he whose ultimate destination is a port in France be said to be a passenger between two places in Britain? Even if it were possible to get over that primary difficulty, is it possible to "subdivide minutely" (to use Lord Halsbury's expression in the case of *The "Rutland"*¹) the description of the passage from Leith to Dunkirk, so as to describe it first as a passage from Leith to Middlesborough, and then as a passage from Middlesborough to Dunkirk? But it seems to me that the idea of compulsory pilotage, as applying to the River Tees in a voyage where there were no passengers except to a foreign port, is excluded by the plain words of section 604 (1) of the statute, and that this view is enough for the decision of the case.

LORD LOW.—If the collision between the "Eildon" and the "Hebe" had occurred after the former had entered the Tees, but before she arrived at Middlesborough, I should have agreed with the Lord Ordinary, and as your Lordships are of a different opinion, I shall state shortly the grounds upon which I would have done so.

The provisions of section 604 (1) of the Merchant Shipping Act, 1894, are intended for the protection of passengers, and, in my humble opinion, the construction which your Lordships put upon the enactment would, to a large extent, defeat its object. If there had been a single passenger to Middlesborough on board the "Eildon" upon the voyage in question, and if, as I am now assuming, the collision had occurred before the "Eildon" arrived at Middlesborough, I do not think it could be disputed that it would have been compulsory upon the master to take a pilot on board when he entered the Tees. But (according to the view taken by your Lordships, if I rightly understand it) because that single passenger was awaiting, all the passengers were deprived of the security which the employment of a pilot is supposed to give, and which the statute intended that they should have.

¹ L. R., [1897] App. Ca. 333.

July 7, 1908. A construction of the enactment which would lead to such a result does not commend itself to my mind as likely to have been what the Legislature intended, and I should not be prepared to adopt it unless the language used, when fairly read, admitted of no other construction.

Watson v. Gibson & Co.
Lord Low.

The words requiring to be construed are "every ship carrying passengers between any place in the British Islands and any other place so situate."

Now, the "Eildon" was undoubtedly carrying passengers, and therefore the question is narrowed to this, whether she was carrying them between two places in the British Islands? It would, I suppose, be conceded that Leith is a place and that Middlesborough is a place within the meaning of the enactment. Therefore when the accident occurred (upon the assumption I am making) the "Eildon" was "carrying passengers," and, as matter of fact, she was carrying them "between" two "places" in the British Islands. If the statute had said from a place in the British Islands to any other place so situate, there would have been more difficulty, because the words "from" and "to" would have suggested, on the one hand, the place of embarkation, and on the other the destination of the passengers. I think that the word "between" was used for the very purpose of excluding that idea, and that the true construction of the enactment is that when a ship is carrying passengers, and is in fact carrying them between two places in the British Islands, even although their voyage may have commenced before the first place was reached and may be prolonged beyond the second place, it is compulsory for the master to take a pilot while navigating within the limits of any district for which pilots are licensed.

But then when the collision happened the "Eildon" was not in fact carrying passengers between Leith and Middlesborough, because she had already arrived at Middlesborough, and any passengers for Middlesborough would in ordinary course have left the ship before the collision took place. The question remains whether Cochrane's Wharf and Dent's Wharf, both at Middlesborough, are separate places within the meaning of the enactment. I am of opinion that they are not. Looking to the context and the purpose of the enactment, I think "place" means a place where passengers are taken on board and disembarked. In that sense Middlesborough is a place, but different wharves at Middlesborough are not places, and when the "Eildon" was shifting from one wharf to another at Middlesborough for convenience in loading cargo, she was not, in my opinion, carrying passengers between places in the British Islands within the meaning of the enactment. If her destination, after leaving Middlesborough, had been another port in the British Islands, the question might not have been so clear, because it might have been contended that she had completed her voyage to Middlesborough and had commenced her voyage to that other port. Any such argument is, however, excluded by the fact that her next port of call was Dunkirk.

I therefore agree with your Lordship that, upon the defenders' own statement, the defence of compulsory pilotage is not open to them.

LORD ARDWALL.—(After the narrative quoted *supra*)—The defenders state as a defence that at the time of the collision the "Eildon" was in charge of a pilot whose employment was compulsory. The Lord Ordinary

has held that it was. Against this judgment the pursuers have reclaimed, July 7, 1908. and accordingly the question submitted for determination at this stage of the case is whether it was compulsory on those in charge of the vessel ^{Watson v. Gibson & Co.} "Eildon" to employ a qualified pilot in the River Tees. Section 604, sub-^{Lord Ardwall.} section (1), of the Merchant Shipping Act provides as follows:—"The master of every ship carrying passengers between any place in the British Islands and any other place so situate shall, while navigating within the limits of any district for which pilots are licensed under this or any other Act, employ a qualified pilot . . . and if he fails to do so shall, for each offence, be liable to a fine not exceeding One hundred pounds." The question accordingly comes to be, was the "Eildon," when the collision occurred, carrying passengers between Leith and Middlesborough? or between Cochrane's Wharf, Middlesborough, and Dent's Wharf, Middlesborough? or between Leith and Dunkirk? If within the meaning of the Act either of the first two alternatives be answered affirmatively, then it would appear that the employment of a pilot at the place where the collision happened was compulsory. If the last alternative be answered in the affirmative and the other two in the negative, then such employment was not compulsory.

The first remark that occurs to me is that the clause must be read as a whole, and that the meaning which the words would naturally convey to any ordinary person must be regarded as their true meaning; the direction to employ a pilot was intended for masters of ships, and not for lawyers or logicians.

Now, when a ship is described as carrying passengers "between" one place and another, I take it that in ordinary language it is the termini of the passengers' journey or voyage that are designated and not any stopping places in the course of such journey. To illustrate my meaning, suppose that a person is travelling by the East Coast route from Edinburgh to London, he would in ordinary language be described as a passenger "between" Edinburgh and London, and although physically and in point of actual fact he was travelling for a part of the journey between Newcastle and York, it would not convey a true impression to say of such passenger during that stage of the journey that he was a passenger between Newcastle and York.

Similarly, if a ship is carrying passengers from Leith as one terminus to Dunkirk as the other terminus, I think the ship cannot, according to the ordinary use of language, be said to be carrying them to Middlesborough or to any other place either within or without the British Islands. Yet the Lord Ordinary has found that the "Eildon," with no passengers on board except those bound for Dunkirk, was carrying these passengers between Leith and Middlesborough within the meaning of the Act, though such passengers never landed at Middlesborough or ever left the ship till they reached Dunkirk. He does not seem to decide whether the ship at the time of the collision was carrying passengers from Leith to Middlesborough or not. It appears to me that in no view can it be predicated of the ship that at that time she was so engaged, because so far as Middlesborough was concerned, she was, on her reaching Cochrane's Wharf, an arrived ship, her voyage was over, and the passengers had reached their destination, so the only other alternative open which can justify the Lord Ordinary's conclusion

July 7, 1908. is that the "Eildon" at the time of the collision was carrying passengers
Watson v. "between" (for that is the word used in the Act) Cochrane's Wharf and
Gibson & Co. Dent's Wharf, both in Middlesborough. I must say I consider that to pre-
Lord Ardwall. diccate this of the "Eildon" at that time is to talk something very like
nonsense, and I am certain that such a description of the employment of
the "Eildon" at the time of the collision would never have occurred to a
shipmaster or anyone else. This is a highly penal clause of the Act, and if
the "Eildon" had not employed a pilot and the master had been prosecuted
for a fine of £100 on the ground that he had failed to employ a pilot while
his ship was carrying passengers between Cochrane's Wharf and Dent's
Wharf, these being "places" within the British Islands within the meaning
of the statute, I think the prosecution would have been laughed out of
Court.

The plain common-sense meaning of the clause is simply this, that ships
carrying passengers from one British port to another British port are to
employ pilots when navigating within the limits of any district for which
pilots are licensed, whereas ships carrying passengers between a British port
and a foreign port are not required to do so. The word "place" and not
"port" is used, I suppose in order to cover places outside of as well as
inside of ports, but that does not affect the general meaning. Port is said
in the definition clause of the Act (section 742) to "include place," but
there may be places where passengers are disembarked outside of a port and
yet within the British Isles. I should suppose Iona is not a port, and yet
thousands of passengers are landed there from steamships every year. I
desire further to point out that the obvious and indeed the only sure test by
which the master of any ship can determine whether his ship is in the ordi-
nary meaning of the words "carrying passengers between any place in the
British Islands and any other place so situate" is the destination of the
passengers as entered in the ship's books or papers, and for their passage to
which place they have paid the customary fares. In *The "Hanna"*¹ and
*The "Lion,"*² payment of a fare was taken as the test of whether a person
was or was not a "passenger" on board a ship within the meaning of the
earlier shipping statutes, and I think that similarly the test of the place to
which a ship is "carrying" any person is the place to which such person
has paid his fare.

I am therefore of opinion that at the time the collision occurred the
"Eildon" was not, according to the ordinary use of language or within the
meaning of the statute, carrying passengers "between any place in the
British Islands and any other place so situate," but was in the ordinary
sense of the phrase carrying passengers between Leith and Dunkirk, and
that accordingly it was not compulsory on the master to employ a pilot.
Lord Low supposed the case of the "Eildon" carrying one passenger to
Middlesborough, and pointed out that it was hard that for want of that one
passenger the others should be deprived of the safety afforded by the
employment of a pilot. But the presence of that passenger would have
altered the whole case and made the section applicable, with the result that

¹ 1866, L. R., 1 A. & E. 283.

² 1869, L. R., 2 P. C. 525, and 2 A. & E. 102.

the passengers to Dunkirk would have obtained a protection which under July 7, 1908. the statute they were not entitled to.

I am accordingly of opinion that the Lord Ordinary's interlocutor should be recalled, the third plea in law for the pursuers sustained, and the second plea in law for the defenders repelled, and that *quoad ultra* the parties should be allowed a proof of their averments, and the pursuers a conjunct probation.

Watson v.

Gibson & Co.

Lord Ardwall.

The LORD JUSTICE-CLERK was absent.

THE COURT pronounced this interlocutor:—"Recall the . . . interlocutor reclaimed against: Sustain the third plea in law for the pursuers: Repel the second plea in law for the defenders: Remit the cause to the . . . Lord Ordinary to allow the parties a proof of their averments *quoad ultra*, and to the pursuers a conjunct probation."

BOYD, JAMESON, & YOUNG, W.S.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—
Agents.

GIERTSEN AND OTHERS, Pursuers (Reclaimers).—*Dickson, K.C.—*
C. H. Brown.

No. 162.

GEORGE V. TURNBULL & COMPANY, Defenders (Respondents).—
Horne—W. T. Watson.

July 9, 1908.

Et c Contra.

Giertsen v.
Turnbull &
Co.

Ship—Charter-Party—Time Charter—Warranty of Seaworthiness—Separate Voyages.—Under a time charter-party a steamer was hired by the owners to the charterers for a period of six months from September 1905, "she being then tight, staunch, and strong, and every way fitted for the service," the owners being bound to "provide and pay for the necessary equipment for the proper and efficient working of the said steamer, maintaining her in a thoroughly efficient state for and during the service."

On 28th November 1905 a breakdown of machinery occurred while the vessel was on a voyage from Jaffa to Valencia, necessitating her going to a port for repairs. This breakdown was due to defects which were in existence before the vessel left Jaffa on 20th November.

Held that the owners' obligation at common law and under the charter-party was to hand over the vessel in a seaworthy condition at the commencement of the hiring, and to maintain her in that condition by defraying whatever expenses were necessary for repairs; but that there was no warranty, either express or implied, that she should be seaworthy at the commencement of each particular voyage or stage of a voyage during the currency of the charter, so as to entitle the charterers on the ground of breach of implied warranty to refuse payment of the hire for the voyage between Jaffa and the place where the breakdown was remedied.

The "Vortigern," [1899], P. 140, distinguished.

Ship—Charter-Party—Breakdown of Machinery—Date of Commencement.—A time charter-party provided "that in the event of loss of time from . . . breakdown of machinery . . . the payment of hire shall cease from the time the breakdown occurred until" the vessel "be again in an efficient state to resume her service."

In the course of a voyage the vessel left a port with defects in her machinery which at first did not impede her progress, but which gradually became more serious, and ultimately necessitated her going to a harbour for repairs.

Held that the breakdown occurred at the point of time when the defects

July 9, 1908. became so serious as to render it necessary, in the opinion of a prudent navigator, that she should proceed to a harbour for repairs.

Giertsen v.
Turnbull &
Co.

Ship—Charter-Party—Breakdown—Off Hire—Liability for coals consumed during off hire.—A clause in a time charter-party provided that the charterers of the vessel should pay for the coals used during the currency of the charter. The charter-party expressly provided that the payment of hire should cease during breakdowns.

Held that the charterers were bound to pay for the coals used during periods of breakdown.

2D DIVISION.
Lord Salvesen.

IN July 1905 Mathilde Giertsen, Bergen, and others, owners of the s.s. "Bauta," of Bergen, chartered her to George V. Turnbull & Company, Leith, for a period of six calendar months from September 1905.

At the conclusion of the period of hire the parties differed as to the amount due under the charter-party, and in consequence two actions were raised by the owners against the charterers, and a cross action by the charterers against the owners. These actions were conjoined.

The charter-party provided, *inter alia*, as follows:—"That the owners agree to let, and the charterers agree to hire, the said steamship or vessel for the term of six calendar months; commencing from the 1/30th September 1905 . . . she being then tight, staunch, and strong, and every way fitted for the service . . . on the following conditions:—(1) That the owners shall provide and pay for all provisions and wages of the captain, officers, engineers, firemen, and crew; and shall pay for the insurance on the vessel, and for all necessary stores . . . and provide and pay for the necessary equipment for the proper and efficient working of the said steamer, maintaining her in a thoroughly efficient state for and during the service. (2) That the charterers shall provide and pay for all the coals, fuel, port charges, pilotages, agencies, and all other charges and expenses whatsoever. (3) That the charterers shall accept and pay for all coals in ship's bunkers on delivery; and the owners shall on the expiry of this charter-party pay for all coals then left in the bunkers, at current market prices in both cases. (4) That the charterers shall pay for the use and hire of the said vessel at the rate of £270 sterling per calendar month. . . . (9) That the captain, although appointed by the owners, shall follow the instruction of the charterers, who will furnish him from time to time with the necessary sailing directions. . . . (12) That in the event of the loss of time from a deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire shall cease from the time the breakdown, &c., occurred, until she be again in an efficient state to resume her service; but should the vessel be driven into port, or to anchorage, by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterers' risk and expense. Charterers to have the option of adding such time off hire to the period stipulated for under this charter. . . . (22) Average, if any, according to York and Antwerp Rules, 1890. . . . (26) Penalty for non-performance of this charter, proved amount of damages. . . ."

The following narrative is taken from the opinion of the Lord Ordinary (Salvesen):—

"These actions all arise out of a charter-party which was entered into between the owners of the 'Bauta' and a firm of shipping agents in Leith. The charter-party is dated 26th July 1905, and was for a

period of six calendar months commencing on 23d September of that July 9, 1908. year. The sums sued for by the owners represent certain deductions which the charterers made when settling for the hire of the vessel during the time that she was actually employed. The charterers, on the other hand, maintain that they were entitled to make larger deductions than they have actually done, and in the counter action at their instance they sue for repetition of sums paid amounting *in cumulo* to about £200. Some of the deductions which are in dispute represent comparatively small amounts, and these the parties have arranged extrajudicially. The controversy has accordingly been substantially narrowed to this—for what periods were the charterers exempt from payment of hire during the currency of the charter-party, in respect of certain breakdowns of machinery which occurred on three separate occasions, and which for the time being prevented the working of the vessel? The clause in the charter-party which regulates this matter is expressed in the following terms :—(His Lordship quoted clause 12). On the construction of this clause as applicable to the facts in the case the controversy turns.

“The evidence with regard to the first breakdown is as follows :—On the 14th of November, while the ‘Bauta’ was on a voyage to Jaffa in ballast to load a cargo of oranges there, the master, who was on deck, heard a peculiar sound, which is entered by the first mate in the log-book as a violent shock in the engine-room. The captain now explains that this language does not accurately express what actually took place, and that the noise in fact was such that it did not attract the attention of any of the other persons who were on deck. It was, however, an unusual sound; and although the captain does not now profess to know what caused it, he at one time attributed it to the propeller having struck some wreckage, although the evidence now led for the ship suggests that it may have been one of the knocking sounds which are a common result of some temporary derangement in the machinery. The experts examined were agreed that such noises are attributable to a variety of causes, such as the slackening of bolts, or the presence of water in the cylinders, or the like. As the steamer, however, was able thereafter to maintain her ordinary speed, the captain did not attach so much importance to the occurrence as he was inclined to do at the time. The entries in the log shew that on the 14th, 15th, 16th, and 17th of November the steamer was able to make, on an average, about 8 knots an hour; and indeed occasionally the speed rose to 8½ and even to 9 knots under favourable conditions. At 10.40 P.M. on the 17th the vessel arrived at Jaffa, and next day she commenced to take in her cargo of oranges. In the mate’s log there is no further reference to the noises in the engine-room, or to anything which could give rise to any uneasiness.

“In the engineer’s log, which was kept by the first engineer, the witness Henrikssen, the entry with regard to the same matter is in the following terms :—‘At 8 P.M. a strange noise was heard in engine-room; the steam pressure was then 140 lbs. As the fires were being cleaned at the time the place whence the sound came could not be located. As the steam pressure rose rapidly the sound disappeared, and the engines were kept working under full steam pressure.’ There are no remarks with reference to the 15th, 16th, or 17th of November, but on the 18th of November the engineer notes, ‘On arrival at Jaffa the strange sound aforementioned was again heard, but during the

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manceuvring nothing was heard.' The engineer, however, deponed that when the pressure got low he had heard a knocking sound, the cause of which he was unable to explain, from time to time during the period between the 14th of November and the arrival of the ship at Jaffa.

" At Jaffa the engineer made as thorough an examination of the engines as was possible under the circumstances. Jaffa is an open roadstead, and accordingly steam required to be kept up on the boilers during the whole period of loading, and I think it is proved that it would have been unsafe to have tilted the vessel so as to have made a thorough examination of the propeller and propeller shaft possible. The engineer, however, rowed round the vessel in a boat, and he also took hold of the propeller with his hand to ascertain whether it was loose. The captain also made an inspection of the ship from a boat, but did not handle the propeller or shaft. Nothing was found to be wrong with the machinery except that two bolts at the couplings which support the propeller shaft were found to be out of order, the one being broken and the other slack. These were put right, and it was hoped that thereby a recurrence of the knocking sound would be prevented. Up to that point I think the master and engineer did all that was reasonable; and I reject the view that they ought to have called a survey by engineers of other vessels, or to have gone to Port Said. The defect, whatever it was, was quite obscure; and there was no reason to apprehend at that time that it would interfere with the working of the vessel.

" The 'Bauta' left Jaffa at 7 P.M. on 20th November on a voyage to Valencia. About an hour after departure (as the engineer notes in his log) 'the strange sound was again heard somewhat more pronounced when steam went down a little, but on the steam pressure going up the sound disappeared.' On the 21st the sound was again heard all through the twenty-four hours every time the pressure went below 150 lbs., and was observed to grow worse; and the same remark is made with regard to the 22d. On the 23d, at 1.30 A.M., the engines were stopped to examine the pumps to ascertain if the sound might originate there. A coupling bolt was then found to be out of order, and a new one was put in. At 8.40 A.M. the engines were again started, but without any improvement. On the 24th the strange sound from the engines became more observable, but no special flaw could be detected. On the 25th, as the sound became worse, it was decided to take out the piston rods, and at 8.30 A.M. the engines were stopped and all the three piston rods were examined, but were found to be in order. On the 26th the vessel apparently proceeded under full speed and steady high pressure. On the 27th the thumping noise became more pronounced and sharper, and there was great vibration in the engines when the shocks occurred, and for the first time the engineer seems to have thought that the propeller must be loose on the shaft, and that this was the cause of the persistent noise. At 8.30 on the morning of the 28th the engines were stopped in order that a new bolt might be put in the crank-shaft; and while the ship was stopped an examination was made of the propeller of a similar kind to that made at Jaffa, with the result that the engineer reached the conclusion that the propeller was loose on the shaft. The engineer then apprised the master of his discovery, and it was resolved to make for the nearest port, which happened to be Bona, under slow speed, so as not to make the damage worse.

This was accordingly done, and by midnight on the 30th the vessel July 9, 1908. was moored in Bona harbour. It was there ascertained that the shafting had got out of line, and that the white metal stern-bush had been worn down to a dangerous extent. According to the experts, the gradual wearing away of the bush was sufficient to account for the knocking sound which had continued at intervals since the 14th of November. The vessel had to lie at Bona until her machinery was again in an efficient condition, and in the meantime the cargo of oranges had to be transhipped and forwarded by another vessel." (His Lordship also stated the facts as to two other breakdowns, with which this report is not concerned.)

On these facts the charterers ultimately maintained that their liability to pay hire ceased upon the date of the commencement of the voyage from Jaffa and lasted until the "Bauta" was again seaworthy, whereas the owners dated the period of non-hire from 28th November, the date at which the vessel abandoned her voyage and made for Bona. With regard to the cost of coals consumed during the period off hire, the charterers contended that during the off hire period the owners were bound to pay for the coals consumed, whereas the owners maintained that the charterers were liable.

By interlocutor, dated 20th March 1907, the Lord Ordinary (Salvesen) found that the period for which the charterers were exempted from payment of hire began at 8.30 A.M. on 28th November 1905.*

* "OPINION.—(After the narrative quoted *supra*)—The owners of the 'Bauta' contend that it is only from the time that the vessel arrived at Bona until she was again efficient that no hire is due. The charterers, on the other hand, maintain that the breakdown must be held to have commenced on 14th November, and that, from that time, the hire ceased to be payable. In their action, however, they do not insist upon this extreme contention, and, indeed, there was no evidence whatever that the defect—assuming it to have commenced on the 14th—caused any loss of time until much later. Accordingly, their main contention was that, as from the time that the vessel left Jaffa, she was not, by reason of the defects which afterwards developed so as to cause a breakdown, in full working order, and that, as this caused a loss of time exceeding twenty-four running hours, the hire must be held to cease from the time the breakdown occurred.

"In my opinion, this construction of the clause is unsound. The words 'a breakdown of machinery' must be construed in a popular and reasonable sense, and I do not think that the ordinary commercial man would say that the machinery had broken down because there was a defect in the machinery which did not interfere with the ordinary working of the ship, although an ultimate breakdown was attributable to that defect. In many cases it would be impossible, *e.g.*, where breakdowns arise through parts of the machinery gradually wearing out, to say when the defect commenced, and it would be most unsettling to business if a construction of a common clause in a commercial contract were to be adopted which would necessarily raise endless controversies. The vessel here was able to steam at her full speed for seven days after the alleged breakdown, because I think the small progress that she made on the 24th, 25th, and 26th November is sufficiently accounted for (apart from the occasional stoppage of the engines for purposes of examination) by the strong head winds and high seas which she encountered. Even on the 27th November she was able to cover practically her ordinary day's journey, and it was only after 8.30 A.M. on the 28th that the speed was greatly reduced in consequence of the discovery which was then made. If she had, in the meantime, reached Valencia, I presume the charterers' argument would have been just the same, although, in point

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By interlocutor, dated 18th July 1907, the Lord Ordinary found that the owners were entitled to payment for the coal consumed during the time when the vessel was broken down.*

The charterers reclaimed, and argued;—(1) They were not bound to pay any hire after the commencement of the voyage from Jaffa, and the date of the commencement of the voyage was the date at which loading began, viz., 18th November.¹ This was clear upon two distinct grounds. (a) In the first place, the owners' obligation, both at common law and under the charter-party, and particularly clause 1 thereof, was to provide a ship in seaworthy condition at the commencement of each voyage which she might undertake during the period of hire;²

of fact, there would never have been a day during which a reasonable amount of work in their service was not done. It is not to be left out of view that the charterers themselves at first were prepared to pay, and in fact did pay, the hire up to the 25th of November, notwithstanding that they had at that time before them both of the ship's logs, which contained all the evidence upon which they now rely. I also reject the shipowners' construction of the clause in question. They contended that the breakdown did not take place until the vessel arrived at Bona, and that, up to that time, it could not be said that a breakdown had occurred 'preventing the working of the vessel,' as she, in fact, proceeded to Bona under her own steam. In my opinion, in a commercial sense, the vessel broke down whenever the defect was discovered which rendered it necessary, in the opinion of a prudent navigator, that she should proceed to a harbour for repairs. She was not the less broken down that she was able to proceed, under her own steam at half speed, than if she had employed a tug, or had managed to reach port under sail. This view appears to be in accordance with the decision in the case of *Hogarth*, 18 R. (H. L.) 10, where the breakdown was held to date from the time that the high-pressure engines broke down, although the vessel was able to reach a port under her low-pressure engines. . . ."

* "OPINION.—The question is whether, during the period when, according to my previous judgment, payment of hire ceased, the coals consumed on board the 'Bauta' fall to be charged against the shipowners or the charterers. The latter contended that it was inequitable that during the time when they were deriving no benefit from the ship, they should nevertheless be liable for the cost of the coal used to enable the vessel to steam to a port of safety from the spot where the actual breakdown took place. In my opinion, the decision of this question depends not on general considerations of equity, but on the terms of the charter-party. By article 2 the defenders were taken bound to provide and pay for all the coals, fuel, &c., used during its currency. But for the stipulation contained in article 12, they would also have been liable to pay the hire, for the misfortunes of a ship under a time charter primarily affect the charterer. It does not, however, follow that because they have stipulated that the hire shall cease from the time a breakdown occurs, the other expenses for which they are liable shall also cease to run, and the implication from the stipulation in Article 12 points in the contrary direction. There is no express decision on this matter; but the *dictum* of Mr Justice Phillimore in *Vogemann*, 6 C. C. 253, accords with my own opinion. I hold that the general obligation on the charterer to provide and pay for coals is not subject to any implied limitation during the time that the vessel is broken down. . . ."

¹ The "Carron Park," L. R., 1890, 15 P. D. 203.

² *Kopitoff v. Wilson and Others*, 1876, 1 Q. B. D. 377; *Cohn v. Davidson and Another*, 1877, 2 Q. B. D. 455; *Steel v. State Line Steamship Company*, 1877, 3 A. C. 72, 4 R. (H. L.) 103; *Abbott's Law of Merchant Ships and Seamen*, 14th edition, pp. 492 and foll.

and each separate stage of each voyage.¹ Upon the facts it was July 9, 1908. clear that the vessel was not seaworthy when she left Jaffa. The owners, accordingly, had not fulfilled their part of the contract, and were accordingly precluded from insisting on payment of hire.² (b) In the second place, clause 12 provided that hire was to cease from the time of the occurrence of a breakdown. The breakdown occurred, if not earlier, at any rate at Jaffa, that being the place at which the vessel became inefficient for the special service contemplated, which was the true test of a breakdown.³ To deny that a vessel was broken down, on the ground that she was not wholly incapable of making progress, was contrary alike to common sense and law, and to make the matter depend upon the opinion of the captain, as the Lord Ordinary had done, was to make a question of fact, in which two parties were deeply interested, depend upon the judgment and courage of an individual, who was, in all probability, unknown to the parties when they made their contract. (2) They were not liable to pay for coals used during the breakdown. This was clear from clause 12. There it was provided that detentions due to weather or accidents to cargo were to be at the expense of the charterers, from which it logically followed that detentions due to other causes were to be at the expense of the owners. Further, the last sentence of clause 12 shewed that the period of breakdown was to be treated as a complete hiatus, and that the charterers could add it on at the end of the period of hire. Accordingly, if the owners' view as to coals was sound, the result would be that for the period in question the charterers would be paying twice for coals. Clause 22, which imported the York and Antwerp Rules, 1890, was also in their favour. Rule 9, in calculating general average, debited the shipowner with the estimated cost of coals where cargo and stores had been burned in time of peril. On any view, the question depended on the terms of the charter-party, and, accordingly, the case of *Vogemann v. Zanzibar Steamship Company, Limited*,⁴ was not in point, the charter-party there being different.

Argued for the respondents;—(1) The charterers were bound to pay hire down to the 28th of November, when the vessel had to abandon her voyage and make for Bona, that being the time at which the breakdown happened. The charterers' first contention, viz., that the owners were in breach of their obligations under the charter-party and at common law, and therefore could not demand hire, was radically unsound. The owners' obligation was to furnish a seaworthy vessel at the commencement of the period of hire,⁵ and to effect necessary repairs from time to time. They did not warrant the vessel sound at the commencement of each "stage" of the voyage. The doctrine of stages was inapplicable in the case of a time charter. The "*Vortigern*,"⁶ relied on by the charterers, related solely to seaworthiness in the limited matter of sufficiency of coal. Accordingly the fact that the vessel developed certain defects did not entitle the charterers to

¹ The "*Vortigern*," [1899] P. 140; Carver's Carriage by Sea, 4th ed., secs. 19b, 21; Scrutton on Charter-Parties and Bills of Lading, p. 74.

² *Turnbull v. McLean & Co.*, March 5, 1874, 1 R. 730, Lord Justice-Clerk, at p. 738.

³ *Hogarth v. Miller, Brother, & Co.*, Dec. 1, 1890, 18 R. (H. L.) 10.

⁴ 1901, 6 Com. Cases, 253, 1902, 7 Com. Cases, 254.

⁵ Carver's Carriage by Sea, 4th ed., sec. 21.

⁶ [1899] P. 140.

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refuse to pay hire.¹ Their remedy, if they had one, lay in an action of damages on the ground that the vessel had not been repaired when she ought to have been repaired, or that the repairs had been inexpeditiously or inefficiently carried through.² There was no such case here. There was nothing visibly wrong with the vessel at Jaffa; at anyrate there was nothing to justify her in deviating from her voyage, and had she done so, the owners would have exposed themselves to the risk of an action of damages for improper deviation.³ Further, it was always necessary to prove that the unseaworthiness of the vessel had directly resulted in damages to the charterers,⁴ and this, as might easily be demonstrated, the charterers could not do. In any event, it would not be lightly presumed that the master was in error in his decision.⁵ The charterers' argument on clause 12 was also unsound. A vessel could not be described as broken down during a period in which she regularly accomplished her daily run. The breakdown did not occur until she became inefficient,⁶ and she was not inefficient until the 28th. (2) As regarded coals, it was clear that the charterers had to pay. Clause 12 made no reference to coals, and the case was indistinguishable from and ruled by *Vogemann v. Zanzibar Steamship Company, Limited*.⁷ Lastly, the charterers had barred themselves from contending that no hire was due for the period in dispute by claiming and recovering from the cargo owners in general average the amount due to them for the period in question. They had in fact themselves treated the period in question as one in which the vessel was on hire. They had accordingly suffered no loss from the breakdown, and were bound to pay the hire.

LORD ARDWALL.—The three actions now conjoined in which the interlocutors reclaimed against have been pronounced arose out of a charter-party of the vessel "Bauta" entered into between her owners, Mathilde Giertsen and others, and George V. Turnbull & Company, Leith, as charterers. The vessel was hired out for six calendar months beginning in September 1905, and it was stipulated that the charterers should pay for the use and hire of the said vessel at the rate of £270 sterling per calendar month.

The two questions which formed the subject of the discussion on the reclaiming note were, first, what was the period on the vessel's voyage from Jaffa to Bona during which the said vessel is to be regarded as off hire within the meaning of the 12th article of the charter-party, and second, whether the charterers were entitled to escape paying for the coals used during the time that the said vessel was off hire on the voyage from Jaffa to Bona?

¹ Ripley and Another v. Scaife, 1826, 5 B. & C. 167; Inman Steamship Co. v. Bischoff, 1881, 6 Q. B. D. 648, 1882, 7 A. C. 670.

² Havelock v. Geddes, 1809, 10 East, 555.

³ Carver's Carriage by Sea, 4th ed., secs. 287, 288, 289; Abbott's Law of Merchant Ships and Seamen, 14th ed., pp. 522 and foll.; Joseph Thorley, Limited, v. Orchis Steamship Company, Limited, [1907] 1 K. B. 660.

⁴ The "Europa," [1908] P. 84.

⁵ Phelps, James, & Co. v. Hill, [1891] 1 Q. B. 605; cf. The "Bona," 1884, 51 L. T. 28.

⁶ Hogarth v. Miller, Brother, & Co., Dec. 1, 1890, 18 R. (H. L.) 10.

⁷ 1901, 6 Com. Cases, 253, 1902, 7 Com. Cases, 254.

The facts of the case are set forth with great clearness and correctness July 9, 1908. in the Lord Ordinary's opinion, and I require only to refer to them incidentally in connection with the contentions presented to us on behalf of the ^{Gierlsen v.}Turnbull & Co. charterers.

The Lord Ordinary has held that the period for which the vessel was off Lord Ardwall. hire on the voyage from Jaffa to Bona was from 8.30 A.M. on the 28th of November 1905 till 9 A.M. on the 1st of January 1906, the former date being the time when it was discovered that the propeller of the vessel was loose on the shaft. As a consequence of this discovery, the voyage on which the vessel then was from Jaffa to Valencia was interrupted, and the master resolved to make for the nearest port, which happened to be Bona, at slow speed. The vessel arrived at Bona by midnight on the 30th of November, and it was then ascertained that the shafting had got out of line and that the white metal stern-bush had been worn down to a dangerous extent. Consequently the vessel had to lie at Bona till her machinery was repaired.

It seems tolerably clear on the evidence that the accident which originally led to the propeller and shaft getting out of order was the propeller striking some wreckage on the 14th of November while the vessel was on her voyage to Jaffa. It was contended before the Lord Ordinary by the owners that they were entitled to hire until the time when the vessel arrived at Bona, but on the reclaiming note they acquiesced in the judgment of the Lord Ordinary, and I need say nothing more on that point than to refer to the Lord Ordinary's opinion regarding it, in which I concur.

The charterers, on the other hand, while they maintain that the breakdown must be held to have commenced on the 14th of November, yet only insist in their action on non-liability for hire from the time when the vessel left Jaffa, and they claim this exemption from hire on two grounds. In the first place, they plead that under the first clause of the charter-party the owners were bound under the clause of maintenance to have the vessel in a seaworthy condition at the commencement of each voyage that she might undertake, and that the "Banta" not having been seaworthy in the proper sense of the word at Jaffa, the owners thereby committed a breach of their contract, and cannot on their part claim remuneration in respect of the voyage from Jaffa to Bona. In support of this contention they relied upon the case of *The "Vortigern."*¹ That was a case in which a ship ran out of coal and was forced in consequence to burn fifty tons of cargo, the value of which the freighters successfully claimed to deduct from the amount of freight on the ground that the implied warranty of seaworthiness had been broken by the vessel not having a sufficient quantity of coal to continue her voyage. But it is plain from the opinions delivered in that case that it is only with reference to supplies of coal that a ship must be put in a seaworthy condition at the commencement of each stage of a voyage, because it is usual in long voyages that the vessel has leave to call at certain ports for the purpose of coaling, and accordingly the vessel must be made seaworthy at the commencement of each stage of the voyage, by being supplied with sufficient coal at starting, and if she is not so supplied, then the war-

¹ [1899] P. 140.

July 9, 1908. ranty of seaworthiness is held, as in the case of *The "Vortigern,"*¹ not to have been complied with. But at the same time it is made plain in the judgment in that case, that except in such cases the warranty of seaworthiness is satisfied by a vessel being put in a seaworthy condition when starting on her voyage, or in the case of a vessel being hired when she is handed over to the charterers.

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I am accordingly of opinion that the charterers' contention on this point is ill-founded, that the implied warranty of seaworthiness was complied with when the vessel was handed over to the charterers in a seaworthy condition at the commencement of the period of hiring, and that the maintenance clause in article 1 of the charter-party is inserted merely for the purpose of laying upon the owners the burden and the expense of maintaining the vessel during the period of hire in a thoroughly efficient state, including of course the expense of all necessary and proper repairs. Therefore if the charterers had been at the expense of repairing the steamer at Jaffa or elsewhere, they would have recovered that expense under this clause, but there is nothing in it to suggest that the payment of hire is to cease merely because the vessel at some time during the currency of the time charter requires repairs to put her in a thoroughly efficient state.

The only article of the charter-party which deals with the cessation of payment of hire is article 12, and that article prescribes that the hire is to cease when, *inter alia*, there is a breakdown of machinery or damage preventing the working of the vessel for more than twenty-four working hours, and it is further provided that the payment of hire shall cease from the time "when the breakdown occurred until she be again in an efficient state to resume her services." On this clause the charterers maintained that in the present case the breakdown must be held to have occurred at Jaffa, because at that time the vessel was suffering from the defect in the machinery which led on the 28th of November to her discontinuing her voyage. They argued that to make the question of the occurrence of the breakdown depend merely upon the opinion of the master of the vessel on the question when it was prudent to discontinue the voyage, was to put the matter on a wrong basis, by making the time of the occurrence of the breakdown depend upon an opinion, and not, as they contended it ought to do, upon fact. They therefore maintained that, it being now ascertained by sufficient evidence that when at Jaffa the shaft and propeller of the vessel were in a condition to render her not fit for the voyage on which she was starting, the breakdown within the meaning of the charter-party must be held to have occurred at Jaffa.

On this question I entirely agree with the Lord Ordinary in holding that the words "a breakdown of machinery" must be construed in a popular and reasonable sense, and that in such sense the vessel broke down when a defect was discovered which rendered it necessary in the opinion of a prudent navigator that she should proceed to a harbour for repairs. This does not mean, as was suggested by counsel for the charterers, that the question of when there is a breakdown is made to depend entirely upon the opinion of the master. The master's opinion is, of course, of great value as

¹ [1899] P. 140.

a piece of evidence, but should it turn out that that opinion was wrong, it July 9, 1908. may be corrected by other evidence in any particular case. If the contention of the charterers were given effect to, it appears to me that it would put matters in a very uncertain and undesirable position as regards the application of a clause of this kind in a charter-party, because according to that contention not the time when a vessel has to go to a port for repairs is to be taken as the time of the breakdown, but the time when the defect in her machinery, which, when fully developed, ultimately led to her having to discontinue her voyage, can be ascertained or conjectured to have first come into being. It would be most undesirable that the liability or non-liability for hire of a vessel should be made to depend upon the result of investigations of the kind. Investigation, for instance, as to whether a hairy crack in some piece of the machinery was old or new? and if old, how old? and so on.

Therefore, in the present case I have no hesitation in holding that the breakdown did not occur on the 14th of November, when the original damage probably was done to the machinery or when the ship left Jaffa, but on the 28th of November, when, after having progressed so far upon her voyage perfectly satisfactorily as regarded speed and safety, it was discovered that the propeller was loose on the shaft, and that it was necessary to go to port for repairs.

The second question to be considered is whether during the period when payment of hire ceased, in terms of article 12 of the charter-party, the coals consumed on board the "*Bauta*" are to be paid for by the shipowners or the charterers. It was contended for the charterers that it was inequitable that they should be charged for the coal which was needed to enable the vessel, after the breakdown which occurred on the voyage, to proceed to port for repairs, and that it was a necessary corollary from the cessation of payment of hire that payment for coals should also cease over the same period. I agree with the Lord Ordinary that this question must be determined on the terms of the charter-party and the nature of the contract.

Now, in a contract constituted by time charter, in the absence of special exemption, the charterers have to suffer the consequences of all mischances that may happen to the ship. In the present case there is a stipulation that in certain circumstances the hire shall cease, but there is no stipulation that the other expenses for which the charterers are liable shall also cease to run, and accordingly, there being nothing in the charter-party to exempt the charterers from payment of the charges for coal and other expenses mentioned in article 2 of the charter-party during the cessation of hire provided for by article 12, it follows that the general obligations contained in article 2 still rested upon the charterers notwithstanding the breakdown of the machinery. An opinion to this effect was, as noted by the Lord Ordinary, delivered by Mr Justice Phillimore in the case of *Vogemann*,¹ and this opinion was approved of by the Court of Appeal,² and although it was *obiter* as regarded the case then under discussion, yet it is entitled to great weight considering the eminence of the Judges who delivered it.

On the whole matter I entirely agree with the interlocutors of the Lord

¹ 6 Com. Cas. 253.

² 7 Com. Cas. 254.

July 9, 1908. Ordinary and the reasoning by which he has supported them. I accordingly am of opinion that we should refuse the reclaiming note and adhere to the whole interlocutors of the Lord Ordinary.

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The LORD JUSTICE-CLERK, LORD STORMONTH-DARLING, and LORD LOW concurred.

THE COURT adhered.

ALEX. MORISON & Co., W.S.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—Agents.

No. 163.

EDGAR HUME SLEIGH AND OTHERS, Petitioners (Respondents).—

R. S. Horne—W. T. Watson.

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ALEXANDER YEAMAN (James Hume Sleigh's Judicial Factor),
Respondent (Reclaiming).—*Clyde, K.C.—Macphail.*

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Trust—Judicial Factor's firm acting as law-agents—Fees paid by borrowers of trust funds.—One of a firm of law-agents was appointed judicial factor on a trust-estate. He lent part of the factory funds on heritable security to clients of the firm. The usual fees were paid to the firm by the borrowers in accordance with the table of fees.

Held (rev. judgment of Lord Guthrie) that the factor was not bound to communicate to the factory estate the fees paid by the borrowers to his firm.

Trust—Judicial Factor's firm acting as law-agents for beneficiaries.—A partner in a firm of law-agents, was appointed judicial factor on a trust-estate. The firm did legal work on the employment of the beneficiaries' guardians, and of the beneficiaries themselves after they had attained majority. The work was done in connection with the disbursement of the factory income to the beneficiaries, and also in connection with the preparation of deeds rendered necessary in consequence of certain beneficiaries having applied for an advance of capital. For these services the firm charged fees and commission against the beneficiaries.

Held (rev. judgment of Lord Guthrie) that the factor was not bound to communicate to the factory estate fees and commission recovered from the beneficiaries.

2D DIVISION.
Lord Guthrie.

THE late James Hume Sleigh, sometime secretary and treasurer of the Bank of Bombay, died on 26th June 1899, leaving a trust-disposition and settlement dated 30th October 1896, and a holograph codicil dated 1st January 1898.

By his trust-disposition and settlement the truster conveyed his whole estate to trustees, and directed that an equal share of the income of the residue should be paid to each of his three children, Edgar Hume Sleigh, Charles Hope Sleigh, and Marie Edgar Sleigh, the capital being settled for each child's issue. He also appointed his sister, Miss Jane Slight, and his brother-in-law, Dr Henry M. Church, guardians to his children.

The truster was survived by his three children, who were all in minority. Miss Slight and Dr Church accepted office as guardians.

The trustees appointed by the truster having declined to act, Alexander Yeaman, W.S., Edinburgh, was, on 4th November 1899, appointed judicial factor on the trust-estate.

On 22d January 1907 the beneficiaries under the trust presented a petition for recall of the appointment of the judicial factor, and for the appointment of new trustees. On 26th February 1907 the Lord Ordinary (Guthrie) recalled the appointment of the judicial factor, and remitted to the Accountant of Court to examine his accounts.

Edgar Hume Sleigh, Charles Hope Sleigh, and Marie Edgar Sleigh, July 9, 1908.
lodged a note of objections to the factor's accounts, which stated, *Sleigh v. inter alia* :—(2) “ . . . The factor himself undertook the law-^{Sleigh's} agency business of the factory and continued to act as such agent ^{Judicial} until the recall of the factory under the firm name of Messrs Lindsay, ^{Factor.} Howe, & Company. The net factory estate amounts approximately to £47,700, of which the factor invested approximately the sum of £43,600 in heritable bonds. Of this sum over £20,000 has been lent to the clients of his own firm. All the said bonds were prepared in the name of Messrs Lindsay, Howe, & Company as agents for the factor, but the same were truly prepared by the factor himself. . . . The factor was paid in full for the realisation and reinvestment of the whole capital estate at the rate of 1 per cent, the total sum allowed to him therefor by the Accountant being £499, 12s. By thus acting in the name of his said firm the factor received an additional and illegal payment for his services *qua* factor. Moreover, the factory estate was thereby deprived of independent advice in connection with the investment of the said funds and the security arising therefrom. The factor is accordingly bound to communicate to the factory estate the fees thus obtained in the name of Messrs Lindsay, Howe, & Company in connection therewith. . . . (3) During the minority of the petitioners the income of the estate was alleged to be paid to Messrs Lindsay, Howe, & Company, who in turn, it is represented, paid it over to the guardians of the beneficiaries. For this service the said firm charged the sum of £34, 2s. 6d. in name of commission and £33, 16s. 6d. in name of business charges. Said disbursement of income in the name of Messrs Lindsay, Howe, & Company was truly made by the factor, who had received full payment otherwise for his trouble in collecting and disbursing the same. The Accountant of Court has fixed the factor's fee for said services at the rate of 4 per cent. . . . By making said additional charges through his firm the factor has received double remuneration for the work of the factory. . . . The factor is bound now to communicate to said estate the amounts of said commission and business charges. (4) After the petitioners came of age the factor under his firm name of Lindsay, Howe, & Company disbursed to them the sums to which they were entitled, and charged them with similar commission. The petitioners maintain that the charges which the factor is entitled to make in respect of his disbursement to them of the income of their respective shares of the estate are covered by the aforesaid percentage upon the income of the estate allowed by the Accountant of Court, and that he is bound to communicate to the portions of the factory estate respectively effeiring to the petitioners the sums so charged by him in name of commission. . . . (5) By holograph codicil appended to the last will and testament of the late James Hume Sleigh, it is provided that the sum of £2000 contained in a deposit-receipt of the National Bank of India, should in the event of the trustor's death ‘be the property of my children and administered as provided for in my last will and testament.’ The petitioners Edgar and Charles Sleigh requested out of the said sum payment of £300 to each. . . . In connection with the payment to them of the sums of £300 each, the factor represented to them that they had only a liferent in the said sum of £2000, and took bonds in security for the repayment thereof. Said bonds were alleged to be drawn by the said firm of Lindsay, Howe, & Company, but were in

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reality drawn by the factor. In any event, the factor being a partner of said firm is not entitled to make said charges through the said firm. . . . The factor is not entitled to credit therefor, and is bound to communicate the same to the factory estate."

The judicial factor lodged answers in which he stated, *inter alia* :—
“(2) No fees for law-agency have been charged against the factory. . . . The whole expenses . . . incurred in connection with the investment of the factory funds on the said heritable securities were paid by the borrowers against whom they were charged by Messrs Lindsay, Howe, & Company, who prepared the necessary security deeds, &c. No charge was made against the factory in connection therewith. . . . (3) The objectors' guardians, Miss Slight and Dr Church, appointed Messrs Lindsay, Howe, & Company to be their agents, who in that character performed certain services for which the ordinary professional charges were made.* Messrs Lindsay, Howe, & Company were not employed by the factor to do any work for the factory, and no charge against the factory was made by them. . . . (4) The charges referred to were not made in respect of any work pertaining to the factory, but, as the objectors are well aware, for the professional services outwith the factory altogether performed on their individual behalf and at their request. . . . (5) The objectors Edgar and Charles Sleigh having applied for an advance out of the factory estate the same was made by the factor. The necessary documents were prepared and charged for by Messrs Lindsay, Howe, & Company against them as individuals—no charge was made against the factory estate, and no fee was allowed to the factor by the Accountant for the realisation rendered necessary by the request.”

On a remit by the Lord Ordinary, the Accountant of Court reported, *inter alia* :—“(3, 4, and 5) That the late Mr Sleigh by will appointed guardians to his children, and Messrs Duncan Smith & MacLaren appear to have acted for them when the petition for a judicial factor was presented. Thereafter Messrs Lindsay, Howe, &

* The following letters written by Miss Slight and Dr Church were produced by the petitioners :—

Letter, Miss Jane H. Slight to Duncan MacLaren, Esq., S.S.C., dated 3d December 1907.—“Dear Sir,—In answer to your question as to the factorship on my late brother's estate, during the minority of my two nephews and niece, it was my impression that the appointment of factor embraced *all* the duties requiring to be discharged in connection with the estate, and that the appointment was made, not only to facilitate my duties as guardian, but also to avoid further expenses which would have been incurred by a law-agent.

“I was not aware, therefore, that Messrs Lindsay, Howe, & Company were employed separately as agents on the estate, as all my transactions were through the factor himself.”

Letter, Dr Henry M. Church to Charles H. Sleigh, Esq., dated 30th November 1907.—“ . . . I wish to say that I did not appoint Messrs Lindsay, Howe, & Company as law-agents on your behalf in connection with your late father's estate.”

The judicial factor produced a memorandum (No. 58 of process) sent by Messrs Lindsay, Howe, & Company to Miss Slight and Dr Church, asking their approval, as guardians, to arrangements the writers proposed for the children. On 10th February 1900 Miss Slight and Dr Church signed as approving.

Company appear to have acted as agents for them and for the July 9, 1908. beneficiaries after they came of age. They prepared annual accounts, which were submitted to and approved of by the guardians, and carried through the necessary discharges. The Accountant is of opinion that the factory had no connection with or interest in the charges for these operations. . . ."

On the 12th February 1908 the Lord Ordinary sustained the objections to the factor's accounts, and granted leave to reclaim.*

The judicial factor reclaimed.

Argued for the judicial factor;—(Obj. 2) A judicial factor might act as agent for the factory estate though he could not charge

* "OPINION.— . . . (Obj. 2) Stripped of specialties, the question in objections 2 to 5 is the same, namely, whether a judicial factor can retain sums paid to him or his firm for business done in connection with the trust. In dealing with the second objection the Accountant indicates his view that the principle, as derived from actual decision, is limited to this, that 'a factor cannot make profit at the expense of the estate.' If this be the extent of the principle, then the second objection would fall to be disallowed. But the principle is based on the view that the factor must not place himself in a position of double interest. His duty is to choose the best agents for the trust. His own firm may be the best, or they may not; his membership of the firm prevents his arriving at an independent and unprejudiced judgment on that question. If this be the foundation of the principle, then the application will strike at all cases of remunerative employment by the factor of his firm whether profit be made by him and his firm directly at the expense of the estate, or whether the profit comes directly from the borrowers from the estate, but all the same through the employment of the factor's firm by him. That view has been repeatedly laid down both in Scotland and England. It may be sufficient to refer to the judgment of Lord Chancellor Lyndhurst in *New v. Jones*, 1 Hall & Twells, p. 632 (quoted by the Lord Justice-Clerk Hope in the Whole Court case of *Lord Gray and Others*, 19 D., p. 1, at page 5), and Lord Chancellor Cranworth in *Broughton v. Broughton*, 1855, 5 De Gex, M. & G., p. 160 (also quoted by the Lord Justice-Clerk in *Lord Gray's* case, at page 9), and to the opinions in the same case of *Lord Gray* and in the subsequent case of *Lauder v. Millars*, 21 D. 1353. The result is thus stated by Lord Cranworth in *Broughton*:—"The rule applicable to the subject has been treated at the bar as if one sufficiently enunciated it by saying that a trustee shall not be able to make a profit of his trust; but that is not stating it so widely as it ought to be stated. The rule really is that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty, and a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them."

"(Obj. 3) The principle deciding the second objection applies here, unless the factor could instruct his averment, contained in the answers, that his firm was employed, not by him, but independently by the objectors' guardians, Miss Slight and Dr Church. That, however, is denied by Miss Slight and Dr Church in the letters Nos. 42 and 41 of process. A proof on this point was not asked; and I therefore sustain this objection.

"(Objs. 4 and 5) These objections fall to be sustained, if my view is correct that it is illegal for a factor to make profit through his firm by the business of the trust. No evidence was tendered of any independent selection and employment of the factor's firm by the beneficiaries as individuals. This result cannot be affected by any view I may entertain of the shabbiness of the objections. In all calculations of interest I fix the rate at 4 per cent."

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fees.¹ Here the fees were paid by the borrower, and did not come out of the factory estate. It followed that the factor was not bound to communicate the fees. A person occupying a fiduciary position was bound not to place himself in such a situation that his own interests might conflict with the interests of the trust. In the present case there was no possible conflict of interest. The factor was personally responsible for his intromissions, and was as much interested in getting the best possible investment as was the trust-estate. If the factor might be biassed in the selection of an investment he might equally be biassed in the selection of an agent. The fact that he was paid fees by the borrowers could not raise a conflict of interest. Again, where a trustee obtained a secret advantage out of the execution of the trust he was bound to communicate that advantage to the estate. That principle only applied if the advantage were obtained secretly.² In the present case the beneficiaries and their guardians were aware that the factor's firm were acting as agents, and must be taken to have known that the agents would be paid by the borrowers in accordance with the table of fees. *Broughton v. Broughton*³ was a case in which an executor-solicitor who had acted on behalf of the estate was held not entitled to charge fees, but only out of pocket costs. The fees disallowed would have come out of the estate. It was to that class of case alone that Lord Cranworth's *dictum* applied. *Keech v. Sandford*⁴ was an old case, and the facts were very dissimilar to those of the present case. (Objs. 3, 4, and 5) These objections related to charges for work done on the employment of the guardians or of the beneficiaries after they came of age. The charges were made not against the estate but against the beneficiaries personally. The beneficiaries and their guardians were entitled to employ the factor, and the factor was not bound to communicate the fees. These objections, therefore, should be repelled.

Argued for the petitioners;—A trustee was not entitled to make any profit out of the execution of the trust other than that which was properly incidental to his office.⁵ If a judicial factor chose to act as agent for the factory the utmost he could charge was out of pocket costs.⁶ No distinction could be drawn between the factor and his firm, or between work done as factor and work done as agent. What was prohibited was making a profit out of the execution of the trust. It was immaterial whether the profit came out of the estate or not, but in the present case it did come out of the estate in this sense, that the factor's fee, to which all other profits made by him out of his office must be imputed, came out of the estate. Again, a trustee was bound not to place himself in such a position that his own interests might conflict with the interests of the trust.⁷ In the present case

¹ Rennie, 1849, 6 Bell's App. 422; Lord Gray and Others, 1856, 19 D. 1; *Lauder v. Millars*, 1859, 21 D. 1353, *per* Lord Justice-Clerk Inglis, at p. 1356.

² *Huntington Copper Co. v. Henderson*, 1877, 4 R. 294, *affd.* 5 R. (H. L.) 1; *Ronaldson v. Drummond & Reid*, 1881, 8 R. 956.

³ 1855, 5 De Gex, Macnaghten, & Gordon, 160.

⁴ *Select Chancery Cases*, p. 61, referred to 1 Macq. 472.

⁵ Rennie, 6 Bell's App. 422; *Huntington Copper Co. v. Henderson*, 4 R. 294.

⁶ Lord Gray and Others, 19 D. 1; *Lauder v. Millars*, 21 D. 1353.

⁷ *Keech v. Sandford*, *Select Chancery Cases*, p. 61, referred to 1 Macq. 472; *Ex parte James*, 1803, 8 Vesey jun. 337; *Broughton v. Broughton*, 5 De Gex, Macnaghten, & Gordon, 160; *Aberdeen Railway Co. v. Blaikie Brothers*, 1854, 1 Macq. 461.

there was a conflict of interest. It was the interest of the factor to July 9, 1908. lend the funds to the clients of his own firm. It was the interest of the borrower to get as low a rate of interest as possible, and it was the interest of the factory to get a high rate of interest. Further, it was the duty of the factor to supervise the agent of the factory.¹ If he employed his own firm he put it out of his power to perform that duty. (Objs. 3, 4, and 5) The general principle that a trustee was not entitled to make a profit out of the execution of the trust applied to these objections. There was no independent employment either by the beneficiaries or their guardians. Accordingly these objections should be sustained.

At advising on 9th July 1908,—

LORD LOW.—The judicial factor in this case is a partner of the firm of Lindsay, Howe, & Company, W.S., and it appears that part of the trust funds was invested by him upon heritable securities, the borrowers being clients of his firm. Perhaps I should explain that it was only one-half of the amount invested upon heritable securities which was lent to clients of Messrs Lindsay, Howe, & Company. The fees received by the firm for the professional services rendered by them in carrying through these transactions amount to £295, 17s., and the contention of the beneficiaries under the trust is that that sum must be credited to the trust-estate. The answer made by the judicial factor to that claim is that the whole of these fees were paid by the borrowers, against whom they were charged by Messrs Lindsay, Howe, & Company, in accordance with the recognised practice in Scotland. The Lord Ordinary has, however, given effect to the claim of the beneficiaries.

There are two well-established principles of trust law, both of which are said to be applicable to this case. The one is that a trustee must not make profit from the execution of his office (a rule which, of course, does not apply to the remuneration of a judicial factor for work done *qua* judicial factor); and the other principle is that a trustee cannot be allowed to place himself in a position in which his interest as an individual conflicts, or may conflict, with his duty as a trustee.

The Lord Ordinary's opinion is that both of these principles have been infringed in this case, and that accordingly the judicial factor is bound to communicate to the trust-estate the profit which he has made, through his firm, by acting as agent both for the borrower and the lender in carrying through the transactions to which I have referred. Now, if the fees received by the firm had been charged against and paid by the trust-estate, I imagine that the soundness of the Lord Ordinary's view could not be impugned. But no part of the fees was, or could have been, charged against the trust-estate, because they were earned by and paid to the judicial factor (through his firm) not as judicial factor, or as acting as law-agent for the trust, but as law-agent for the borrowers. I know of no authority for saying that the judicial factor is bound to credit these fees to the trust-estate. All the cases, so far as I know, in which a person in a position of trust has been held bound to communicate profit which he has made to the

¹ New v. Jones, 1833, 1 Hall & Twells, 632.

July 2, 1908. *Sleigh v. Sleigh's Judicial Factor.*
Lord Low. trust-estate have been cases in which that profit has been earned either directly or indirectly out of, or at the risk of, the trust-estate. Thus, if a trustee chooses to do professional work for the trust, which he would have been entitled to employ another professional man to do, he cannot claim remuneration from the trust-estate, but only actual outlays. Again, if a trustee receives a commission from a person dealing with the trust, he must communicate the benefit to the trust-estate; and if he trades with trust funds, the profits belong to the trust-estate.

Such cases are familiar, and the law in regard to them is well settled, but there is no case, so far as I know, in which the Court has compelled a trustee to communicate to the trust-estate remuneration for professional services rendered to a third party, such remuneration being wholly paid by the third party, and to no extent, either directly or indirectly, coming out of the trust-estate. I am therefore of opinion that the rule that a trustee must not make profit from the execution of his office does not apply to this case, because in my opinion he has not done so in any reasonable sense.

In regard to the rule that a trustee must not enter into a transaction in which his duty as a trustee comes in conflict with his interests as an individual, the penalty for infringing the rule is that the transaction will not be enforceable against the beneficiaries, and may be set aside at their instance, while if loss to the trust-estate results, the trustee will be liable to make it good. Thus in *Aberdeen Railway Company v. Blaikie Brothers*,¹ where a director of a railway company contracted to supply certain material to the company, it was held by the House of Lords that he could not enforce the contract; and in the *York Buildings Company v. Mackenzie*² the purchase by the common agent in a ranking and sale of part of an estate sold by public roup was reduced by the House of Lords many years after the transaction and although the purchase was made in complete good faith.

In this case the sufficiency of the securities is not challenged. It is not suggested that the investments were not sound trust investments, or that the securities were other than ample. If the beneficiaries had been seeking to have the investments set aside on the ground that the judicial factor lent trust funds to his own clients and acted as law-agent for both parties, it may be that the Court would, without inquiring into the sufficiency of the securities, have ordained the factor to restore the money to the trust-estate, he receiving an assignation to the securities. But there being no suggestion that the transactions should be set aside, I can find neither authority nor principle for imposing a fine upon the factor—because it really comes to that—to the amount of the remuneration which he received from the borrowers for professional services rendered to them alone.

The result is that in my opinion the Lord Ordinary was wrong in sustaining the second objection. In taking this view, however, I differ from the Lord Ordinary only upon the question of remedy, and I am not to be taken as dissenting from the opinion which he indicates that in lending trust funds to his own clients the judicial factor placed himself in a position in which

¹ 1 Macq. 461.

² 1795, 3 Pat. App. 378.

his interest as an individual might possibly conflict with his duty as a trustee. July 9, 1908.

The third and fourth objections to the factor's accounts have also been sustained by the Lord Ordinary. They arise in this way—By his will the late Mr Sleigh directed his trustees (in whose place the judicial factor stands) to divide the income of the trust-estate among his children, and to hold the capital for their issue. He also appointed guardians to his children. So long as the children were in minority the free income was paid by the factor to their guardians, and when they came of age it was paid to them. Lindsay, Howe, & Company acted as law-agents first for the guardians and afterwards for the children when they came of age, and the account to which the third objection refers is an account rendered by the firm to the guardians for professional services rendered in receiving payment of the income from the factor and thereafter administering it as agents for the guardians. The account to which the fourth objection refers is a similar account rendered to the children after they came of age. The Lord Ordinary has held that Lindsay, Howe, & Company are not entitled to claim payment of the charges contained in either of these accounts, on the ground that they represent charges for professional work done by the factor through his firm in connection with the trust. I am unable to assent to that view. The judicial factor's duties were ended when he paid the income to the guardians or the beneficiaries as the case might be, and if the latter chose to employ Lindsay, Howe, & Company to act as their law-agents in ingathering and administering the income for them, I see no reason why the firm should not have undertaken the employment and made the usual professional charges for their services.

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—
Lord Low.

The Lord Ordinary refers to two letters, Nos. 41 and 42 of process. The former is written by Dr Church, one of the guardians, to one of the beneficiaries saying "I did not appoint Messrs Lindsay, Howe, & Company as law-agents on your behalf in connection with your late father's estate." No. 42 of process is a letter by the other guardian, Miss Slight, to Mr Duncan MacLaren, S.S.C., in which she says that her impression was that the factor's appointment "embraced all the duties requiring to be discharged in connection with the estate," and that she was, therefore, not aware that Messrs Lindsay, Howe, & Company were employed separately as agents on the estate.

It is to be observed that these letters were addressed to third parties, and there is nothing to shew that they were ever communicated to the factor or his firm, and in the objections there is no suggestion that the firm were not authorised to act as law-agents for the guardians and for the children after they came of age. If there had been a specific averment to the effect, inquiry might have been necessary, but in the absence of any such averment, or any motion for inquiry, I am not prepared to give any weight whatever to the letters Nos. 41 and 42 of process.

The objection which is stated to the accounts is that the services which are charged for were services which it was the duty of the factor to perform and which were covered by his factor's fee. As I have already said, I do not think that that is an objection which can be sustained to the effect of holding that no part of the accounts can be charged against the guardians

July 9, 1908. or the beneficiaries. The accounts might indeed have contained certain charges which fell to be struck out on the ground that they represented services truly rendered to the trust and not to the guardians or the beneficiaries, or that they represented work which fell to be performed by the factor, and was covered by his fee. Such charges, however, would raise questions of audit merely, and not questions of principle to be determined by the Court. As therefore the accounts have been examined by the Accountant of Court, and he has reported that they are in order, I am of opinion that objections 3 and 4, and objection 5, which is in a similar position, as well as objection 2, should be repelled.

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Factor.
—
Lord Low.

LORD ARDWALL.—It is settled law that neither a trustee nor a judicial factor is entitled to obtain remuneration out of the trust funds for agency business performed by him for the trust under his charge. The leading Scotch case is that of *Lord Gray and Others*,¹ decided by the whole Court on 12th November 1856. The principle upon which this rule is based undoubtedly is that the trustee or factor must not place himself in a position where he has or may have a double interest to serve, namely, his own interest and the interest of the estate; and in order to discourage persons in such fiduciary positions from doing business for the estate under their charge, the law has said that although it is not illegal for them to do so, yet they shall not get any remuneration for so doing, but shall only be entitled to recover cash outlays which they have made (see *Gray*,¹ *supra*). But it has never, so far as I can find from any cases quoted during the argument, been laid down that a trustee or factor must not only forego any remuneration from the trust, but must communicate to the trust any profit which he has in any way made arising out of his position as trustee or factor.

The cases of *Robertson v. Morrison*² and *Lauder v. Millar*,³ the case of *Gray*¹ above quoted, and *Broughton v. Broughton*,⁴ were all cases where a person in a fiduciary position was claiming to recover payment of accounts for business done in connection with the trust out of the trust-estate, and therefore I think the closing words of Lord Cranworth's *dictum* in *Broughton*,⁴ quoted by the Lord Ordinary, were not intended to apply to any other kind of case than that then under consideration.

The ground stated by Lord Cranworth as the foundation of the rule in such cases is as follows:—He says,—“It has often been argued that a sufficient check is afforded by the power of taxing the charges, and the answer to this is that the check is not enough, and the creator of the trust has a right to have that and also the check of the trustee. The result therefore is that no person in whom fiduciary duties are vested shall make a profit off them by employing himself, because in doing so he cannot perform one part of his trust, namely, that of seeing that no improper charges are made.”

In the present case, as I shall presently point out, this ground of the rule has no application, nor has the only penalty that has hitherto been imposed upon law-agents doing work for the estate on which they are trustees or factors any application in the present case, because that penalty

¹ 19 D. 1.

² 6 Bell's Appeals, 422.
⁴ 1855, 5 De Gex, M. & G., p. 160.

³ 21 D. 1353.

simply consists in their not being allowed to recover out of the trust-estate July 9, 1908.
any remuneration for the work done.

The present case arises out of the circumstance that the factor through his own firm obtained suitable investments upon heritable security for the funds of the factory estate. According to the rule in the table of fees the expense of such an investment falls entirely upon the borrower. It is the borrower therefore in this case who has the interest to see that no improper charges are made, and not the factor, because *qua* factor he has no interest to protect, inasmuch as the estate is not liable for any charges whatever, be they proper or improper. He is accordingly not in the position of having a divided duty, first to the estate and then to himself, so far as these charges are concerned. Further, I see no equitable grounds for holding that these fees, paid as they are by the borrower, should be credited to the trust-estate. It has been suggested that the factor's fee covers all work done for the estate or in connection with it, and that therefore these charges paid by the borrower should be applied to reimburse the estate *pro tanto* for the factor's fee. I think it is a sufficient answer to this to say that the work of drawing or revising the deeds necessary to carry out a loan upon heritable security is not work in the contemplation of parties in calculating a factor's fee, but is entirely extra work so far as the duties of the factor are concerned. It is true some suggestions were made on behalf of the respondents to the effect that to allow trustees or factors to lend money through the firm of law-agents to which they belong might have the result of raising a conflict of interests in which the factor might be tempted to accept unsatisfactory securities out of favour to his own firm or his own clients; but if he were to do so, the remedy would be to reduce the transaction and claim damages from the trustee. I therefore do not think suggestions such as this can be held to affect the matter. It has often been said that it is undesirable that an agent should act both for the borrower and the lender in any case, and this so far is true, but the Courts have never held that such an arrangement is illegal, although they have frequently said that in such transactions agents must be particularly careful in carrying them through, otherwise they will be liable to actions of reduction and damages at the instance of one or other of their clients.

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Some minor suggestions were also thrown out, but I consider that they are too remote possibilities to take into consideration in this matter, and on the whole I am unable to find authority or principle for the proposition that a factor or trustee ought to be penalised for carrying out loan transactions through his own firm by having to pay into the trust-estate fees received from the borrower, which never belonged to the trust, and to which, so far as I can see, the trust has no legal or equitable right.

The Lord Ordinary has sustained objections 3, 4, and 5 on the same general ground on which he has sustained objection 2, namely, that they relate to accounts which the firm of Messrs Lindsay, Howe, & Company, of which the factor is a partner, charged against certain beneficiaries of the trust-estate or their guardians; that accordingly these accounts must also be regarded as an attempt to make profit out of the estate under the factor's charge; and that therefore the accounts must be disallowed except in so far as they consist of outlays. This matter has been decided without a

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proof, but if it were necessary a proof might be allowed in order to prove or disprove the allegation that these accounts are not accounts belonging to the trust at all, but are, as they bear to be, accounts incurred by the beneficiaries under the trust, or their guardians, after these parties had received payment out of the trust of the sums due to them from time to time. It was said that these beneficiaries and guardians never knew that Messrs Lindsay, Howe, & Company were acting for them, and supposed all along that the work now charged for was being done by or on behalf of the factor. All I can say is that if they thought this they were certainly mistaken, but the fact that they were mistaken will not disentitle Messrs Lindsay, Howe, & Company from recovering these charges unless it can be shewn that they had no right to make them in respect that they did not do the work. I think that the memorandum No. 58 of process and docquets appended thereto clearly shew that the guardians, at all events Miss Slight and Dr Church, knew perfectly well that Messrs Lindsay, Howe, & Company were taking charge of their interests, and that they approved of their doing so, while the accounts themselves shew that all the charges made are not charged, as is suggested, against the trust-estate, but against the sums received by the guardians or their agents from the judicial factor on the trust-estate after such sums had been received. It is of course open to the guardians of the children to have these accounts taxed, but, when that has been done, I can see no good reason for their resisting payment.

Messrs Lindsay, Howe, & Company were legally just as much entitled to act for these guardians and beneficiaries as they would have been entitled to act for any other person who happened to have an interest in this trust with regard to moneys which had ceased to be in the trust and had been paid over to the beneficiaries. At the same time I do not think that Messrs Lindsay, Howe, & Company ought to have undertaken the business in question, because these guardians and beneficiaries were, properly speaking, the clients of Messrs Duncan Smith & MacLaren, and the factor's firm ought not to have interfered with them.

I am accordingly of opinion that the Lord Ordinary's interlocutor ought to be recalled in so far as it sustains the objections 2, 3, 4, and 5, that these objections should be repelled, and the case remitted to the Lord Ordinary for further procedure.

LORD JUSTICE-CLERK.—I agree entirely in the opinions which have been given. There can be no doubt that a trust-estate in the hands of a trustee or judicial factor must be watchfully guarded against any attempt of the person in a fiduciary position to make profit out of the estate in his hands, and the Courts have always been strict in enforcing the rule against such action. But, on the other hand, where as here the things done by the factor were—as they certainly were—for the benefit of the estate in the ordinary course of business, there is no illegality in the fact that the judicial factor, being one of a firm of law-agents, received with the firm the fees which the borrowers were liable to pay, and which they did pay, for the legal work done in the business of drawing up and having completed the documents necessary to secure the loans, which was not work falling in any case to be done by the factor himself.

Further, I agree that, when funds were handed over to the minors' guar- July 9, 1908.
 dians, no objection can be stated against charges made for the business done
 for the guardians, after they received the funds by the legal firm to which Sleigh v.
 the judicial factor belonged, the work done being not done in the factory, Judicial
 but after the funds had been paid out by the factor and accounted for in Factor.
 his accounts by the receipt of the guardians. These guardians were in the Lord Justice-
 knowledge of the actings of Messrs Lindsay, Howe, & Company, and took Clerk.
 the benefit of them. Taxation seems to me to be the only right they have.
 I agree with the opinions expressed as regards the details of the matter
 involved in the case, and do not think it necessary to repeat them.

LORD STORMONTH-DARLING concurred with Lord Low.

THE COURT pronounced the following interlocutor:—"Recall the
 . . . interlocutor reclaimed against so far as it sustains the
 objections 2, 3, 4, and 5, and repel the said objections: With
 these findings remit the cause to the . . . Lord Ordinary
 for further procedure," &c.

DUNCAN SMITH & MACLAREN, S.S.C.—MELVILLE & LINDSAY, W.S.—Agents.

THE MINISTER OF DALSERF, Pursuer.—*Henderson Hamilton.*
 THE HERITORS OF DALSERF, Defenders.

No. 164.

July 10, 1908.

Teinds — Minister's Stipend — Augmentation — Augmentation of seven
chalders.—The minister of a parish applied for an augmentation of seven
 chalders. There had been no augmentation for fifty-nine years, and it
 appeared that the previous minister, who had occupied the benefice for fifty-
 six years, had been possessed of considerable private means. All the
 heritors assented to the augmentation. In the circumstances the Court
 granted an augmentation of seven chalders. Minister of
 Dalserv v.
 Heritors.

THE minister of the parish of Dalserv brought a process of augmen- Teind Court.
 tation against the heritors, in which he craved for an augmentation of
 seven chalders. The stipend had been fixed at eighteen chalders in
 1849, and from that date till the present application no augmentation
 had been asked for. The heritors lodged in process a minute unani-
 mously consenting to the augmentation craved. It was stated that
 the present minister's predecessor, who had held the benefice for fifty-
 six years, had been possessed of considerable private means. The
 free teind was stated to amount to £120.

LORD PRESIDENT.—This is an unusual demand, and under ordinary cir-
 cumstances I do not think this Court would be prepared to grant it. But
 the circumstances here are peculiar. There has been no modification of this
 stipend since 1849, and there is a complete concurrence on the part of all
 the heritors in the augmentation asked for. They no doubt take the view
 that the present low figure at which the stipend stands is due to the per-
 sonal circumstances and the moderation of the previous incumbent, who
 lived a long time, and they feel that it is right that the benefice should not
 suffer on that account. I regard this as quite a special case, and in the
 peculiar circumstances we find here I think your Lordships may grant the
 augmentation.

July 10, 1908. LORD M'LAREN, LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE
 Minister of
 Dalsarf v.
 Heritors. concurred.

THE COURT granted the augmentation of seven chalders craved for.

P. GARDINER GILLESPIE & GILLESPIE, S.S.C., Agents.

No. 165.

MRS KATE THOMSON or SCOTT, Pursuer.—*Inglis*.

ANDREW SCOTT, Defender.—*Dykes*.

July 11, 1908.

Scott v. Scott

Husband and Wife—Divorce on the ground of Desertion—Insanity of defender.—The circumstance that a spouse, who has been in desertion for four years, becomes insane after the expiry of that period and remains so at the date of an action of divorce on the ground of desertion brought by the injured spouse, does not render the action incompetent.

2D DIVISION.
 Lord Mac-
 kenzie.

On 13th January 1908 Mrs Kate Thomson or Scott raised an action of divorce for desertion against her husband, Andrew Scott, then an inmate in Buckinghamshire County Lunatic Asylum, Stone, near Aylesbury.

The Lord Ordinary (Mackenzie) appointed a curator *ad litem* to the defender.

The following pleas in law were, *inter alia*, stated on behalf of the defender :—(1) The action is incompetent and ought to be dismissed, in respect that the defender is now insane. (2) The action is irrelevant and ought to be dismissed, in respect that the defender has not been in wilful and malicious desertion since he became insane as condescended on.

The Lord Ordinary reported the case to the Second Division.*

* In reporting the case the Lord Ordinary said :—"This is an action of divorce on the ground of desertion brought by a wife against her husband.

"According to the pursuer's averments the material dates are as follows :—The parties were married in 1894, and the defender left the pursuer in November of that year. In January 1895 he stayed two days in the pursuer's parents' house when she was there. On 15th March 1899 he was admitted to Hampstead Workhouse suffering from influenza, with fever and delirium tending to become maniacal. On 10th April 1899 he was sent to Hanwell Asylum, and was transferred to the Buckinghamshire County Asylum on 9th December 1904, where he was at the date of the raising of the action. The pursuer avers that it is not expected he will ever recover.

"A curator *ad litem* has been appointed to the defender. It was contended by him that in the circumstances above set forth the action is incompetent or irrelevant, in respect the defender has not been in wilful and malicious desertion since he became insane. The pursuer's contention is that as the defender was, according to her averments, in wilful and malicious desertion for four years before he became insane, the supervening insanity is no bar to her obtaining decree of divorce.

"The difficulty arises from the fact that it has never been settled since the Conjugal Rights Amendment Act, 1861, at what date the right to make a *bona fide* offer to adhere expires. Under the old law an offer of adherence, when made timeously and *bona fide*, was sufficient to bar divorce—Fraser on Husband and Wife, p. 1214. At p. 115 of Lothian's Consistorial Law the view is expressed that the last opportunity for offering to adhere is the interval between the charge on the decree of adherence or admonition by the Church Court, where such is given, and the raising of the action of divorce. In *M'Lauchlan v. M'Lauchlan*, 1 D. 294, it was held

Argued for the defender ;—The action was incompetent and should be dismissed, seeing that the defender was now insane and could not therefore be held to be in desertion. The conditions under which divorce on the ground of desertion might be obtained were set forth in the Act 1573, cap. 55. That Act was merely declaratory of the consistorial law of the Reformation. Under that law great importance was attached in actions of divorce to the citation of the defender, and this necessarily postulated, as a preliminary to divorce, that the defender should be able to appear and defend the case.¹ Citation was also considered of importance in the Roman Dutch Law,² and in the modern law of South Africa.³ The terms of the Act 1573, cap. 55, which required, among other preliminaries, that there should be an action of adherence and decree for adherence, shewed that any circumstance which was a reasonable cause for non-adherence would be a good defence to an action of divorce on the ground of desertion.

that the pursuer could not be barred from obtaining decree of divorce by the defender offering to adhere after the four years had expired and all the preliminary proceedings required by the Act of 1573 had been taken. If proceedings had been instituted under the old law as it existed prior to the Conjugal Rights Amendment Act, 1861, the first step would have been to bring an action of adherence. If this had not been brought before the defender had become insane, it is difficult to see how the pursuer could have obtained a decree ordaining a person of unsound mind to adhere. Accordingly, in the present case, unless a decree of adherence had been obtained by April 1899, it could not have been obtained at all, and the subsequent action of divorce could not have been proceeded with.

“ The Conjugal Rights Amendment Act of 1861 has, however, made a change on the Act of 1573, for it provides that it ‘shall not be necessary prior to any action for divorce to institute against the defender any action of adherence, nor to charge the defender to adhere to the pursuer, nor to denounce the defender, nor to apply to the presbytery of the bounds, or any other judicature, to admonish the defender to adhere.’ The effect of this is explained by the Lord President in *Watson v. Watson*, 17 R. 736. The abolition of the forms required by the Act 1573 as necessary preliminaries to the action of divorce did not in any way alter the substantial conditions on which alone divorce could be obtained. The argument for the curator *ad litem* was that there was no vested right to divorce on the expiry of the four years during which malicious and obstinate desertion had continued. He founded on the case of *Auld v. Auld*, 12 R. 36, in which the Lord President and Lord Shand, referring to the cases of *Winchcombe*, 8 R. 726, and *Muir*, 6 R. 1353, criticised the view that as a result of the 11th section of the Conjugal Rights Amendment Act the whole procedure formerly necessary is to be held to have taken place the moment the action is raised, and that therefore an offer to adhere after the summons has been served comes too late. The case of *Hunter v. Hunter*, 2 F. 771, was also founded on. In *M’Callum*, 3 Macph. 550, Lord Deas expressed the opinion that the meaning of section 11 of the Act of 1861 is that if there shall have been non-adherence for the statutory period, decree of divorce may be obtained by simply instituting and following out the action of divorce itself.

¹ The Booke of the Universal Kirk of Scotland (Bannatyne Club Edition), vol. i. p. 262; Works of Sir George Mackenzie, vol. i. p. 277; Harpprecht’s Commentary on Justinian’s Institute, vol. i. p. 416 (Collected Works, Tübingen, 1627).

² Voet’s Commentary on the Pandects, book 24, title 2, sec. 9.

³ Nathan’s Common Law of South Africa, vol. i. p. 280.

July 11, 1908. This was the effect of the statute as determined by the decisions of the Court and the alteration in the law made by the Conjugal Rights Act, 1861, merely simplified the procedure, and did not affect the substance of the law.¹ In this case the defender being insane could not be called on to adhere, and, as, therefore, he was not in non-adherence at the date when the action was brought, the pursuer could not obtain divorce. The case of *M'Lauchlan v. M'Lauchlan*² was distinguished by the fact that there the offer to adhere was made only after the action had been raised.

Scott v. Scott.

Argued for the pursuer;—The law of divorce for desertion was founded on the Act 1573, cap. 55, and therefore it was immaterial to inquire as to the prior law of this country or as to other systems of law. That statute required, as a preliminary, an action of adherence, but that action might be brought after one year's desertion,³ and the pursuer could, after obtaining decree, bring an action of divorce on

In the case of *Mackenzie*, 22 R. (H. L.) 32, Lord Watson says,—‘The only remedy provided by Scotch law where the offending spouse persists in avoiding cohabitation after decree is to be found in the Act of 1573. Decree of divorce under that Act is, in my opinion, nothing else than a penalty for obstinate non-adherence.’ And in dealing with the Conjugal Rights Act it is pointed out that the object of that enactment was to simplify procedure by allowing the pursuer to prove non-adherence in his suit for divorce.

“If insanity, just as imprisonment, be a reasonable cause for non-adherence, the question is whether it cannot be pleaded as an answer to an action of divorce for desertion.

“If it can be so pleaded, it may entail great hardship upon a pursuer. There may have been malicious and obstinate desertion for the statutory period. Under the old law an action of adherence might have been raised after a year. Under the existing law the action of divorce, in which non-adherence must be proved, can only be raised after the four years. If insanity supervenes shortly after the expiry of four years, the pursuer, according to the defender's argument, might under the existing law be in a worse position than before 1861, and might lose her remedy altogether.

“I think it is possible to hold that, on the facts as averred, the present action is competent and relevant, and I am accordingly of opinion that a proof should be allowed. So long as the substantial conditions, to use the expression of the Lord President in *Watson's* case, are observed, the injured spouse is entitled to the statutory remedy. The substantial conditions could not be fulfilled in *Auld* or in *Hunter*, because the adultery of the pursuer was a reasonable cause for non-adherence on the part of the defender at the date of the action. So if insanity had here supervened before the four years of desertion had expired, the action could not have been maintained. Where, however, as here, there had been four years' desertion prior to insanity, it appears to me that the defender had incurred the statutory penalty. It is not necessary to express an opinion on the question whether it is too late, after the action has been brought, for the defender to offer to adhere. There can be here no offer to adhere on

¹ *Auld v. Auld*, Oct. 31, 1884, 12 R. 36; *Hunter v. Hunter*, March 15, 1900, 2 F. 771; *Watson v. Watson*, March 20, 1890, 17 R. 736; *Mackenzie v. Mackenzie*, May 16, 1895, 22 R. (H. L.) 32, at p. 40.

² Dec. 21, 1838, 1 D. 294.

³ *Lothian's Law Practice and Styles peculiar to Consistorial Actions*, p. 97.

the expiry of the four years of desertion. Accordingly, the pursuer here might have obtained decree in an action of adherence brought while the defender was sane, and could then have proceeded afterwards with the action of divorce. The Act of 1861 merely simplified procedure, and did not otherwise affect the right of the injured party to obtain divorce. It had been settled that where one spouse was in desertion for four years there was a *jus quæsitum* in the injured spouse to insist for divorce.¹ That right might be defeated by the subsequent misconduct of the injured spouse, the principle in such cases being that the party was personally barred from obtaining redress.² An offer of adherence after the expiry of the four years was too late.³ But the effect of the insanity of the defender was nothing more than to make it impossible for him to offer to adhere, and as an offer to adhere made at any date after the insanity began would have been ineffectual, the fact that the defender was insane could not defeat the pursuer's right to divorce. Assuming, however, that the pursuer's action could now be met by an offer of adherence, no offer had been made. Insanity was not equivalent to an offer to adhere, and it could not be assumed that the defender, if he recovered, would be willing to adhere.⁴

At advising on 11th July 1908,—

LORD STORMONTH-DARLING.—This action of divorce for desertion has been reported to this Division by Lord Mackenzie on the question whether an offer to adhere can competently be made by or on behalf of a husband after the lapse of the four years which are necessary to lay the foundation for such an action, the question not being one of willingness to adhere if he could, but of impossibility of adherence owing to his supervening insanity. It is admitted that the marriage took place on 28th March 1894, and it is averred by the wife, who is pursuer, that in November 1894 the defender left the house where he and she had resided with her parents without giving any reason, and that he has never, with the exception of two days in January 1895, lived with the pursuer since that time, or contributed anything towards the support of her or the child of the marriage, who was born in July 1894. The curator *ad litem* appointed to the defender in the process states that, owing to the insanity of the defender, he is not in a position to ascertain the facts as to these averments; but he admits that the defender became an inmate of Hampstead Workhouse, suffering from influenza with fever and delirium tending to become maniacal, on 15th March 1899, and that he was transferred to Hanwell Asylum on 10th April in that year, since which time he has been continuously in an asylum, and is not expected

the part of the defender. As, however, it may be considered that the case touches the general question of when an offer to adhere may be made, upon which different views have been expressed in the cases of *Muir* and *Winchcombe*, and the case of *Auld*, I think it proper to report the point."

¹ *M'Lauchlan v. M'Lauchlan*, Dec. 21, 1838, 1 D. 294.

² *Auld v. Auld*, 12 R. 36; *Hunter v. Hunter*, 2 F. 771; *Mackenzie v. Mackenzie*, 22 R. (H. L.) 32, at p. 35.

³ *Muir v. Muir*, July 19, 1879, 6 R. 1353; *Winchcombe v. Winchcombe*, May 26, 1881, 8 R. 726.

⁴ *Mordaunt v. Moncreiffe*, L. R., 2 Sc. App. 374.

July 11, 1908. to recover. In these circumstances it is averred by the curator that since
 Scott v. Scott. 15th March 1899 it has been impossible for the defender to adhere to his
 wife.

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 Darling.

The Lord Ordinary expresses the opinion that, 'on the facts as averred, the present action is competent and relevant, and that a proof should be allowed, because here there had been four years' desertion prior to insanity, and the defender had incurred the statutory penalty for that conjugal misconduct. His Lordship thinks it unnecessary to express an opinion on the question whether it is too late, after the action has been brought, for the defender to offer to adhere, because there can be here no offer to adhere on the part of the defender; but he reports the case, as it may be considered that it touches the general question of when an offer to adhere may be made—a question 'upon which different judicial views have been expressed in the cases of *Muir*¹ and *Winchcombe*² on the one hand, and *Auld*³ on the other.

I doubt whether there was any such real difference of judicial view as the Lord Ordinary indicates. In *Muir's* case¹ the husband's offer to adhere, after the action of divorce had been personally intimated to him, was held to come too late, chiefly on the strength of section 11 of the Conjugal Rights Act of 1861, and the wife, who was pursuer, and had established desertion for upwards of four years, got her divorce. *Winchcombe's* case² was one where a wife also got her divorce simply on the ground that the husband had deserted her for more than four years, and that there was no proof of his having made, after the expiry of the period, such an offer of adherence as she was bound to accept. Now, it is quite true that in *Auld's* case³ Lord President Inglis declined to accept what he characterised as the Lord Justice-Clerk's *obiter dictum* about the effect of section 11 of the Act of 1861 as finally settling the law. In particular, his Lordship combated the view for which the pursuer in *Auld's* case³ was attempting to use Lord Moncreiff's *dictum*, viz., that the lapse of four years gave a vested right to a deserted spouse to obtain divorce which could not be defeated by anything which happened after that period. And what had happened in *Auld's* case¹ after the lapse of the four years was that, by her own admission, the wife who complained of having been deserted had borne an illegitimate child. I greatly doubt whether Lord Moncreiff ever intended his *dictum* to be stretched so far as that, but, at all events, the pursuer's counsel here did not carry it to that extent, or anything like it. He fully admitted, with Lord President Inglis, that the changes introduced by section 11 of the Conjugal Rights Act, were changes in the form of procedure merely, and could not affect what the same learned Judge called "the substance of the enactments previously in force relating to this branch of the law of divorce"; and one of these substantial conditions was, of course, that the deserted spouse should not by her own conduct have disentitled herself from obtaining the remedy she sought.

But if the judgment that we are now to pronounce is to have any useful effect, such as the Lord Ordinary obviously intended by making the action at this stage the subject of a report, it will not do to restrict it to a mere

¹ 6 R. 1353.

² 8 R. 726.

³ 12 R. 36.

criticism of the cases of *Muir*,¹ *Winchcombe*,² and *Auld*.³ Three other cases July 11, 1908. at least must be dealt with—those of *M'Lauchlan*,⁴ *M'Callum*,⁵ and *Scott v. Scott*.
Watson.⁶

M'Lauchlan's case⁴ depended in the Outer-House before Lord Fullerton, and began with the wife obtaining decree of adherence, upon which she gave a charge to the defender, her husband, which was disobeyed. He was denounced, and the denunciation was recorded. She then presented a petition to the presbytery to proceed to the admonition and excommunication of her husband. Finally she raised an action of divorce, in which the defender stated that he was ready and willing to adhere, and the pursuer met that with the plea that it was incompetent and irrelevant to make such an offer at that stage. Lord Fullerton repelled this plea of the pursuer, and appointed her to state in a minute, signed by herself, whether she accepted or declined the offer made by the defender. Lord Fullerton's interlocutor was, however, recalled by the First Division, consisting of the first Lord Mackenzie, Lord Corehouse, and Lord Gillies, very much on the strength of a passage in Baron Hume's lectures. Lord Mackenzie said that it did not appear to him to admit of doubt that, when desertion had been obstinately continued so long as it had been in that case (upwards of four years before the wife obtained her decree of adherence), there was a *jus quæsitum* in the party deserted to insist for a divorce which was not liable to be thereafter defeated at the option of the deserter. Lord Corehouse said that the statute gave the remedy for four years "malicious and obstinate desertion," which remedy was meant to be effectual. He also pointed out, like Lord Mackenzie, that unless the deserted spouse acquired a right to obtain a divorce after the lapse of four years such as could not be defeated by a subsequent tender of adherence, the remedy of the statute would be quite inoperative. And Lord Gillies agreed, on the assumption (which all the Judges made) that the pursuer's proceedings, ecclesiastical and civil, had been regular.

M'Callum's case⁵ was an action of divorce on the ground of desertion, and the judgment in it was pronounced soon after the passing of the Conjugal Rights Act, which by section 11 rendered it unnecessary, prior to any action for divorce, to institute against the defender any action of adherence, or to charge the defender to adhere to the pursuer, or to denounce the defender, or to apply to the presbytery of the bounds, or any other judicature, to admonish the defender to adhere. Excommunication not being expressly abolished by section 11, the case was reported by the Lord Ordinary (Lord Ormidale), on the question whether wilful desertion for four years together was a sufficient ground for divorce. The First Division unanimously held that, when admonition was dispensed with, excommunication as a necessary consequence was dispensed with also, and accordingly it was remitted to the Lord Ordinary to proceed with the cause.

Watson's case⁶ followed in 1890, and was sent to the whole Court. It was proved that in 1874 the wife left her husband, and had persisted in her desertion ever since. Her husband deponed that he was willing to take

¹ 6 R. 1353.² 8 R. 726.³ 12 R. 36.⁴ 1838, 1 D. 294.⁵ 1865, 3 Macph. 550.⁶ 1890, 17 R. 736.

July 11, 1908. her back, but she was not called as a witness, and it did not appear that any remonstrance had been made to her, although she was living in Scotland, and her address was known to the pursuer. The whole Court, by a majority, holding that the facts proved were not sufficient to warrant decree of divorce, remitted the case to the Lord Ordinary to take further proof, particularly with regard to the state of mind of the pursuer towards his wife during the period of desertion, and as to her willingness to return to him during that period. This case, therefore, seems to shew that in the opinion of the majority the necessity of admonition or remonstrance on the part of the spouse complaining of desertion was a question of circumstances depending upon the merits of the particular case, and that no absolute rule could be laid down. Perhaps the case is chiefly important for a vigorous protest by Lord President Inglis against the notion of introducing, or even seeming to countenance, divorce *a vinculo* by consent of parties.

It seems, therefore, to be the result of all the cases that when, as here, there has been "malicious and obstinate defection of the parties offender" for the full statutory period of four years, the injured spouse being all that time willing to adhere, and not being disentitled by any conjugal misconduct of her own from seeking the remedy of divorce, that is by itself a sufficient cause of divorce, whether it be called a vested right or a *jus quæsitum* to apply for the remedy. I am accordingly of opinion, with the Lord Ordinary, that the proof which he proposes should be allowed.

LORD LOW and LORD ARDWALL concurred.

The LORD JUSTICE-CLERK was absent.

THE COURT remitted to the Lord Ordinary, instructing him to find the libel relevant, and to fix a diet for proof.

GEORGE A. GRANT, S.S.C.—ROBERT MILLER, S.S.C.—Agents.

No. 166.

July 11, 1908.

M. v. H.

M., Pursuer (Respondent).—*Watt, K.C.—Spens.*
H., Defender (Reclaimer).—*Morison, K.C.—Hon. W. Watson.*

Reparation—Slander—Judicial Slander—Averments regarding co-defender in divorce action—Privilege—Malice—Sufficiency of averments of malice.—In an action of divorce for adultery brought by a husband against his wife, the wife's alleged paramour was called as co-defender. The husband founded on a written confession by the wife admitting that she had miscondacted herself with the co-defender, and averred:—"In consequence of the information elicited by the pursuer from the defender, the pursuer has made inquiries and has ascertained, and now avers, that" upon certain dates "the defender miscondacted herself with the co-defender, and that the co-defender is the father of the child which was born to the defender." The Lord Ordinary granted decree of divorce against the wife, but assoilzied the co-defender with expenses.

Thereafter the co-defender brought an action against the husband for reparation for the slander contained in the statements in the divorce action. He averred that these statements were made falsely, calumniously, and maliciously, and without probable or any cause. That no inquiries had been made by the husband or on his behalf relative to the co-defender's

conduct, and that no evidence was attempted to be led at the trial against July 11, 1908. him. That the wife had been induced by the husband to write the alleged confession and that the husband knew that that confession was untrue. M. v. H.

Held that this being a case of judicial slander it was necessary for the pursuer to set forth facts and circumstances from which malice could be inferred—that the pursuer had failed to set forth facts from which it could be inferred that the defender's statements in his action of divorce, which were relevant, were made from a malicious motive—and therefore that the present action was irrelevant, and the defender was entitled to absolvitor.

Scott v. Turnbull, July 18, 1884, 11 R. 1131, *approved and followed*.

Gordon v. British and Foreign Metaline Co., Nov. 16, 1886, 14 R. 75; and *Beaton v. Ivory*, July 19, 1887, 14 R. 1057, *commented on and explained*.

ON 12th June 1908, M. brought an action in the Court of Session 1ST DIVISION. against H. concluding for £500 as damages for an alleged slander. Ld. Johnston.

The pursuer averred that he had formerly been in the service of the defender, his duties being to look after a pony and the garden attached to the house. He further averred:—

(Cond. 3) "On 21st January 1907 the defender raised an action in the Court of Session against his wife, concluding for divorce on the ground of the adultery of his wife with the pursuer or some other male person to defender unknown. In said action the pursuer was called as co-defender, and the defender averred on record that 'In consequence of the information elicited by the pursuer from the defender, the pursuer has made inquiries and has ascertained, and now avers, that upon Tuesday, 1st May 1906, and upon other dates during that month, and also in the month of April preceding, the defender (Mrs H.) misconducted herself with the co-defender (pursuer), and that the co-defender is the father of the child which was born to the defender (Mrs H.) on or about 11th January 1907.' These statements are false and calumnious, and were made by the present defender recklessly, maliciously, and without probable or any cause. No inquiries whatever were made by the present defender, or on his behalf, relative to the pursuer's connection with the case, and the only communication he caused to be made to the present pursuer was in December 1906, when he endeavoured, through a private detective, to induce the pursuer to sign a similar confession to corroborate the said alleged confession by Mrs H. This the present pursuer refused to do. Further, the present defender never had any information connecting the present pursuer with his wife's alleged adultery, except a statement in one of the two documents referred to below, which document the present defender knew at the time he took the oath of calumny his wife was repudiating as false. Further, no evidence was attempted to be led at the trial against the pursuer."

(Cond. 4) "In said action the defender produced and founded on written statements alleged to have been addressed to him by his wife on or about 23d September 1906, and bearing to contain, *inter alia*, the following statement:—'I, Bella H., confesses to having on May 1st fallen pregnant with William M.' This was all that connected the present pursuer with the alleged adultery in this document. The other statement contained no mention of the present pursuer. With reference to defender's explanations in answer, it is averred that he knew perfectly well that his wife's condition might be due to himself."

July 11, 1908.

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(Cond. 5) "The said Mrs H., in her pleadings in said action, denied that she ever had been guilty of adultery with the pursuer, and averred that the said letter or confession founded on by the defender was untrue, and written solely on the suggestion and at the instigation of the defender, and merely for the purpose of obtaining his consent to a separation. In point of fact the defender knew that there was no truth whatever in said alleged confession, and the same was suggested by him and written at his instigation with a view to obtaining a separation, which, at the time, both spouses desired. Notwithstanding the defender's said knowledge, and the fact that his wife in said action denied adultery with the present pursuer, and explained the circumstances in which the said alleged confession was written, the defender persisted in his allegations against the present pursuer, and took upon himself the burden of proving the said statements made by him on record, and adopted same as his own. By the judgment of the Court the pursuer was assoilzied from the conclusions of said action in so far as same were directed against him, and was found entitled to expenses against the defender."

(Cond. 6) "The foresaid statements were made by the defender of and concerning the pursuer falsely, calumniously, and maliciously, and were made without probable or any cause, and were admitted by him to have been so made when examined as a witness in the said action. At 1st May 1906 the pursuer was a boy of seventeen years of age, and was employed in a menial capacity in defender's service, and the foresaid statements made by defender concerning him were known by defender to be untrue, and they were made by defender recklessly, and in the knowledge that the said confession had been repudiated by his wife. There had never been the slightest familiarity, much less impropriety, between the pursuer and the defender's wife. Moreover, the defender persisted in said statements after his wife had stated on record the circumstances in which the so-called confession had been granted as aforesaid. Further, the defender knew that the child with which he charged the pursuer with being the father had been born on 11th January 1907, and was a child which had the full period of gestation, and that his said wife had been absent in England from 5th to 25th April 1906, during which period intercourse between pursuer and her had been impossible."

The pursuer pleaded, *inter alia* ;—(3) The defamatory statements complained of having been made maliciously and without probable cause, the defender is not protected by privilege from responsibility therefor.

The defender pleaded, *inter alia* ;—(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the action, which should accordingly be dismissed. (2) The statements complained of being privileged, and the defender having acted without malice, is entitled to be assoilzied from the conclusions of the action.

On 6th June 1908 the Lord Ordinary (Johnston) pronounced an interlocutor repelling the first plea in law for the defender, and approving an issue for the trial of the cause.*

* "OPINION.—In this action, although as originally stated I do not think there was a relevant case set forth for the pursuer, I think that his amendments render it such that I must send it to trial. The circumstances are that the defender raised an action against his wife some eighteen months ago for divorce, and called as co-defender the pursuer in the present action,

The defender reclaimed, and the case was heard before the First July 11, 1908. Division on 11th July 1908.

Argued for defender and reclamer ;—The pursuer had averred no relevant case. The statement complained of being made in the course of judicial proceedings was privileged, and was only actionable on the ground of malice. Further, being relevant to the issue in dispute in the action in which it was made, facts and circumstances must be set forth from which malice could be inferred.¹ No such facts and circumstances had been set forth here. The confession of a wife was highly relevant to an action for divorce, and there were no facts and circumstances averred from which it could be inferred that the accusation against the co-defender implied in that confession was brought forward for the secondary purpose of injuring him, or for any other motive than the perfectly legitimate motive of assisting the case of the pursuer in the divorce action.

M. v. H.

who was then in the position of his groom. He raised that action, as stated in the record in the present action as amended, basing it upon a written confession under the hand of his wife. It is now said that in the divorce action the present pursuer 'was called as co-defender, and defender averred on record that—"In consequence of the information elicited by the pursuer from the defender"' (the defender in the passage I am reading means the wife and the pursuer means the husband) "'the pursuer has made inquiries, and has ascertained, and now avers, that upon Tuesday, 1st May 1906, and upon other dates during that month, and also in the month of April preceding, the defender misconducted herself with the co-defender, and that the co-defender is the father of the child which was born to the defender on or about 11th January 1907.'" As originally stated, the first part of that passage was not quoted, and the first part of that passage is what, I think, makes the amended record relevant, because it says—"In consequence of the information elicited by the' present defender from his wife, he 'has made inquiries, and has ascertained and now avers' definite facts.

"It is alleged now that no such inquiries were in fact made, that the husband ascertained nothing, and founded this averment of a specific act of adultery, and of intercourse continuing over two months, upon absolutely nothing but his wife's letter. That is the averment. It may be true or it may not. The statement to which I refer is, 'This' (referring to the letter of confession) 'was all that connected the present pursuer with the alleged adultery in this document. The other statement contained no mention of the present pursuer. These statements are false and calumnious, and were made by the present defender recklessly, maliciously, and without probable or any cause. No inquiries whatever were made by the present defender, or on his behalf, relative to the pursuer's connection with the case, and the only communication he caused to be made to the present pursuer was in December 1906, when he endeavoured, through a private detective, to induce the pursuer to sign a similar confession to corroborate the said alleged confession by Mrs H. This the present pursuer refused to do. Further, the present defender never had any information connecting the present pursuer with his wife's alleged adultery, except a statement in one of the two documents referred to below, which document the present defender knew at the time he took the oath of calumny his wife was repudiating as false. Further, no evidence was attempted to be led at the trial against the pursuer.'

"The result of the trial was that the Lord Ordinary, while finding that

¹ Scott v. Turnbull, July 18, 1884, 11 R. 1131 ; Gordon v. British and Foreign Metaline Co., Nov. 16, 1886, 14 R. 75 ; Beaton v. Ivory, July 19, 1887, 14 R. 1057 ; Campbell v. Cochrane, Dec. 7, 1905, 8 F. 205 ; A v. B, 1907, S. C. 1154.

July 11, 1908. Argued for the pursuer and respondent;—Facts and circumstances from which malice could be inferred were duly set forth here. The averments were that the husband had made no inquiries, and had received no information in corroboration of his accusation against the co-defender. He based that accusation solely on the alleged confession, and yet he had recklessly, and without probable cause, persisted in that accusation after the wife had repudiated the confession, and when he had no evidence to lead in support of it. These facts and circumstances were sufficient to infer legal malice.

LORD PRESIDENT.—I confess that I think that this is an exceedingly clear case. I have nothing to add on the general law to what was laid down long ago by Lord President Inglis in *Scott v. Turnbull*,¹ and I venture to think that his Lordship's exposition of the law in that case is the law of Scotland,

there was enough in the conduct of the wife corroborative of her written confession to justify his granting decree of divorce, held that there was no evidence against the co-defender, and accordingly he was assoilzied. Now, the contention before me has been that there is no relevant averment of facts and circumstances from which malice can be inferred. It is quite true that in the case of *Scott v. Turnbull*, 11 R. 1131, the Court laid down what had been fully recognised before—but they laid it down authoritatively—that in a case of judicial slander where the statement is relevant to the action—and some Judges think even where it is irrelevant, but at the same time pertinent—the pursuer must not merely aver malice, but he must aver a state of circumstances from which malice may be deduced; that it is not sufficient to use the adjectives 'false,' 'malicious,' and so on, but that there must be circumstances stated from which the malice may be deduced. The Lord President Inglis puts it thus in the case referred to:—'In order to displace the honest and proper motive of the defender and to shew that the statement was made from an improper motive, I think there must be a statement of facts and circumstances from which malice can be inferred.' That is certainly the law, but it is stated, I think, very widely, and it is to be read in connection with the circumstances of each case. And, a very few years afterwards, in the case of *Gordon v. The British and Foreign Metaline Company*, in 14 R. 75, there is a very important criticism and explanation by the Lord Justice-Clerk Moncreiff of the case of *Scott v. Turnbull*. He says,—'Now, at this point I should wish to say a few words on the case of *Scott v. Turnbull*, in 11 R. 1131, and the general principle which that case involved. The objection here is that the mere allegation of malice, without a specification of the facts which would imply malice and would lead the jury to come to the conclusion that it existed, is fatal to the action. Now, I entirely agree in the view that was taken in the case of *Scott v. Turnbull*. Malice is in the breast of the party accused, and it cannot be known to the outer world unless there has been some act that evinces malice, and from which the existence of malice is to be deduced. Consequently, when a man alleges malice against another in a privilege suit he must have some reason from which he has inferred its existence—some reason not in his own mind merely, but deduced from the outward acts or words of the person against whom the allegation is made. All that was laid down in *Scott v. Turnbull*—it has been frequently laid down before—was that the averment of malice should not be left on the bare allegation of its existence, that he should specify, to some extent at least, the outward acts, words, or circumstances which have led him to infer that the person acted maliciously. I think that is quite reasonable, because otherwise an

¹ 11 R. 1131.

and has been so considered ever since. I think that the Lord Ordinary is quite mistaken when he argues, as he appears to do, that the authority of that case has been trenched upon in any subsequent case. I think the Lord Ordinary's criticism is easily seen to be erroneous. His Lordship quotes the case of *Gordon v. British and Foreign Metaline Company*.¹ In *Gordon*¹ there were facts and circumstances set forth on the record from which malice could be inferred. In other words, there was no displacing of the *dictum* of Lord President Inglis, that there must be a statement of facts and circumstances from which malice could be inferred; but it was held, in that particular case, that the facts and circumstances were such as those from which malice could be inferred. The case, in other words, fitted the criterion which was laid down in the case of *Scott v. Turnbull*.² The Lord

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Ld. President.

allegation of malice may be a random suggestion for which the litigant alleging it has no grounds in fact. But I do not think that this case falls under that category. On the contrary, without saying in the least that the facts set out on the record necessarily lead to the conclusion that the proceedings in question were malicious, I think they are at all events facts which a jury are entitled to deliberate upon and decide whether they were in their view sufficient to infer malice.'

"That last paragraph gives what I believe to be the true and full explanation of the law upon the point. I may also refer to the case of *Beaton v. Ivory*, in 14 R. 1057, in which the late Lord President Inglis, referring to what he had already said in the case of *Scott v. Turnbull*, says that he did not intend to lay down a general rule in the terms broadly stated in *Scott v. Turnbull* as applicable to all cases. I think that this indicates that he concurred with the views expressed by Lord Justice-Clerk Moncreiff in the case I have last quoted. But there are two subsequent cases: the case of *Campbell v. Cochrane*, 8 F. 205, and the anonymous case *A v. B* in Court of Session Cases, 1907, 1154, in which words are used by some of the Judges which, I cannot help thinking, cannot be received as of general application. In *Campbell v. Cochrane*, one or more of the Judges in support of an averment of malice desiderate a statement of tangible antecedent circumstances. In the case of *A v. B* the Lord President, I think, asks for either something extrinsic or something to be inferred from intrinsic exaggeration of statement. I think all cases of this class have to be referred to their own particular circumstances. And taking the circumstances alleged here, and taking the law as laid down by Lord Moncreiff—to which I entirely subscribe—it seems to me that we have here an allegation of circumstances from which either the Court or a jury may perfectly well and fairly infer malice. There is nothing extrinsic of the case, there are no tangible antecedent circumstances; but there is, on the allegation now made, a reckless use of the pursuer's name in relation to this action of divorce, under circumstances in which the pursuer of that action, finding it necessary to lay hold of some name in order to justify his action, pitches upon the present pursuer, and without inquiry and without being able to justify himself in the result by leading any evidence whatever, asserts that he was engaged for weeks in an illicit intercourse with his wife. It seems to me that, looking to the class of case we are dealing with, if that allegation be true—I do not say that it is sufficient—but I say that at least it sets forth circumstances under which either the Court or a jury might perfectly fairly consider that the pursuer in the action of divorce had acted with such reckless disregard of the interest of a third party as to be equivalent to malice. I shall therefore repel the plea to the relevancy, and send the case to a jury."

¹ 14 R. 75.

² 11 R. 1131.

July 11, 1908. Justice-Clerk, in this case of *Gordon*,¹ ends his opinion by saying that the particular facts there were facts which a jury were entitled to deliberate upon, and decide whether they were, in their view, sufficient to infer malice. The Lord Ordinary says this last paragraph gives what he believes to be the full and true explanation of the law. I point out that that is not a general statement of the law, but only what the particular facts in that case were. And, accordingly, I cannot agree with the Lord Ordinary when he says that Lord President Inglis, in the subsequent case of *Beaton v. Ivory*,² referring to what he had said in the case of *Scott v. Turnbull*,³ and saying that he did not intend to lay down a general rule in these terms applicable to all cases, by that indicated that he had given up his view as expressed in *Scott v. Turnbull*,³ and adhered to some later view as expressed in *Gordon's* case.¹ He did no such thing. What he did say in *Beaton v. Ivory*² was to point out that his general observations in *Scott v. Turnbull*³ were directed to cases of judicial slander, and judicial slander only, and that the general rule which he there laid down must not be applied to other cases of slander which were not judicial slander. The result is, as I stated to begin with, that I believe the criterion laid down by Lord President Inglis in *Scott v. Turnbull*³ is the just criterion, and is absolutely unshaken as the law of Scotland.

When one comes to apply that criterion to the present case, what does one find? A gentleman has a confession from his wife in writing, in which she says that she has committed adultery with a certain person, and, upon that confession, and founding upon it, he raises an action against his wife for divorce. In that action he gets decree against his wife. I need scarcely remind your Lordships that one cannot get decree unless the Judge before whom the case depends considers that the statement is not only relevant, but considers also that it is proved; and, inasmuch as persons are not allowed to get decree of divorce if there is collusion, the Judge has to turn his attention to that matter also, and here he has recorded his opinion that there is not a shadow of proof that there was any collusion between the parties. There was not enough evidence to convict the wife without the confession, and it is, of course, trite law that the confession is only evidence against herself, and is as nothing against the co-respondent. Accordingly, for want of sufficient evidence, the Lord Ordinary, I assume perfectly rightly, has assoilzied the co-respondent; and now this co-respondent brings this action against the pursuer in the divorce action (the husband) for judicial slander.

I confess that I have extraordinary difficulty in following a course of reasoning which can possibly think such a statement, made in such circumstances, and leading to such a result as it did in the first case, can be a statement which shews that malicious attitude or intention which is necessary for judicial slander. The Lord Ordinary has put the whole thing upon one sentence—that the pursuer in the divorce action prefaced his statement that, having made inquiries, he made this charge, and he says that the pursuer in the present action denies that any such inquiries were made. I think that the statement “has made inquiries” is sufficiently satisfied by

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the production of the confession itself. But, if it is not, who is going to judge of what particular amount of inquiry ought to be made? and I suppose, probably, some questions were asked, and even supposing every answer was unfavourable to the idea of adultery having been committed—that is to say, after the husband had asked all such servants as he could find, and everybody who had been with the wife and the co-respondent, and all of them had given a negative answer, and said they had never seen anything wrong—is there anything to prevent the husband founding upon the confession, and the confession alone, and what testimony he might himself supply, and going on to try the case? Supposing he had, on the other hand, missed out that sentence “having made inquiries,” would there be any difference? On the whole matter I think that the case is more than clear, and that we should recall the interlocutor of the Lord Ordinary, and assoilzie the defender from the conclusions of the action.

M. v. H.
 Ld. President.

LORD M'LAREN.—I concur with your Lordship in the chair, and only wish to repeat an observation which I made in the course of the argument. While the Courts have never gone so far as to extend to written pleadings the absolute privilege that attaches to oral advocacy, yet the distinction is necessarily a thin one. The chief difference seems to be that you take a judicial slander in a pleading out of the region of protection if you shew that it is a statement which is not pertinent to the action. But where it is pertinent, and especially where it has been held to be relevant, and is a ground of action that satisfied the Judge before whom the case was heard—if you have these ingredients it is plain that it would be almost impossible to formulate a substantial case of malice proper to be submitted to a jury. I think Mr Morison was well founded in what he said, that it is only in cases where a process has been concocted for the purpose of doing injury to some outside person that the Courts have found averments of malice sufficient to entitle a pursuer to go to a jury. But, in the present case, while it is said, no doubt, that this was a feigned action—that the parties merely wished to be separated, and that the Lord Ordinary was imposed on—it is not stated, and obviously it could not be stated, that this action of divorce was got up for the purpose of doing an injury to the present pursuer. It is therefore not within the class of cases in which an issue of judicial slander can be sent to a jury.

I must add that I have also considerable difficulty on the question of damage, because it does not seem to me—although that is not necessary to our judgment—it does not seem to me very likely that in a case of this kind damage which was capable of being estimated in money could ever be proved.

LORD KINNEAR.—I entirely agree. I agree with Lord M'Laren that the case we have to consider is not exactly the same as the case that arises on the privilege of counsel or the privilege of witnesses. The question is what privilege the law allows to the parties to an action in stating the facts which may be necessary to support their pleas. Now, as I understand the law, if a litigant makes a relevant averment in support of his case, he is not answerable in damages to a third person merely because that averment may

July 11, 1908. Justice-Clerk, in this case of *Gordon*,¹ ends his opinion by saying that the particular facts there were facts which a jury were entitled to deliberate upon, and decide whether they were, in their view, sufficient to infer malice. M. v. H. The Lord Ordinary says this last paragraph gives what he believes to be the full and true explanation of the law. I point out that that is not a general statement of the law, but only what the particular facts in that case were. Ld. President. And, accordingly, I cannot agree with the Lord Ordinary when he says that Lord President Inglis, in the subsequent case of *Beaton v. Ivory*,² referring to what he had said in the case of *Scott v. Turnbull*,³ and saying that he did not intend to lay down a general rule in these terms applicable to all cases, by that indicated that he had given up his view as expressed in *Scott v. Turnbull*,³ and adhered to some later view as expressed in *Gordon's* case.¹ He did no such thing. What he did say in *Beaton v. Ivory*² was to point out that his general observations in *Scott v. Turnbull*³ were directed to cases of judicial slander, and judicial slander only, and that the general rule which he there laid down must not be applied to other cases of slander which were not judicial slander. The result is, as I stated to begin with, that I believe the criterion laid down by Lord President Inglis in *Scott v. Turnbull*³ is the just criterion, and is absolutely unshaken as the law of Scotland.

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July 11, 1908. turn out to be inaccurate and to be injurious to the person complaining.

M. v. H. The privilege which a litigant has—which is indispensable for the administration of justice—allows him to make such averments without subjecting himself to actions of that kind. But, then, I have no doubt he may be made liable if it can be shewn that he made the averment complained of, not with the direct motive of supporting his own case, but with some indirect motive, as, for example, injuring the character of the person complaining.

Lord Kinnear.

Now, I cannot see that there is the slightest ground for saying that there is an averment here of any such indirect malicious motive. The defender's statement was absolutely relevant to the case, and the present pursuer does not say that he made it with any other purpose than that of supporting the case which he brought into Court. On the contrary, he avers that he did intend the averment to support his case and made it for that purpose. Therefore I am unable to see that there is any relevant averment of malice, or that there is any issuable matter on record.

I desire to add that I agree with what your Lordship in the chair stated, that the law as laid down by Lord President Inglis in *Scott v. Turnbull*¹ is absolutely untouched by any subsequent decision, and must govern this case.

LORD PEARSON was absent.

THE COURT recalled the Lord Ordinary's interlocutor, and assoilzied the defender.

BRYSON & GRANT, S.S.C.—WEBSTER, WILL, & Co., S.S.C.—Agents.

No. 167. THE SALVATION ARMY ASSURANCE SOCIETY, LIMITED, Complainers (Appellants).—*Clyde, K.C.—Macmillan.*

July 11, 1908. THE BRITISH LEGAL LIFE ASSURANCE COMPANY, LIMITED, Respondents. —*C. D. Murray—Hon. W. Watson.*

Salvation
Army Assur-
ance Society
v. British
Legal Life
Assurance Co.

Insurance—Life Insurance—Collecting Societies and Industrial Assurance Companies Act, 1896 (59 and 60 Vict. cap. 26), sec. 4, subsec. 2, and sec. 14, subsec. 1—Transfer to another company—Notice.—The Collecting Societies and Industrial Assurance Companies Act, 1896 (59 and 60 Vict. cap. 26), enacts:—Sec. 4. “(1) A member of or person insured with a collecting society or industrial assurance company shall not, except”—(here followed certain exceptions not material for the purposes of this report)—“become, or be made a member of or be insured with any other such society or company without his written consent . . . (2) The society or company to which the member or person is sought to be transferred shall, within seven days from his application for admission to that society or company, give notice thereof in writing to the society or company from which he is sought to be transferred.”

Sec. 14. “(1) It shall be an offence under this Act if . . . (c) A collecting society or industrial assurance company to which a member or person is sought to be transferred fails to give such notice as is by this Act required.”

F., who was insured with an industrial assurance company (company A), in September 1906 applied for and obtained a policy of insurance from

another industrial assurance company (company B). F. paid the weekly premium on both insurances down to 10th December 1906. F. thereafter applied for and obtained from the B company a policy on the same terms as he got from the A company. The provisions of the new policy were more favourable to the assured than the provisions of the general tables of company B, and the insurance required to be sanctioned by the directors of company B. The directors were not, but the agent who negotiated with F. was, aware that F. had been insured with company A. F.'s insurance with company A did not lapse for about two months after he had ceased paying his contributions. No notice was sent by company B to company A.

Held that the transaction was a transfer of F.'s insurance from company A to company B, and that company B not having given notice in terms of the Collecting Societies and Industrial Assurance Companies Act, 1896, sec. 4 (2), had committed an offence under sec. 14 (1).

THE SALVATION ARMY ASSURANCE SOCIETY, LIMITED, an industrial assurance company within the meaning of the Collecting Societies and Industrial Assurance Companies Act, 1896, with concurrence of the Procurator-fiscal of Lanarkshire, brought a complaint in the Sheriff Court at Lanarkshire against the British Legal Life Assurance Company, Limited.

2D DIVISION.
Sheriff of
Lanarkshire.

The complaint set forth:—"That the British Legal Life Assurance Company, Limited, being an industrial assurance company within the meaning of the said Collecting Societies and Industrial Assurance Companies Act, 1896, . . . did on or about the 24th day of December 1906 receive proposals for insurance . . . upon the lives of Peter, Mary, David, Marion, and James Findlay, . . . and did on or about the 27th day of December 1906 issue policies of insurance upon the lives of the said Peter, Mary, David, Marion, and James Findlay . . . while the said persons were insured with the complainers, the Salvation Army Assurance Society, Limited, under policies of insurance, . . . the fact of the said persons being insured with the complainers as aforesaid being well known to the said British Legal Life Assurance Company, Limited, or alternatively, the said British Legal Life Assurance Company, Limited, having culpably failed to ascertain the fact of said insurance with the complainers, and that the said British Legal Life Assurance Company, Limited, did fail to give notice to the complainers . . . of the said proposals for insurance made to the said British Legal Life Assurance Company, Limited, which were proposals to be transferred from the said Salvation Army Assurance Society, Limited, to the said British Legal Life Assurance Company, Limited, within the meaning of the said Collecting Societies and Industrial Assurance Companies Act, 1896, . . . contrary to the said Collecting Societies and Industrial Assurance Companies Act, 1896, sections 4 and 14, and contrary to the Friendly Societies Act, 1896, sections 86, 89, 91, and 102."

On 10th December 1907 the Sheriff-substitute (Mackenzie) assoilzied the respondents.

The complainers obtained a case for appeal which set forth that the following facts were proved:—" (1) In the year 1904, James Findlay . . . effected insurances on the lives of himself, his wife, and his children . . . with the complaining Society. . . . (3) In September 1906 Findlay approached the respondents' agent, Matthew Ferris, with proposals for insurance on his own life and the life of his wife, and these proposals having been accepted, the proposed insur-

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ances with the respondent Company were effected. The benefits secured and the premiums payable under these insurances were different from the benefits secured and premiums payable under Findlay's insurances with the complaining Society. (4) From September to December 1906 Findlay paid the premiums due on his insurances with both Insurance Companies, but in December, having become dissatisfied with the attention he was receiving from the complainers' collectors, he resolved to leave the complainers' Society, and intimated this resolution to one of their collectors. The premiums due to that Society had generally been collected once a fortnight, and the last payment by Findlay was made on 10th December 1906. His intimation to the complainers' collector, just referred to, was made in the course of the following week. (5) Shortly after giving this intimation Findlay requested the respondents' agent—the said Matthew Ferris—to call upon him, and the agent having done so, Findlay proposed to him that he should take over the insurances which he had with the complaining Society. The respondents' agent at first declined on the ground that his Company did not do transfer business, but, on Findlay explaining that it was not a transfer which he was proposing, but that he was leaving the complainers, and had stopped paying them premiums, the respondents' agent proceeded to consider the application. Findlay further informed the respondents' agent that his Company might have the business if they would secure him in immediate benefits of £12, 10s. on his own life and £12 on the life of his wife, at weekly premiums of 2½d. and 2d. respectively. These were the same benefits as Findlay was entitled to under his insurance with the complainers' Society. It was not proved that Findlay told the respondents' agent this. The respondents' agent made no inquiry either at this or any other time as to whether Findlay's insurance with the complainers' Society had or had not lapsed. (6) The terms asked by Findlay being more favourable to the insured than those provided in the general tables of the respondent Company, it was beyond their agent's authority to accept them on his own initiative. He accordingly reported the matter to the district superintendent of the Company, who visited Cowdenbeath about this time. He informed the superintendent that Findlay had been insured with the complainers, but had ceased to be a member of their Society. (7) On receiving the agent's report, the district superintendent of the respondents' Company, accompanied by the agent, interviewed Findlay in regard to his application, and . . . on 21st December 1906 took from Findlay a proposal in writing for insurance on his own life and the lives of his wife and his children . . . The benefits stipulated for were substantially identical with those secured by Findlay's insurance with the complainers' Society, and the weekly premiums payable were the same. (8) Having received this proposal, the respondents' agent and superintendent forwarded it . . . to the district office of the Company at Edinburgh, with the recommendation that it should be accepted. . . . (9) The proposal was subsequently forwarded from the Edinburgh office, with the recommendation of the local manager, to the head office in Glasgow, and there submitted to the directors of the Company, who sanctioned its acceptance, after which policies were issued on 27th December. The insurances in question were not based on the tables contained in any public prospectus issued by the respondents, but on tables issued for the private information of agents of

the Company. (10) Neither the Edinburgh office nor the head office were informed that Findlay had been insured with the complainers' Society. (11) No notice of Findlay's application was given by respondents to the complainers. (12) At the time when the policies were issued by the respondent Company, Findlay's insurances with the complainers had not lapsed. They did not lapse till February." Salvation
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ance Society
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The questions of law for the opinion of the Court were:—“(1) Upon the facts above stated to have been proved, were James Findlay and his family transferred, or sought to be transferred, from the complaining Society to the respondent Company, within the meaning of sec. 4 (2) of the Collecting Societies and Industrial Assurance Companies Act, 1896? (2) Upon the facts above stated as proved, were the respondent Company rightly assoltized from the complaint?”

The case was heard before the Second Division on 18th June 1908.

Argued for the complainers and appellants;—The word “transferred” in section 4 (2) referred to transfer of custom. There was a transfer whenever a person insured with one industrial assurance company took out a policy with another such company, and there was a seeking to transfer whenever a person insured with one industrial company was approached by the agent of another company with the object of inducing the assured to take out a policy with the second company.¹ Such an enactment was necessary for the protection of industrial companies. In the case of an ordinary insurance, the insurance lapsed *ipso facto* if the assured did not pay his premiums at the proper time. But in the case of industrial companies the statute provided that the insurance should not lapse until (1) notice was given by the company to the assured that the insurance would be forfeited in case of default of payment within a certain time, and (2) default had taken place.² Now, a company might well be disposed to refrain from giving notice to a contributor who was unable to pay his contributions on account of temporary embarrassment, but would be very prompt to give notice to a contributor who was unable to pay because he had taken out a policy with another company. It was unreasonable that an industrial company should be exposed to the risk of being placed in the position of giving time to a contributor who was using his money to keep up a policy with a rival company. It was therefore reasonable to provide that whenever a person insured with one company was approached by another company, notice should be given to the first company. It followed that there might be a transfer although the insurance with the second company was not substituted for the insurance with the first company. There might be a transfer although both insurances co-existed.³ If that were so, it was plain that an offence had been committed.⁴ But even if it were necessary that there should be a substitution, there was a substitution here.

Argued for the respondents;—The word “transferred” was used in

¹ Collecting Societies and Industrial Assurance Companies Act, 1896 (59 and 60 Vict. cap. 26), sec. 4 (1) and (2).

² Collecting Societies and Industrial Assurance Companies Act, 1896 (59 and 60 Vict. cap. 26), sec. 3.

³ Pearl Life Assurance Company, Limited, v. Scottish Legal Life Assurance Society, Limited, L. R., [1901] 1 K. B. 528.

⁴ Collecting Societies and Industrial Assurance Companies Act, 1896 (59 and 60 Vict. cap. 26), secs. 4 (2) and 14 (1).

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a popular sense. It meant the carrying over either of a member or of a policy of insurance from one company to another. It did not include the case of a person already insured entering into an additional contract of insurance. The mischief struck at was poaching. If a company attempted to take away a customer from the company with which he was insured, it was quite reasonable that it should have to give notice, so that the first company might have an opportunity of making representations, and, if possible, of retaining its customer. The object was to enable the first company to protect its vested interests, not to enable it to exhaust the customer's potential capacity for business. If the respondents' construction of the sections were right, no offence had been committed. No attempt had been made to induce Findlay to leave the complainers and come over to the respondents. Accordingly, there was no seeking to transfer, and no notice was required. The case of the *Pearl Life Assurance Company, Limited*,¹ was distinguishable. All that was held there was that there might be a seeking to transfer although the old and the new insurances were in existence at the same time. That was plainly sound law, but it did not touch the present case.

At advising on 11th July 1908,—

LORD STORMONTH-DARLING.—It is perhaps unfortunate that in this appeal, which calls for the construction of the Act 59 and 60 Vict. cap. 56, bearing a title which is not self explanatory, we have no aid from a preamble, to shew what was the mischief or mischiefs intended to be remedied. But I think we may safely gather from the Act itself that there were at least three mischiefs which the Act had in view. The first was that in the case of these small insurances—insurances on any one life for a sum of less than £20—they might be forfeited for non-payment of the contribution or premium without notice. The second was that such insurances might be transferred or sought to be transferred from one society or insurance company to another without the written consent of the person insured. And the third was that the canvassing by agents for such insurance societies or companies should be checked. The first of these mischiefs was dealt with by section 3 of the Act, which required that a notice should be served on the person insured by the insuring society or company requiring payment by the insured person of his contribution within not less than fourteen days. The second mischief was dealt with by section 4 (1), which required the written consent of the insured person, or, in the case of an infant, of his father or other guardian, to any transfer of his insurance from one such society or company to another. And the third mischief was dealt with by section 4 (2), which provided that within seven days of the insured person's application for admission to the new society or company a notice thereof should be given in writing to the society or company from which he was sought to be transferred.

The Sheriff-substitute, who heard the case, has given a careful judgment, in which he has held, among the facts proved, that the first approach to the respondents' agent (Ferris) was made by the insured person (Findlay) himself, that at first no attempt was made by Ferris to induce Findlay to effect an

¹ L. R., [1901] 1 K. B. 528.

insurance with the respondent Company, that on Findlay renewing his pro- July 11, 1908.
posals these were accepted, but with different premiums and benefits from
those secured under the insurances effected with the complaining Society, Salvation
that from September to December 1906 Findlay paid the premiums due on Army Assur-
both insurances, but that Findlay having become dissatisfied with the v. British
attention he was receiving from the complainers' collectors he stopped Legal Life
making payments after December, and proposed to Ferris that he should Assurance Co.
take over the insurances which he had with the complaining Society, that LdStormonth-
this being beyond Ferris' authority as a canvassing agent, he referred the Darling.
matter to the respondents' superintendent, who received Findlay's proposals
in writing and forwarded them to the head office, and that in the end these
were accepted, in ignorance that Findlay had been insured with the com-
plaining Society, though they substantially secured the same benefits as in
the case of the latter. I do not wonder, therefore, that the Sheriff-substitute
has held that in the circumstances there was no offence under the Act, and
has assoilzied the respondents, for it is hard to say that on the facts so found
any moral blame lay either with the respondents' head office or even with
Ferris, their canvasser.

But I have come to the conclusion that, at all events, a technical offence
has been committed under the Act, though it is not a case for inflicting any-
thing but a very modified penalty. Indeed, Mr Clyde, for the complaining
Society, did not ask for more.

It is always desirable that in the construction of an Imperial statute the
Courts of the two countries should speak with the same voice, though a
Scottish Court may not, strictly speaking, be bound by the decision of an
English one. Now, the only case in which this statute has been construed
in England is that of the *Pearl Insurance Company*.¹ There an alderman
of the city of London had held that there was no transfer, or seeking to
transfer, where no two insurances had been shewn to co-exist. But a
Divisional Court, consisting of Mr Justice Wills and Mr Justice Phillimore,
reversed his decision, holding that there was a seeking to transfer in the
sense of the Act, and remitted to him to convict. I think we must hold to
this decision. There was in this case a co-existence of two insurances sub-
stantially securing the same benefits in return for the same contributions for
a short time, though the persons concerned in the transaction may not have
known or intended it. Accordingly, the complaining Society ought to have
received notice of Findlay's proposal for admission to the respondents' Com-
pany in terms of section 4 (2), and the omission to send such notice consti-
tuted, at all events, a technical contravention of the Act.

LORD LOW.—I think that sections 3 and 4 of the Collecting Societies and
Industrial Assurance Companies Act, 1896, are intended for the protection
both of persons insuring with such societies or companies and of the societies
and companies themselves.

Section 3 confers a benefit upon the person insured, because it provides
that forfeiture of the insurance shall not be incurred by reason of any default
in paying any contribution until after notice has been given to the insured

¹ L. R., [1901] 1 K. B. 528.

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that in case of default of payment by him, within a certain time and at a certain place, the insurance will be forfeited, and until default has been made in paying the contribution in accordance with that notice.

Subsection 1 of section 4 also contains provisions in favour of the assured. It is in these terms :—"A member of or person insured with a collecting society or industrial assurance company shall not . . . become or be made a member of or be insured with any other such society or company without his written consent, or, in the case of an infant, without the consent of his father or other guardian."

I imagine that the main object of that enactment is to protect persons insured against the solicitations of collecting agents of such societies or companies. I suppose that such agents are paid by results, and that therefore the interest of each agent is to obtain as much business as possible for the society or company which he represents. He is therefore likely to exalt the merits of his company beyond those of all other companies, and to try and persuade a person insured with another company to leave that company and take out an insurance with that which he represents, or to insure with the latter company in addition to the insurance already effected with the other company. I think that the enactment, if read according to the natural meaning of the language used, covers both of these cases, and provides that in either of them the written consent of the insured shall be obtained.

Subsection 2 of section 4 (upon which the question at issue mainly turns) is designed for the protection of the society or the company, and here again I think that the risks mainly in view were those arising from what I shall call the excessive zeal of their collectors. The subsection runs thus :—"The society or company to which the member or person is sought to be transferred shall, within seven days from his application for admission to that society or company, give notice thereof in writing to the society or company from which he is sought to be transferred."

That seems to me to be an enactment unusually difficult of construction, and I cannot pretend to have arrived at any confident opinion as to what its meaning truly is.

In the first place, it deals with the same persons as fall within the scope of the previous subsection. That is plain from the use of the expression "the member or person." That being so, one would rather expect that subsection 2 would be the correlative of subsection 1, and would deal, from the point of view of the society or company, with both of the situations in which a member or person insured may apparently find himself under subsection 1,—that is to say, both with the case of a person dropping his connection with one company and becoming a member of or insuring with another, or becoming a member of or insuring with that other company without dropping the first.

The difficulty in adopting that construction is occasioned by the use of the word "transferred." Mr Clyde argued that the transference contemplated was a transference of what he called custom, which covered the case of a person effecting an insurance with a new company while retaining that in a company with which he was already insured. It seems to me that that construction is negatived by the words actually used, because it is the

person that is spoken of as being "transferred." The precise words are July 11, 1908. "the member or person sought to be transferred." Now, if a person is transferred from one place to another, or from one company to another, he is taken out of the first and put into the second; if he is transferred he cannot be partly in one and partly in the other.

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I am therefore unable, without unduly straining the language used, to read subsection 2 as providing for any other case than that of a person stopping his insurance with one company for the purpose of effecting an insurance with another. I say, for the purpose of effecting an insurance with another, because I do not think that the mere fact that the person insuring with a company had at some previous period of his life been insured with another company would of itself bring the case within subsection 2. For example, if a man came to the conclusion that he could not afford to continue paying premiums and therefore allowed an insurance which he had to drop, and a considerable time afterwards changed his mind and effected a new insurance with another company, I do not think that that would be a transfer within the meaning of the enactment.

Further, I think that subsection 2 of section 4 must be read in connection with section 3. If a man was unable to pay his contribution by reason of illness, or inability to obtain work, or other innocent misfortune, the company with which he was insured might be disposed to treat him with great consideration, whereas if they found that he had stopped paying his contribution because he had effected an insurance with a rival company, they might consider it prudent to give the notice required by section 3 as early as possible. I therefore think that the provisions of subsection 2 of section 4 were intended to prevent a company with whom a person was assured being prejudiced by the benefit conferred upon him by section 3, in cases where the reason for his stopping payment of his contribution was that he had transferred his insurance to another company.

Again, section 14, subsection 1 (b) and (c), require to be considered. That subsection makes it an offence under the Act (b) if a person attempts to transfer a member or person from one society or company to another without the written consent required by section 4 (1); and (c) if a society or company to which a member or person is sought to be transferred fails to give the notice required by section 4 (2). In both cases the offence is only committed in the case of there being a transference, and accordingly I do not think that a person or a society or company could be convicted of an offence under the 14th section if what had been done had merely been to effect an additional insurance with a second society or company, leaving the insurance with the first society or company in force, and payment of contributions in respect thereof being continued.

As regards the present case the facts are very clearly stated by the Sheriff-substitute, and upon these facts I am of opinion that the transaction referred to in the complaint was truly a transfer of Findlay's insurance from the complainers' Society to the respondents' Company. Findlay, who was insured with the complainers, stopped paying his contributions to them, and immediately effected with the respondents an insurance which secured to him the same benefits for payment of the same contributions as his insurance with the complainers had done. Further, the terms upon which the respon-

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July 11, 1908. **Salvation Army Assurance Society v. British Legal Life Assurance Co.** dents insured Findlay were more favourable to the insured than those provided in their general tables, and required to be sanctioned by the directors. That, I think, constituted a clear case of the transfer of an insurance within the meaning of the Act.

Lord Low. I am therefore of opinion that an offence under the Act was committed, although I agree with your Lordship that having regard to the circumstances stated in the case it was merely a technical offence. There is no reason to suppose that any of the officials of the respondent Company, except Ferris, the collector, who arranged the matter with Findlay, knew that Findlay had been insured with the complainers, and Ferris cannot be charged with anything more serious than that, according to my view, he put a wrong construction upon section 4 (2) of the Act, which is not surprising. Therefore, although I think that the respondents should have been convicted of the offence libelled, I am of opinion that it was a case for a merely nominal penalty.

LORD ARDWALL concurred.

LORD JUSTICE-CLERK.—The Act of Parliament upon which this case is based was passed for the purpose of protecting the small insurer from several evils. One was that the companies or societies which granted small insurances had to be restrained from cutting off the insured from the benefit of the insurance and so holding past premiums while getting rid of their obligation. Therefore it was provided that forfeit should not take place without sufficient notice to the assured, who was in arrear, and giving him the opportunity to pay up overdue premiums. A second purpose was to prevent persons insured being induced under pressure to transfer their insurance from one company or society to another, unless written consent was obtained. Improper canvassing was also struck at.

Accordingly under the Act fourteen days' notice must be given of any intended forfeit, and where a transfer is proposed there must be a written consent of the party, or of the parent or guardian of a minor; and where any insured applies to a new insurance company or society, notice is required to be given to the original insurers within seven days of his application.

In this case it appears that one Findlay, a person insured with the complainers, approached the agent of the respondents in the appeal desiring to effect an insurance, and that at first the agent did not try to induce Findlay to insure with him. Thereafter Findlay renewed his application and was granted an insurance with the respondents. For some time thereafter Findlay kept up both insurances, and then being dissatisfied with the complainers, stopped his payments to them, and asked the agent of the respondents to give him an insurance on the same terms as he enjoyed with the complainers. At this time the insurance with the complainers was still in force. The agent had no power to grant special terms, and the matter was referred to his superiors, who granted the concession. It is only fair to say that they were not aware, as the agent was, that Findlay had held an insurance from the complainers.

On these facts my opinion is that the interlocutor of the Sheriff-substitute is erroneous, and that the complainers are entitled to a judgment on the

latter transaction. That which was done, was done without obedience to July 11, 1908. the statutory direction being fulfilled, which requires that notice be given. It may be that there was no evil motive as a cause of the breach of the Army Assurance Society v. British Legal Life Assurance Co. statute, but the offence is a technical one, and it is not necessary that there should be any wilfulness to constitute it. Unless we are to go contrary to the decision in the *Pearl Insurance Company* case,¹ we must hold that a technical offence has been committed, and while the decision of an English Court is not a binding authority on this Court, it is entitled to all respectful consideration. My own opinion is that it was rightly decided. I should have been in favour of a judgment to the same effect had this been the first case occurring under the Act. Whatever difficulty may be created by the word "transfer" in the statute, which has led to much discussion, I have no doubt that what was done here was a transfer in the sense of the Act.

If that be a sound view, as I understand your Lordships hold it to be, there must be a conviction and a penalty. But in the circumstances of the case there does not seem to be any ground for more than a nominal penalty, as the case is one really for the purpose of having the law applicable to a particular set of circumstances settled, and indeed the complainers, through their counsel, expressed their desire that the case should be so dealt with.

THE COURT pronounced this interlocutor:—"Answer the first question of law . . . in the affirmative, and the second question . . . in the negative: Find and declare accordingly: Recall the determination of the Sheriff-substitute, and remit to him to convict the respondents accordingly, and decern: Find the appellants entitled to their expenses. . . ."

ALEX. MORISON & Co., W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

MRS ANNE MOUAT HANNAY OR BOYD AND OTHERS (James Lawrence No. 168.
Boyd's Testamentary Trustees), First Parties.—*D.-F. Campbell*—
J. G. Jameson. July 11, 1908.

JAMES LAWRENCE BOYD, Second Party.—*Lees, K.C.*—*Burn Murdoch.* Boyd's
GEORGE HANNAY AND OTHERS (Trustees acting under a Deed of Trustees v.
Trust, dated 21st October 1878, and executed by James Lawrence Boyd.
Boyd), Third Parties.—*Hunter, K.C.*—*C. J. L. Boyd.*

Husband and Wife—*Donation inter virum et uxorem*—*Implied Revocation.*—A husband in 1878 invested £4000 in name of trustees in trust for his wife in liferent alienably. Neither the wife nor the trustees ever received payment of the interest on the sum so invested. In 1889, the wife, at the request of the husband, signed a letter acknowledging receipt of the annual interest which had accrued on the trust funds.

In a question raised after the husband's death, as to whether the wife's right to the interest, being a donation *inter virum et uxorem*, had been revoked by the husband, held that the letter of 1889 negatived any presumption of revocation which might arise from the non-payment of the interest.

Question whether the non-payment of income by the truster was a habile mode of revoking the gift of income, constituted by a formal trust-deed and by handing over of the capital to the trustees.

Trust—Investment of Trust Funds—Power to retain Investments—Com-

¹ L. R., [1901] 1 K. B. 528.

July 11, 1908. *pany Shares*—A power given by a testator to his trustees to “hold any investments” he “may die possessed of for such time as they may think fit,” entitles the trustees to retain shares in public companies upon which there is an uncalled liability, but only so long as they are satisfied of the safety of the shares as a trust investment, and in the exercise of the power the trustees must act with prudence.

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2D DIVISION. THIS was a special case brought with reference to the estate of James Lawrence Boyd of Glendouglie, who died on 11th March 1907. The first parties to the case were Mr Boyd's trustees, acting under his trust-disposition and settlement, dated 28th January 1901, and codicils thereto; the second party was James Lawrence Boyd, Mr Boyd's residuary legatee; and the third parties were the trustees acting under a deed of trust granted by Mr Boyd, of date 21st October 1878.

The moveable estate left by Mr Boyd included shares of banks and public companies, amounting in value to upwards of £16,400, upon which there was an uncalled liability, and the first question in the case was as to the trustees' power to retain these shares. By his trust-disposition and settlement, dated 28th January 1901, Mr Boyd conferred upon his trustees, in addition to the statutory powers of investment competent to gratuitous trustees, a power of investment “in the purchase or on the security of heritage in Scotland, in debentures of public or incorporated companies, and in debentures or debenture stock of railways and other public companies in Great Britain; also to deposit with any bank, including any colonial bank having a branch in this country.” A codicil, dated 20th June 1901, contained the following clause:—“I authorise my trustees to hold any investments I may die possessed of for such time as they may think fit.” By an earlier codicil (which was holograph and signed, but was left unfinished), dated 6th March 1901, Mr Boyd, while authorising his trustees to retain any securities or investments which he might hold at his death, excepted “such stocks as have an uncalled liability,” but this codicil was found by the Court to have been revoked by the codicil of date 20th June 1901.

The first parties maintained that it was within their power as trustees to continue to hold the shares with an uncalled liability above mentioned, if and so long as they were satisfied of the safety of the said shares as a trust investment. The second party maintained that these shares were not “investments” within the meaning of the codicil of 20th June 1901, and that, in any event, the trustees were not entitled to retain such investments indefinitely at their pleasure.

The second question in the case arose as to a claim for arrears of interest made by the third parties, the trustees acting under the deed of trust, dated 21st October 1878, above mentioned. This deed was executed when in consequence of the failure of the City of Glasgow Bank Mr Boyd had become involved in heavy liabilities, and was in the following terms:—“I . . . considering that the making of a reasonable provision for the aliment of my wife and the children (if any) of our marriage is a duty incumbent on me, and being a burden on me and my means and estate, should be satisfied and paid therefrom: Therefore I have resolved to set apart and invest a sum of four thousand pounds in the names of the after-mentioned trustees for the above purpose, and having of even date herewith executed an assignation of a bond and disposition in security over subjects in Leith, which assignation is granted in favour of” [here followed the names of the trustees] “as trustees for the purposes set forth in these presents.”

The truster declared that the trustees should "stand possessed of July 11, 1908. the said sum of £4000, and interests and proceeds thereof, in trust for the following ends, uses, and purposes, viz., in the first place, ^{Boyd's} the said trustees shall hold the said trust premises," *inter alia*, "for Trustees v. ^{Boyd.} behoof of my wife, in liferent for her liferent use allenarly, exclusive of all my marital rights and interests of every kind," and for payment of the annual proceeds to her on her own receipt, without his concurrence, during all the days and years of her life.

The fee of the said sum was destined to the children of the marriage, if any, whom failing to the children of one of Mr Boyd's brothers.

The bond and disposition in security on the subjects in Leith was subsequently discharged, and in 1885 Mr Boyd granted to the trustees a bond and disposition in security for the said sum on his estate of Pittencrieff. This bond and disposition in security and the trust-deed were in Mr Boyd's possession at the date of his death, but it was stated in the special case that the parties believed the trust-deed was originally delivered by Mr Boyd to the agent for the trustees, and returned by him to Mr Boyd.

By a minute, of date 14th May 1879, the trustees, acting on the said trust, authorised and empowered Mrs Boyd to receive and discharge the interest of the said sum of £4000. A certified copy of this minute was found in Mr Boyd's repositories after his death, along with a letter from Mrs Boyd to the trustees under the said trust-deed in the following terms:—"Edinburgh, 25th May 1889.—To the trustees acting under deed of trust by my husband, dated 21st October 1878. Dear Sirs,—I beg to acquaint you that I have duly received payment, through my husband, of the annual interest accruing on the funds under your charge half-yearly, as the same became due, up to and including the term of Whitsunday 1889.—Yours faithfully, ANNE M. BOYD."

With regard to this letter the parties in the special case stated:—"This document is in the handwriting of a former clerk of Mr Boyd's. It was handed to Mrs Boyd by her husband as a document requiring her signature, and she signed it. She received no explanation as to the meaning of the document or the purpose for which it was required, and she did not ask for any explanation. In point of fact, Mrs Boyd had not, at the date of the document, received payment, through her husband or otherwise, of the annual interest prior to that date. The interest which accrued upon the said sum of £4000 prior to the granting by Mr Boyd of the said bond and disposition in security on 14th July 1885 was uplifted by Mr Boyd and applied to his own purposes, and he never paid any interest either to the trustees or to Mrs Boyd upon the said bond and disposition in security. None of the interest upon the said trust fund was set aside or ear-marked in any way by Mr Boyd, and it cannot now be traced. From the date of the trust, Mrs Boyd was alimented by her husband in his house. No receipts were signed by Mrs Boyd for the half year's interest, either prior or subsequent to the letter of 25th May 1889, nor did she subsequently sign any similar letter to the said trustees."

The first and second parties maintained that the trust, in so far as it conferred any benefit upon Mrs Boyd, was a revocable donation, and that the gift of the income of the £4000, so far as accruing during Mr Boyd's lifetime, was revoked by him; that, in any event, the income, if it was exigible, must be presumed to have been paid, and was not extant, and that the amount thereof was not a debt due by

July 11, 1908. the first parties to the third parties; and that interest was, in no event, due on it.

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The third parties maintained that Mr Boyd made a gift to his wife of the income of the £4000 as it accrued; that this gift was unrecalled and formed a debt on Mr Boyd's estate; and that they were entitled to recover the interest accruing after Whitsunday 1878, the letter of date 25th May 1889 being neither a receipt nor a discharge of the income, and not being capable of operating as a bar to their receiving income which had not in fact been paid.

The questions of law for the opinion of the Court were:—"1. Is it within the power of the first parties to retain the shares" with an uncalled liability above mentioned "indefinitely at their pleasure, notwithstanding that there is attached to them a liability to pay uncalled capital? Or are they bound to realise the same for the purpose of reinvestment? 2. Are the third parties entitled (a) to payment on behalf of Mrs Boyd of the income accruing on the sum of £4000 under the deed of trust, dated 21st October 1878, and amounting as at Martinmas 1906 to the sum of £3990; or are they entitled (b) to payment of the sum of £2450, being the income on the said sum for the period from Whitsunday 1889 to Martinmas 1906, or of any part thereof? In either event, are they entitled (c) to interest on the arrears of said income; and if so, at what rate?"

On the first question the undernoted cases were cited.¹

On the second question the undernoted cases were cited.²

LORD LOW.—The first question in this case is whether the testamentary trustees of the late deceased Mr James Lawrence Boyd are entitled to retain certain shares in public companies which belonged to the truster, and upon which there is uncalled liability.

There was found in the truster's repositories a holograph writing of a testamentary nature, signed by him, dated 6th March 1901, and he also left a codicil to his trust-disposition and settlement, duly tested, dated 20th June 1901. By the holograph writing the truster gave power to his trustees "to retain for such time as they may think fit any securities or investments which I may hold at the time of my death, with the exception of such stocks as may have an uncalled liability": while by the codicil of 20th June he authorised his trustees "to hold any investments I may die possessed of for such time as they may think fit," there being in the latter case no exception of stocks having an uncalled liability.

¹ *Ritchies v. Ritchie's Trustees*, July 20, 1888, 15 R. 1086; *Thomson's Trustees v. Henderson*, Oct. 25, 1890, 18 R. 24; *Henderson v. Henderson's Trustees*, July 20, 1900, 2 F. 1295; *Thomson's Trustees v. Thomson*, Feb. 22, 1889, 16 R. 517; *Smith v. Lewis*, [1902] 2 Ch. 667; *Brownlie v. Brownlie's Trustees*, July 11, 1879, 6 R. 1233 (at p. 1236); *Knox v. MacKinnon*, Aug. 7, 1888, 15 R. (H. L.) 83; *Robinson v. Fraser's Trustee*, Aug. 3, 1881, 8 R. (H. L.) 127; *Learoyd v. Whiteley*, 1887, 12 App. Cas. 727 (at p. 733).

² *Dunlop v. Johnston*, April 2, 1867, 5 Macph. (H. L.) 22; *Robertson's Trustee v. Robertson*, Jan. 22, 1901, 3 F. 359; *Edward v. Cheyne*, March 12, 1888, 15 R. (H. L.) 37; *Allan or Hutchison v. Hutchison's Trustees*, Feb. 1, 1843, 5 D. 469; *Kemp v. Napier*, Feb. 1, 1842, 4 D. 558; *Fraser on Husband and Wife* (2d ed.), vol ii., p. 950; *Erskine*, i. 6, 31.

The holograph writing was in some important respects incomplete, and July 11, 1908. that fact, coupled with the circumstances narrated in the special case, suggests that it was intended to be no more than a draft of a proposed ^{Boyd's} Trustees v. codicil. The writing, however, was, as I have said, signed by the truster, ^{Boyd.} and that being so, I do not think that effect could have been refused to it Lord Low. as a testamentary writing if it had not been superseded by the codicil of 20th June. But it appears to me to have been entirely superseded by that codicil. The writing, besides containing the power to the trustees which I have quoted, gave directions in regard to the disposal of the residue of the truster's estate. The codicil also disposed of the residue and authorised the trustees to hold investments possessed by him in the terms to which I have referred. That being so, I am of opinion that the writing was altogether superseded and revoked, and that the truster must be held to have intentionally in the codicil omitted from the power, which he gave to his trustees to hold investments, the exception of stock having an uncalled liability.

The result is that the power which the trustees have is to hold investments of which the truster died possessed for such time as they may think fit. Of course, in exercising such a power, trustees must act prudently, and they are only entitled to retain such investments if they are satisfied that to do so will be for the benefit of the trust. In the statement of the contention of the parties in the special case the trustees (the first parties) only claim right to retain the shares referred to "so long as they are satisfied of the safety of the said shares as a trust investment." I think that that is an accurate statement of their right, and if the first question had been framed in similar terms I should have had no hesitation in answering it in the affirmative. As framed, however, the question is whether the first parties are entitled to retain the shares "indefinitely at their pleasure." I am not prepared to affirm their right to retain in such wide terms, but if the words "indefinitely at their pleasure" be omitted, I am of opinion that the first branch of the first question may be answered in the affirmative, and the second branch in the negative.

The second question is attended with more difficulty, and arises in this way. When the City of Glasgow Bank stopped payment in 1878 the truster was upon the register of shareholders in respect of certain shares which he held in trust. He was, accordingly, a contributory, and the result might very well have been to ruin him. In these circumstances he executed a deed of trust, dated 21st October 1878, by which, upon the narrative that "the making of a reasonable provision for the aliment of my wife and children (if any) of our marriage is a duty incumbent on me," he assigned a bond and disposition in security for the sum of £4000 over certain subjects in Leith to trustees, and directed them, in the first place, to hold the fund for behoof of his wife "in liferent for her liferent use allenary, exclusive of all my marital rights and interests of every kind, and to pay over the annual proceeds to her on her own receipt, without my concurrence, during all the days and years of her life."

The £4000 contained in the bond and disposition in security was repaid in 1885, and the fund was then invested upon the security of an estate belonging to the truster. The trustees never uplifted the interest during the truster's lifetime, having by minute dated 14th May 1879 authorised

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alternative of the first question of law . . . in the affirmative, and the second alternative of said first question in the negative: Answer branch (b) of the second question of law . . . in the affirmative, with the deletion of the words 'or any part thereof,' and branches (a) and (c) of said second question in the negative: Find and declare accordingly, and decern."

BOYD, JAMESON, & YOUNG, W.S.—HAGART & BURN MURDOCH, W.S.—
J. & J. ROSS, W.S.—Agents.

No. 169.

THE RIGHT HONOURABLE WALTER JAMES HORE RUTHVEN, BARON RUTHVEN OF FREELAND, Petitioner.—*Hunter, K.C.—Hon. W. Watson.*

July 14, 1908. MESSRS DRUMMOND AND GEORGE JAMES DRUMMOND, Respondents.—
Fleming, K.C.—Macphail.

Lord
Ruthven v.
Drummond.

Arrestment—Subjects arrestable—Alimentary fund—Entail—Disentail—Settlement of disentailed money.—In a petition for disentail of an entailed sum of money presented by the heir in possession, the next heir consented to the disentail on condition that the balance of the disentailed sum, after satisfying certain debts of the disentailer, should be put in trust to provide an alimentary liferent to the disentailer. The value of the next heir's expectancy and certain debts due to him by the disentailer exceeded in amount the balance of the disentailed sum put in trust.

Arrestments having been used by creditors of the disentailer in the hands of the trustees, *held* that in the circumstances the trust money had really been settled by the next heir, and not by the disentailer, and that consequently the alimentary restriction was valid; and arrestments recalled.

Arrestment—Recall—Recall on ground that subjects not arrestable—Process—Competency—Competency of considering question of right in petition for recall.—*Held* that, where no action of furthcoming had been raised, the question whether a fund arrested was subject to the diligence of creditors could be determined in a petition for recall of the arrestments.

Brand v. Kent, Nov. 12, 1892, 20 R. 29, commented on.

1ST DIVISION.

THIS was a petition by the Right Honourable Walter James Hore Ruthven, Baron Ruthven of Freeland, for recall of arrestments used by Messrs Drummond, creditors of his lordship, against trustees holding a fund for, *inter alia*, the purpose of providing an alimentary liferent to his lordship. The question raised was whether the restriction of Lord Ruthven's provision to an alimentary liferent was good against the diligence of his creditors.

The petition was presented in the following circumstances:—

In 1873 Lord Ruthven, who was heir of entail in possession of the entailed estate of Freeland, sold that estate for the payment of debts affecting it, and after paying the debts the balance of the purchase price was invested in trust in terms of section 9 of the Entail Amendment Act, 1868.¹

In 1892 there remained in the hands of the trustees a sum of £30,000, and Lord Ruthven, being desirous of disentailing that sum for the purpose of paying off further indebtedness, applied to the next heir of entail, his son, the Master of Ruthven, whose consent was necessary, to grant his consent to the disentail. At that date the sum due to outside creditors was £9000, while the balance of £21,000 was more than covered by a debt due to the Master of Ruthven of £11,356, 4s. 9d., and the value of his expectancy, viz., £12,300.

¹ Entail Amendment (Scotland) Act, 1868 (31 and 32 Vict. cap. 84).

The Master of Ruthven thereupon entered into an agreement with July 14, 1908.
 his father, dated 13th March and 11th April 1892, which proceeded on a narrative of the foregoing facts and on the consideration that "in order to enable the said Baron Ruthven to pay debts now due by him and to effect an arrangement of the claims against him of me the said Master of Ruthven . . . he is desirous of acquiring with my consent the said balance of £30,000 remaining entailed." The parties then proceeded to agree that, on the £30,000 being disentailed (in the first place) out of the sum thereby acquired certain provisions should be made for Lady Ruthven and the younger children, and £9000 should be applied in paying off Lord Ruthven's debts to outside creditors; (in the second place), that the balance then remaining of the £30,000, and also Lord Ruthven's reversionary interest in the estate of Harperstown in Ireland, should be transferred and conveyed to Mr George Auldjo Jamieson, W.S. (whom failing, Mr C. J. G. Paterson, C.A.), and Mr A. R. C. Pitman, W.S., to be held by them as trustees for the following trust purposes:—(1) and (2) for payment of the expenses of the trust and of the disentail. (3) "To pay in each year from the first day of January 1892 out of the free income of the residue of the trust-estate £1000 in the event of the free income for the year exceeding that sum or the whole free income in the event of its not exceeding £1000 to the said Baron Ruthven and Lady Ruthven during their joint lives upon their joint receipt and to the said Baron Ruthven if he shall be the survivor during his life after the said Lady Ruthven's death; and that as a provision for their and his alimentary support and maintenance, and for the alimentary support, maintenance, and education of the children of the marriage between the said Baron and Lady Ruthven other than me the said Master of Ruthven, declaring as it is hereby specially provided and declared as an essential part of the arrangements in terms of which I the said Master of Ruthven have consented to discharge my claim for compensation in respect of the disentail or acquisition in fee-simple of said trust fund, and the said debts due to me by the said Lord Ruthven as hereinafter provided . . . that the said provision of income to the said Baron Ruthven and Lady Ruthven, and to the said Baron Ruthven if he shall be the survivor, shall be purely alimentary and for the purpose above expressed, and shall not be affectable for or by the debts or deeds of the said Baron Ruthven and Lady Ruthven, or either of them, or of the said Baron Ruthven if the survivor, or the diligence of their, his, or her creditors." The other trust purposes were declared to be—payment of the surplus revenue to the Master; payment of an annuity to Lady Ruthven should she survive her husband; payment of £6000 to the Master, should he demand it; and payment of the whole residue and remainder to the Master. The agreement went on to provide (in the third place) that the furniture and plenishing at Barncluith House should be made over to the Master. (In the fourth place) "I, the said Master of Ruthven, shall be bound and obliged, and I hereby bind and oblige myself, to execute and deliver when required a valid and effectual deed of consent to the disentail or acquisition in fee-simple by the said Baron Ruthven of the said trust fund of Thirty thousand pounds; and upon the whole arrangements before expressed 'In the first place' 'In the second place' and 'In the third place' being given effect to, I, the said Master of Ruthven, agree to accept the rights to be thereby conferred upon me as in satisfaction of my

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claim to compensation in respect of the disentail or acquisition in fee-simple of the said trust fund of Thirty thousand pounds, and to discharge my claim for compensation accordingly ; and further, I, the said Master of Ruthven, agree, but only upon the said whole arrangements being given effect to as aforesaid, to discharge the said debts due to me by the said Baron Ruthven." (In the fifth place) it was provided that, if from any circumstance Lord Ruthven should be unable to carry out his obligations under the agreement, the agreement should be void, and the Master should instantly receive the £12,300 agreed on as the value of his expectancy, and that all the other claims competent to him should, in that event, be preserved entire.

The Court thereafter sanctioned the disentail of the £30,000, and the balance of that sum was duly paid over to Mr Jamieson and Mr Pitman, as trustees, in terms of the agreement.

On 17th April 1907 Messrs Drummond, bankers, London, and George James Drummond, a partner of that firm, brought an action against Lord Ruthven concluding for payment of certain sums. After negotiations between the parties, decree was, of consent, pronounced against Lord Ruthven on 4th December 1907 for the principal sum of £1379, 5s. 1d., and on 7th January 1908 for £24, 12s. 5d. of taxed expenses. Messrs Drummond extracted these decrees on 21st January 1908, and in virtue of these extracts, on 12th May 1908, they arrested in the hands of C. J. G. Paterson (who had succeeded Mr Auldjo Jamieson as a trustee) and A. R. C. Pitman the sum of £1600, more or less, due and addebted by them to, or held for behoof of, Lord Ruthven.

On 30th June 1908 Lord Ruthven presented a petition for recall of these arrestments on the ground that his interest in the funds arrested was purely alimentary, and not affectable by the diligence of his creditors. Answers to this petition were lodged for Messrs Drummond, in which they denied that the income of the trust fund payable to the petitioner was alimentary and not attachable by the diligence of his creditors, and explained that it was Lord Ruthven himself who obtained the authority of the Court to acquire, and did acquire, in fee-simple the entailed money, and that he thereafter placed the same in trust.

The case was heard before the First Division on 14th July 1908.

Argued for the petitioner;—It was clear *ex facie* of the agreement that none of the money settled here was really Lord Ruthven's. After Lord Ruthven's debts had been paid and the Master's expectancy had been provided for, Lord Ruthven's indebtedness to him carried off the whole of the rest of the disentailed money. The disentail could not have been effected without the Master's consent, and that consent was given on condition of this settlement of the Master's interest in the disentailed money. The money settled was therefore really the Master's money, and the settlement was really the deed of the Master, and consequently the provision for Lord Ruthven was validly restricted to an alimentary provision, and was not subject to arrestment.

Argued for the respondents;—(1) The balance of the £30,000, after paying off the £9000 of debts, was in terms of the petition for disentail *ex facie* Lord Ruthven's own money, and as it was settled by him on himself, the declaration that it was alimentary was of no effect against the diligence of his creditors. That fact could not be displaced by speculations that the Master might have insisted, had

he chosen to do so, on recovering a portion, or even the whole of it, July 14, 1908 in respect of his father's indebtedness to him. In any event, the alimentary restriction in the settlement on Lord Ruthven was ineffective, because there was embraced in it the reversion of the Irish property, the disposal of which was entirely under Lord Ruthven's own control, and could in no way be held to be a settlement by his son. Lord Ruthven v. Drummond.

(2) The form of process was incompetent for the settlement of the question raised here. A question of whether arrestments were validly laid on, which involved a question of right, could not be discussed and determined in a petition for recall. It could only be considered in a furthcoming.¹

LORD PRESIDENT.—This is a petition at the instance of Lord Ruthven for the recall of arrestments which have been laid on trust funds in the hands of Mr A. R. Pitman and Mr C. J. Paterson, who are the trustees acting under a certain deed. The reason alleged for the recall is that the funds held by these gentlemen, and payable to the petitioner, are alimentary funds. The answer made to that is, that although on the face of the deed they bear to be alimentary funds that is a bad description in law, for the funds truly belonged to the petitioner himself, and therefore he could not settle them on himself as an alimentary provision.

Now, we have the deed before us, and in the narrative the whole circumstances in which this money was settled and the trust created are set forth. The circumstances are these: Lord Ruthven came, on the death of Mary Elizabeth, Baroness Ruthven, his grandmother, to be the heir of entail in possession of the estate of Freeland. A portion of that estate was sold under the 1868 Act, which allows entailed lands to be sold to pay debts affecting the fee of the lands, and provides for the investment of any balance of the purchase price remaining after the debts have been paid, with the object of eventually reinvesting that balance in the purchase of land, and in the meantime of paying the annual proceeds of that money to the person who would have been heir of entail in possession but for the sale. The sale of this portion of Freeland having been effected and the debt paid, there remained a balance of £30,000. The agreement and trust-deed further narrated that Lord Ruthven was anxious to disentail this sum of £30,000, and I need scarcely remind your Lordships that there are provisions in the Entail Acts by which a petition to disentail can be made applicable to money in such a position. Now, Lord Ruthven was not in a position to disentail this money at his own hand, for he was born before 1848, but he could do so with the consent of his eldest son, the Master of Ruthven. The Master was willing to give his consent, but only on certain conditions. (I call attention to the fact that I am confining this narrative to what I find in *gremio* of the deed itself.) It was agreed that £12,000 was the value of the Master's expectancy in the £30,000, but Lord Ruthven also owed £9000 to outside creditors, and £11,000 to the Master himself, he having expended that sum in the payment of his father's debts. The deed goes on to provide for the disposal of the money set free by the

¹ Brand v. Kent, Nov. 12, 1892, 20 R. 29; Vincent v. Chalmers & Co.'s Trustee, Nov. 2, 1877, 5 R. 43.

July 14, 1908. process of disentail, and it provides in the first place that £9000 should be immediately applied in payment of Lord Ruthven's debts, and then that the balance should be settled in a certain way. There are provisions for eventual annuities to Lady Ruthven and the younger children, but the rest of the money is practically settled to provide an alimentary liferent provision for Lord Ruthven.

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Ld. President.

The sole question to be decided is, Whose money was so settled? If it was Lord Ruthven's money he could not, of course, create an alimentary liferent in favour of himself. But if it was his son's money the provision was good. In my opinion the money that was settled was the son's money; and I arrive at that result by a simple arithmetical process. To begin with, there was £30,000. £12,000 of that belonged to the Master as the value of his expectancy. That left £18,000, and of this £18,000 £9000 was paid to Lord Ruthven, for it was immediately paid over to his creditors, and thus was really paid to him, for his liabilities were reduced to that extent. That still left £9000 ostensibly for Lord Ruthven, but that sum was swallowed up by the debt of £11,000 which he still owed to the Master. Now, if the Master had chosen to exact payment of that sum he could have done so, and could have put it in his pocket and walked off with it; but if he preferred to put it in trust, along with the £12,000, he could settle that money in any way he chose, and one way was by settling it on his father by the creation of an alimentary liferent in his favour. Therefore, on the face of this deed, it appears to me that a perfectly proper alimentary liferent has been created.

Two little questions, however, remain which must not be left out of consideration. The first is that, besides this £30,000, there was also included in the property settled by this deed the reversion of a certain Irish estate; and Mr Fleming says that if that was of any value it upsets the calculation based on the figures I have given. That is certainly true, if it can be said there was substantially more included in this settlement than was the property of the Master. But if Mr Fleming had intended to say so he should have averred it, and there is no averment to that effect here. And I do not wonder that it has not been averred, for by the look of the deed I should suspect that there was very little surplus value in the Irish estate. However, Lord Ruthven cannot be called upon to prove a negative; and it was for the other parties to aver there was a substantial value in this Irish estate, if in reality any such value existed.

The other point is whether these matters are properly raised in a petition for the recall of arrestments, and an expression used by Lord Kinnear in the course of his opinion in the case of *Brand*¹ was founded on. I only point out that that expression must not be carried beyond the circumstances of the particular case with regard to which it was used, and I have nothing to add to what I said in this matter in the case of *Barclay, Curle, & Co.*² There is no doubt that the questions raised here could have been tried in a furthcoming, and if a furthcoming had been raised at once, I expect your Lordships would have been inclined to let the *nexus* remain until the furthcoming had been decided. But in this case these arrestments have remained

¹ 20 R., at p. 31.

² 1908, S. C. 82.

on for a year, and what was the petitioner here to do? He could not raise July 14, 1908. a furthcoming himself, and he could not compel the creditors to do so, and Lord I think it would be very unfortunate if the law were as Mr Fleming, found- Ruthven v. ing on that expression of Lord Kinnear's, stated it to be, and if the petitioner Drummond. were to be deprived of this remedy. I therefore think that, when there is Ld. President. no furthcoming, the only plan is to consider the recall of the arrestments, and, for the reasons I have stated, I am of opinion that they should be recalled in this instance.

LORD M'LAREN.—This is a petition for recall of arrestments, and I should be content to rest my judgment upon the clause in the deed which has been put before us, which provides that "as an essential part of the arrangements in terms of which I the said Master of Ruthven have consented to discharge my claim for compensation in respect of the disentail or acquisition in fee-simple of said trust fund and the said debts due to me by the said Lord Ruthven. . . . In the fourth place, that the said provision of income to the said Baron Ruthven and Lady Ruthven . . . shall be purely alimentary, and for the purpose above expressed, and shall not be affectable for or by the debts or deeds of the said Baron Ruthven and Lady Ruthven." The deed further provides that if from any cause the agreement could not be carried out, then the debts to the Master of Ruthven should immediately revive. I do not find a separate clause discharging the Master of Ruthven's claim, but nothing can be more clear than that he did discharge that claim, and that it was made a condition of the discharge that the fund which was available for the payment of that claim should be settled in liferent upon his father and mother. If that is not an alimentary provision made by the son, I do not see how it would be possible to create such a provision. The son might have taken the whole sum from his father and mother had he chosen to stand on his rights.

Then it is said that the addition of the Irish estate to the settled fund makes a difference. I am unable to agree with this contention. As regards the Irish property there is no averment on the record, and no expression in the deed, to shew that its inclusion contributed any material addition to the value of the fund.

I therefore think that the case for recall of the arrestments has been made out, because *ex facie* of the deed it appears that this is a good alimentary liferent provision, and one which is not prohibited by law.

LORD KINNEAR.—I concur, and only desire to add that I entirely agree in all that your Lordship has said with regard to the case of *Barclay, Curle, & Company*.¹

LORD PEARSON was absent.

THE COURT granted the prayer of the petition, and recalled the arrestments.

HOPE, TODD, & KIRK, W.S.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

No. 170.

July 14, 1908.

Napier's
Trustees v.
Napier.LAWRENCE TWENTYMAN NAPIER AND OTHERS (Robert Napier's Trustees), First Parties.—*Clark, K.C.—J. H. Millar.*MISS ELIZABETH MALCOLM NAPIER, Second Party.—*Murray.*MISS ISABEL NAPIER NAPIER AND OTHERS (Robert Assheton Napier's Sons and Daughters), Third Parties.—*Macfarlane, K.C.—R. S. Brown.*

Succession—Legacy—Accretion—Liferent.—A testator directed his trustees to hold a certain part of the residue of his estate "for behoof of my son John, his wife, and family, for alimentary use, not alienable or assignable or attachable for his or their debts (and afterwards to their issue in fee), and the annual proceeds arising therefrom to be paid quarterly to those entitled to receive the same."

After the death of John and his wife and of one of his two children, held that the bequest was a bequest of a joint liferent, and that John's surviving child was entitled to the liferent of the whole fund.

Per Lord M'Laren—"A bequest to a plurality of persons for life is in law a joint bequest, unless (1) there are words of severance, such as 'in equal shares,' or (2) the bequest is capable of being construed as a family provision under which the issue of each liferenter takes the parent's original share."

1ST DIVISION. ROBERT NAPIER, engineer and shipbuilder, Glasgow, died on 23d June 1876. By his trust-disposition and settlement, dated 14th April 1871, he directed his trustees to divide the residue of his estate into ten shares, and gave directions as to their disposal, to which it is not necessary to refer.

By a letter or codicil addressed to his trustees, dated 18th January 1876, the testator directed, with regard to one of these shares—"I now direct and provide that five-tenths of this said tenth share shall be set aside and held by my trustees in trust for behoof of my son John, his wife, and family, for alimentary use, not alienable or assignable or attachable for his or their debts (and afterwards to their issue in fee), and the annual proceeds arising therefrom to be paid quarterly to those entitled to receive the same."

The five-tenths of a one-tenth share of the residue of the estate amounted to about £17,000.

The testator was survived by his son John, by the wife of his son John, and by their only children, Robert Assheton Napier and Elizabeth Malcolm Napier, both born before the date of the deed. During the lifetime of Mr John Napier, who died on 28th December 1899, the trustees paid to him the whole income of the £17,000. He was survived by his wife and daughter, but predeceased by his son Robert Assheton Napier, who died in 1894, survived by a family of sons and daughters. After the death of Mr John Napier, one-half of the income of the fund was, by arrangement, paid to his wife, and the other half to his daughter. On the death of Mrs John Napier in 1907, this arrangement came to an end, and questions arose regarding the disposal of the fund.

For the determination of these questions this special case was presented, to which the parties were (1) the testator Robert Napier's Trustees, (2) Miss Elizabeth Malcolm Napier, and (3) Robert Assheton Napier's children.

The contentions of the parties were set forth as follows:—

"The first parties contend that the fee of the one-half of the fund of £17,000, which half is admitted to be liferented by the second party, is in them in trust for her issue, whom failing, for the persons conditionally instituted to them in the settlement; or otherwise, that the fee of the whole fund is in them, and that the question to whom

the fee ultimately goes cannot be decided till the death of the second July 14, 1908. party.

"The second party contends that she has a right to the liferent of the whole fund, and, in any event, to a liferent of one-half thereof. Napier's Trustees v. Napier.

"The third parties contend that they have right to the fee of the whole fund, subject to a liferent of one-half of the fund in favour of the second party, and defeasance *quoad* one-half of the fund in the event of her marrying and having children."

All parties were agreed that the second party was entitled, at least, to the liferent of one-half of the fund.

The case was heard on 20th June 1908.

The questions of law for the opinion and judgment of the Court were:—"(1) Is the party of the second part entitled to the liferent of the whole fund? or, (2) Is the party of the second part entitled to the liferent of only one-half of the fund? (3) Are the parties of the third part entitled to the fee of one-half of the fund absolutely? (4) Are the parties of the third part entitled to the fee of the whole fund, subject to the liferent of one-half thereof in favour of the party of the second part, and also subject to defeasance *quoad* one-half if the party of the second part marries and has children?"

Argued for the first parties;—The trustees were bound to hold the fund until the termination of the liferent. No decision could be given regarding the fee, as there was a destination over in favour of issue, which suspended vesting.¹ If the second party were found entitled only to the income of one-half of the fund, the trustees were bound to hold the remainder until it was ascertained to whom the fee was payable.

Argued for the second party, Miss Elizabeth M. Napier;—The bequest of the liferent was joint, and, on the death of the other members of the class, the surviving member took the lapsed shares by accretion. There were no words of severance to exclude accretion,² and in the case of a liferent provision accretion was presumed.³ No question as to the fee could be decided until Miss Napier's death.

Argued for the third parties, Mr Robert Assheton Napier's sons and daughters;—The destination "afterwards to their issue in fee" indicated the intention of the testator that on the death of each member of John's family, the fee of his or her share of the fund should vest in his or her issue. The third parties were accordingly entitled to immediate payment of one-half of the property. The liferent of this half was undisposed of,⁴ and belonged to the parties who were entitled to the fee. As regarded the other half, the fee had vested in the third parties, subject to defeasance in the event of the second party marrying and leaving issue.⁵

At advising,—

LORD M'LAREN.—The testator, Robert Napier, by his will or trust-deed

¹ Turner v. Gaw, Feb. 20, 1894, 21 R. 563; Thompson's Trustees v. Jamieson, Jan. 26, 1900, 2 F. 470.

² Paxton's Trustees v. Cowie, July 16, 1886, 13 R. 1191.

³ Johnston, March 8, 1899, 1 F. 720, *per* Lord Moncreiff, at p. 722.

⁴ Tristram v. M'Haffies, Dec. 4, 1894, 22 R. 121; Allen v. Flint, June 15, 1886, 13 R. 975, *per* Lord M'Laren, at p. 977.

⁵ Hickling's Trustees v. Garland's Trustees, Aug. 1, 1898, 1 F. (H. L.) 7; Douglas v. Douglas, March 31, 1864, 2 Macph. 1008; Carleton v. Thomson, July 30, 1867, 5 Macph. (H. L.) 151.

July 14, 1908. divided the residue of his estate into ten equal shares. With the provisions of the will we are not concerned. But by a codicil, in the form of a letter addressed to his testamentary trustees, dated 18th January 1876, the testator provided with reference to one of those ten shares "that five-tenths of this tenth share shall be set aside and held by my trustees in trust for behoof of my son John, his wife and family, for alimentary use, not alienable or assignable or attachable for his or their debts, and afterwards to their issue in fee." The subject of the bequest, one-twentieth of the residue of the testator's estate, is stated to amount to about £17,000.

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Ld. M'Laren.

The testator was survived by his son John and his wife, and by their only children, Robert Assheton Napier and Elizabeth Malcolm Napier, both born, as I understand, before the date of the codicil. Robert Assheton Napier died in his father's lifetime, leaving issue, who are parties to this case. Miss Elizabeth Napier, also a party to the case, is unmarried.

I think it is reasonably certain that the bequest of one-twentieth of the estate to the testator's son John, his wife and family, was a bequest of the income for life, because (1) it is given for alimentary use, which is inconsistent with the notion of it being a bequest of a capital sum; (2) it was protected by a special trust; and (3) the fee was destined to the issue of the first takers, a provision which would be unmeaning if the fee had already been given away under the first member of the clause of bequest.

I also consider it to be reasonably clear that the life interest constituted by this bequest was of the nature of a joint liferent.

A bequest to a plurality of persons for life is in law a joint bequest unless (1) there are words of severance such as "in equal shares," or (2) the bequest is capable of being construed as a family provision under which the issue of each liferenter takes the parent's original share.

Now, this gift of one-twentieth of Mr Napier's estate does not satisfy either of the exceptions which I have indicated, and I know of no others. It must therefore be treated as a joint bequest. This is no doubt a somewhat anomalous provision under which a mother and daughter take the income of the fund concurrently; but the testator apparently considered this to be a good scheme for making provision against misfortune or want, and it must be remembered that the fund in question was only a small fraction of Mr Napier's estate, and was intended to be a safe provision under all contingencies.

Now, Miss Elizabeth Napier is the last survivor of the parties interested in this provision for life, and as it is a joint bequest, it follows that this lady is entitled to the income of the entire fund for the remaining years of her life.

As regards the destination of the capital of the £17,000, I do not think that we are in a position to give a decision. If we were in the region of theory, I should not have much doubt that the capital was divisible amongst the children of John Napier and the children of Elizabeth (if she were married) *per capita*. It may be that when the time for division of the capital arrives there will be no dispute, but if there should be a dispute, we have not before us all the parties who may be interested in it, and are therefore not in a position to give an effective decision. I therefore propose that we should answer the first question in the affirmative, and make no answer to the third and fourth questions.

LORD KINNEAR.—I am of the same opinion, and for the reasons which July 14, 1908, Lord M'Laren has given. I think this must be read as a joint liferent to the testator's son John, his wife, and family, and therefore that the last survivor is now entitled to the whole liferent. I think on that decision being reached that it would be altogether premature to decide the questions which are raised as to the fee, because we cannot tell what conflicting interests may emerge when the liferent determines, or who the parties interested may be. We were told that it would be at least simple and safe to decide that the third parties were entitled to the fee, subject to the liferent, and subject to defeasance *quoad* one-half in the event of the second party marrying and having children. But we do not know whether such children, if they come into existence, may be advised to claim a half or some other share of the fee. Lord M'Laren points out that there might be a question whether the fee was divisible between the two families *per capita* or *per stirpes*, and we cannot tell before the event whether it will be for the interest of children yet unborn to maintain one view or the other of that question. We ought not to pronounce a judgment which will not be *res judicata* against all the persons who may come to be interested in the matter.

LORD M'LAREN intimated that LORD ARDWALL, who was present at the hearing but absent at the advising, had authorised him to say that he concurred in Lord M'Laren's opinion.

The LORD PRESIDENT was absent at the hearing.

LORD PEARSON was absent.

THE COURT answered the first question in the affirmative, and refused to answer the third and fourth questions.

FRASER, STODART, & BALLINGALL, W.S.—Hon. A. G. WATSON, W.S.—
J. & F. ANDERSON, W.S.—Agents.

HIS MAJESTY'S ADVOCATE, Complainer (Appellant).—*Sol.-Gen. Ure*—No. 171.
Thomson, A.-D.—Lyon Mackenzie.

SUITS, LIMITED, Respondents.—*Hunter, K.C.—R. S. Horne.* July 16, 1908.

Trade-Mark—Merchandise Marks Act, 1887 (50 and 51 Vict. cap. 28), sec. 2, subsec. (2)—Applying false trade description—Acting innocently.—*H. M. Advocate v. Suits, Limited.*
The Merchandise Marks Act, 1887, sec. 2 (2), enacts,—“Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade-mark or false trade description is applied, or to which any trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive is falsely applied, as the case may be, shall,—unless he proves (a) that having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade-mark, mark, or trade description, and (b) that on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or (c) that otherwise he had acted innocently,—be guilty of an offence against this Act.”

A person acting at the instigation of a Procurator-fiscal wrote to the

July 16, 1908. Glasgow branch of a firm of clothiers, asking for patterns of "Scotch Tweed" waterproofs, and saying,—“What I want is a good serviceable coat, all wool.” The firm wrote, enclosing patterns “as requested.” One of these patterns which did not answer to the trade description, “Scotch Tweed All Wool,” was chosen, and the firm supplied a coat of the material selected. It appeared that the firm’s assistants were enjoined not to give goods any description other than that by which they were invoiced to the branch. The material in question was invoiced to the branch as “overcoating,” and by the rules of the business the firm’s salesmen were permitted to supply it only under the name of “overcoating.”

In a complaint at the instance of the Board of Trade, on which the above facts were proved, the Sheriff-substitute assoltized the respondents.

In an appeal upon a stated case, *held* (*per* the Lord Justice-Clerk, Lord Low, and Lord Ardwall) that the trade description “Scotch Tweed All Wool” had not been applied to the material in question, and (*per* the Court), that even if the trade description “Scotch Tweed All Wool” had been applied to the material, the respondents had acted innocently in the sense of sec. 2, subsec. (2).

Observations (*per* Lord Low and Lord Ardwall) on the conduct incumbent upon persons seeking evidence against offenders by making purchases for this purpose.

2D DIVISION.
Sheriff of
Lanarkshire.

THE firm of “Suits, Limited,” 163 Trongate, Glasgow, were charged in the Sheriff Court of Lanarkshire at Glasgow on a summary complaint at the instance of the Lord Advocate, which set forth that the accused “did, between 18th November and 11th December 1907, in their warehouse at 163 Trongate, Glasgow, sell to Thomas Steven, clerk, 39 Fort Street, Ayr, a waterproof coat to which the false trade description ‘Scotch Tweed All Wool’ was applied, contrary to the Merchandise Marks Act, 1887, and particularly section 2, subsection (2).”*

On 1st April 1908 the Sheriff-substitute (Glegg) assoltized the accused.

The complainer took an appeal by way of a stated case, which set forth that the following facts were proved:—“The communications between the parties were conducted entirely by writing. Throughout the whole proceedings Steven was acting at the instigation and under the direction of the Ayr Procurator-fiscal. The respondents acted through their servants at their branch in Glasgow. On 18th November 1907 Steven wrote to the respondents:—‘I am told you supply Scotch tweed waterproofs for 20s. to measure; and as I want one, would you please send me patterns. I fancy you can give me directions for measuring myself, so that I would not need to go to Glasgow. What I want is a good serviceable coat, all wool, and fit to turn rain. . . . On 19th November the respondents replied:—‘Enclosed please find patterns as requested. Trusting you will be able to make a favourable selection.’ . . . Various patterns were enclosed, but of what material these, other than that chosen, were composed does not appear. On 29th November Steven wrote:—‘I got the patterns of Scotch tweed waterproof, which you sent in answer to my letter of 18th November. I have selected one I enclose.’ . . . The pattern selected was one which Steven and his advisers, after examination, believed not to be Scotch tweed. The coat supplied was made from cloth of this pattern. . . . The respondents sent the coat and an invoice, bearing,—

* The Merchandise Marks Act, 1887 (50 and 51 Vict. cap. 28), sec. 2, subsec. (2), is quoted in the rubric.

'Overcoat £1,' to which was annexed a receipt as follows :—'Received July 16, 1908. of Mr Steven the sum of One pound.' On 12th December 1907 Steven wrote,—'The waterproof is to hand. I would like to have a duplicate receipt for its price; so please sign the enclosed receipt, and return in the enclosed stamped envelope.' The form referred to bore :—'Duplicate.—Received from Thomas Steven, Fort Street, Ayr, One pound in payment of all wool Scotch Tweed Waterproof supplied to him.' On 18th December 1907, Steven wrote :—'I sent you on 12th a form of duplicate receipt for the price of the waterproof I got from you, but I have not received it back. In case it has gone amissing, I enclose a fresh receipt, and I shall be obliged by your signing it and returning it to me.' This form was the same as the previous one. On 19th December 1907, the respondents wrote :—'*Re* your letter to hand. Enclosed please find copy of your receipt. Received from Mr T. Steven the sum of £1 in payment of overcoat supplied to him.' 'Scotch Tweed All Wool' by the definition received in the trade requires that the article shall be made of material spun and woven in Scotland, and be composed wholly of wool, except for a small percentage, about 2 per cent, of foreign matter. The coat supplied contained 20.51 per cent of cotton."

H. M. Advocate v. Suits, Limited.

The case further bore,—"I held that (1) 'Scotch Tweed All Wool' is a trade description; (2) the coat supplied was not 'Scotch Tweed All Wool'; (3) it was not proved that the respondents sold to Steven a coat to which the trade description 'Scotch Tweed All Wool' was applied within the meaning of section 2, subsection (2), of the Merchandise Marks Act, 1887. I also found that if I had held that said trade description was applied, that the respondents had acted innocently within the meaning of section 2, subsection 2 (c), of the Act. The respondents' servants were enjoined not to give goods any description other than that by which they were invoiced to the Glasgow branch. At the said branch there were supplied forms which required that the description of the goods should be marked on the forms in the same way as the goods themselves were entered in the stock-book, which had to be made up from invoices received from headquarters. When a piece was separated from the bulk to make the overcoat in question, it was ticketed with a form on which the description was repeated. The material in this case was invoiced by the respondents to the said branch as overcoating No. 294, and this number was repeated on the forms mentioned and in the stock-book. Under the rules of the respondents' business, it was only under the name of 'overcoating' that it was permissible for the respondents' salesmen to supply it."

The questions of law were :—"(1) Did the respondents sell to Steven a coat to which the trade description 'Scotch Tweed All Wool' was applied within the meaning of and contrary to section 2, subsection (2), of the Merchandise Marks Act, 1887? (2) Was the trade description 'Scotch Tweed All Wool' applied to the coat sold by the respondents to Steven within the meaning of section 2, subsection (2), of the Merchandise Marks Act, 1887? (3) Did the respondents act innocently within the meaning of section 2, subsection 2 (c), of the Act?"

The case was heard before the Second Division on 16th July 1908.

Argued for the complainer and appellant ;—(1) The trade description "Scotch Tweed All Wool" had been applied to the goods in question. It was explicitly stated that the buyer had got what he

July 16, 1908. ordered. *Lord Advocate v. Jacob*¹ was distinguishable. The order here was unambiguous. In *Jacob's* case¹ there was ambiguity. (2) The respondents had not acted innocently. They had not taken all possible precautions. They had not appointed anybody to see that the rules referred to in the case were observed. Mere general directions were not enough.²

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Argued for the respondents;—No doubt it was not necessary for the prosecutor to prove a *mens rea*.³ But the accused was entitled to acquittal if he could prove that the *mens rea* was not present, the *onus* being on him.⁴ Here the Sheriff had found in fact that the accused had acted innocently, and his judgment ought not to be disturbed.

LORD JUSTICE-CLERK.—As regards the first point in the case, namely, whether a technical offence was committed under the section, I think that this is not so strong a case for the prosecution as the case of *Jacob*.¹ In this case I should have much more difficulty in holding that anything was proved which amounted to a contravention. But this case admits of being decided on the second question. The Sheriff-substitute has found as matter of fact that the respondents in this case acted innocently in the sense of section 2, subsection 2 (c), of the Act. I must say in dealing with an Act of Parliament like this in which the *onus* of proof is placed on the accused, I should require a very strong case before I would reverse the judgment of the Sheriff and hold the accused guilty. Apart from that I think the Sheriff was right. We are dealing with a case in which under an Act of Parliament an employer may be made criminally responsible for the unauthorised act of his servant. I think that we ought to be very cautious in applying an enactment of that kind. The judgment of the Sheriff appears to me to be right, and I would propose that the appeal be dismissed.

LORD STORMONTH-DARLING.—I did not take part in the judgment in the case of *Jacob*,¹ and although I do not suggest for a moment that that judgment is unsound or even doubtful, I should prefer not to express any opinion on the first point in this case. On the second point, which is sufficient for its decision, I am clear that the Sheriff-substitute has come to a right conclusion.

LORD LOW.—I am of the same opinion. On the first part of the case I think that it is plain that no offence under the Act was proved, and it is unnecessary to go into details.

I should, however, like to say a word as to the method employed in getting up a case against the respondent. It is no doubt legitimate, and indeed may be necessary if the statute is to be enforced, for a Procurator-fiscal to employ a person to make a fictitious purchase, but although that is quite allowable, everything ought to be done in a straightforward manner, and the article desired ought to be asked for unambiguously. Here the

¹ 1908, S. C. (J.) 90.

² *Coppen v. Moore*, L. R., [1898] 2 Q. B. 306; *Budd v. Lucas*, L. R., [1891] 1 Q. B. 408.

³ *Coppen v. Moore*, L. R., [1898] 2 Q. B. 306.

⁴ *Christie, Manson, & Woods v. Cooper*, L. R., [1900] 2 Q. B. 522, *per* Channel, J.

whole correspondence seems to me to have been calculated, if it was not July 16, 1908. designed, to mislead. What the writer said, in his first letter, was that he wanted a Scotch tweed waterproof, and although he did, in a subsequent part of the letter, introduce the expression "all wool," he did so only incidentally, and it is not surprising that what was sent in reply to the letter was the kind of tweed which is used for making waterproof coats. I confess that it seems to me that the letters were from beginning to end an unfair attempt to entrap the tradesman to whom they were addressed.

On the second part of the case, I accept the law as laid down in the case of *Coppen v. Moore*,¹ to the effect that an employer may, in a question whether an offence under the statute has been committed, be responsible for the unauthorised actions of his servant, but while accepting that doctrine, I agree with your Lordship in the chair that it must be applied with great care. In this case I think that the facts justified the Sheriff-substitute in holding that the respondent acted innocently.

LORD ARDWALL.—Undoubtedly it is a very important matter that adulteration of Scotch tweeds, or any other textile fabric, should be prevented, and it is quite right that the authorities should take steps to bring to justice persons who make or traffic in adulterated goods; but I agree with my brother Lord Low, that in taking the necessary steps everything should be done in a straightforward manner—there should be a straightforward demand for a specific description of goods, about which there could be no ambiguity whatsoever. Of course, traps must be laid in cases of this sort, but I quite concur with what has been said about this and the other case decided in the Justiciary Court this morning,² that in such cases the correspondence was an attempt to force the accused into giving a wrong description of the goods sold, and to make him admit, by his own writing, after the sale had taken place, that he was guilty of an offence. Very properly the accused refused to commit himself to a description of an article which he had not supplied. I agree, therefore, for the reasons stated by Lord Low, that neither the first nor second question can be answered in the affirmative.

In regard to the third question, I agree that the Sheriff was right in holding the accused "innocent" within the meaning of section 2, subsection (2) (c). The precautions taken by them seem to have been most reasonable, and, so far as I can see, sufficient. I am accordingly of opinion on this ground also, that the Sheriff-substitute was right in holding that an offence under section 2, subsection (2), has not been committed by the accused.

THE COURT pronounced this interlocutor:—"Answer the first and second questions of law therein stated in the negative, and the third in the affirmative: Find and declare accordingly; and decern: Find the respondents entitled to expenses in this and in the inferior Court."

W. S. HALDANE, W.S., CROWN AGENT—MACPHERSON & MACKAY, S.S.C.—Agents.

¹ L. R., [1898] 2 Q. B. 306.

² Lord Advocate v. Jacob, 1908, S. C. (J.) 90.

No. 172. ROBERT CLARK AND OTHERS, Pursuers and Claimants (Respondents).

—*Dickson, K.C.—Clark, K.C.—Murray.*

July 16, 1908. BOWRING & COMPANY, Defenders and Claimants (Reclaimers).—

Sol.-Gen. Ure—R. S. Horne.

Clark v.
Bowring & Co.

Foreign—Jurisdiction—Contract—Lex loci or lex fori—Maritime lien—Expenditure on British ship in foreign port.—In a process in Scotland for the judicial sale of a British ship, then lying in a Scottish port, warrant for sale was granted, and the ship was sold. A claim for a preferential ranking on the purchase price was lodged in the process by a New York firm, who alleged that by American law they had a good lien over the ship for certain expenditure incurred by them on her account while she was lying at New York.

Held that the question whether any claimants in the process had a lien over the ship fell to be determined by Scots law, and not by American law.

Ship—Maritime lien—Seamen's wages—Payment by third party—Acquisition of lien by third party—Acquisition without written assignation—Payments not made on credit of the ship.—The owners of a British ship, which was in need of repairs, requested a firm of shipbrokers in New York to give assistance to the ship on her arrival at New York. On the arrival of the ship the firm of shipbrokers expended a considerable sum on repairs and necessities and also paid the seamen's wages. These payments were put together in a lump sum, and the owners accepted a bill for the amount, but the bill was not met at maturity. The owners having become bankrupt, the ship, which was then in Scotland, was sold by warrant of the Court. The New York firm claimed a preferential ranking on the purchase price in respect of their disbursements for seamen's wages, on the ground that the lien for seamen's wages had transmitted to them.

Held (1) that a lien for seamen's wages transmits to the payer without a formal assignation if the payment is made on the credit of the ship; but (2) that, in the circumstances of this case, the payments had been made on the credit of the owners and not of the ship, and that consequently the payer had acquired no lien.

1st DIVISION.
Lord Salvesen.

ON 25th November 1907 an action for declarator and sale of the s.s. "Abbey Holme," registered at Maryport in England, but then lying at the port of Greenock, was brought in the Court of Session at the instance of Robert Clark, shipowner, Glasgow, as representing the master and certain members of the crew of the vessel, and as an individual, and at the instance of the master himself. The registered owner of the "Abbey Holme" was Wilfred Hine, shipowner, Maryport, a partner of the firm of Hine Brothers, shipowners there, who had along with his firm granted a trust-deed for behoof of creditors. The parties called as defenders to the action were Wilfred Hine, the firm of Hine Brothers, the trustee acting under the trust-deed, certain parties holding mortgages over the vessel, and also the firm of Bowring & Company of New York, who had incurred certain expenses in connection with the vessel when she was in America. The pursuers set forth debts due to them amounting in all to £2093, 2s. 7d., for which they averred that they had a lien over the vessel, and they asked that she should be sold under warrant of the Court for the purpose of paying these debts.

Defences were lodged for Bowring & Company in which, besides denying that the pursuers had any lien over the vessel, they averred with regard to their own claim:—"Explained that the said steamship arrived at New York in or about 5th December 1906 in a damaged and unseaworthy condition, making it absolutely necessary that she

should go into dry dock for repairs. These defenders contracted with July 16, 1908.
the owners on the credit of the ship to have it put into a seaworthy ^{Clark v.}
condition, and in connection with the requisite repairs, in the supply ^{Bowring & Co.}
of necessaries to the ship, and in payment of wages then due to the
crew amounting to 848 dollars, they expended a sum of 36,162
dollars. The supply of said repairs and necessaries was completed in
or about the beginning of February 1907, and the sum due to the
repairers and suppliers was paid by these defenders on 15th Feb-
ruary 1907. The remainder of said sum of 36,162 dollars was
expended by these defenders on or before said date. But for the
supply of said repairs and necessaries by these defenders the ship
would have been unfit to proceed. It was in reliance upon the
credit of the ship that these defenders agreed to supply the funds for
paying the crew and for furnishing the ship with necessaries and
repairs, and in respect thereof they have a maritime lien upon the
ship. Further, said agreement for supplying said funds was made in
New York and the rights incident to it fall to be determined accord-
ing to the maritime law of the United States and the law of New
York State. By these systems of law these defenders have a mari-
time lien upon the ship in respect of the sums expended by them in
said repairs and necessaries, as well as in paying the wages of the
crew. Moreover, said agreement being made in the United States
and subject to its laws, it was an implied term of it that these defen-
ders should under any circumstances have the benefit of the lien
recognised by American law. In drawing upon the owners of said
ship for the amount expended by them these defenders did not relin-
quish any of their rights over the ship. . . . The said sums were
expended by these defenders prior to any of the obligations founded
on by the pursuers being incurred, and the rights of these defenders
in respect thereof are preferable to those of the pursuers or the mort-
gagees. A sale of the ship would injuriously affect the just rights of
these defenders." For the amount of Bowring & Company's claim,
viz., 36,162 dollars, Hine Brothers had accepted a bill drawn on them
by Bowring & Company, which matured on 3d May 1907, but on
that date Bowring & Company arranged to give further delay, and
Hine Brothers accepted a new bill which matured on 5th July 1907.
When that bill fell due it was dishonoured.

The pursuers pleaded;—(1) The pursuers, or one or other of them,
in virtue of the writs libelled, having a maritime lien or hypothec
over the said steamship, and being entitled to make their lien or
hypothec effectual by a sale thereof, decree should be pronounced in
terms of the conclusions of the summons. (3) The comparing defen-
ders not having a maritime lien over the said steamship in respect of
the disbursements made by them, the defences should be repelled,
with expenses.

The comparing defenders pleaded;—(3) Neither of the pursuers
having any valid lien over said vessel, the action ought to be dis-
missed. (4) These defenders having, on the credit of the ship,
expended sums on repairs and necessaries for said ship, *et separatim*
on payment of wages of the crew then due prior to 15th February
1907, they have a valid maritime lien over said vessel preferable to
any alleged lien of the pursuers. (5) *Separatim*, these defenders
having, according to the maritime law of the United States, and the
law of New York State, by which the question falls to be determined,
a maritime lien over the vessel in respect of said sums expended on

July 16, 1908. necessities for said vessel, *et separatim* on the wages of the crew then due, they have a claim prior in date and preferable to that of either of the pursuers. (6) In respect of these defenders' rights in said vessel, the pursuers are not entitled, in violation thereof, to have the vessel sold until the defenders' claims are discharged.

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On 25th January 1908 the Lord Ordinary (Salvesen) pronounced an interlocutor, finding that the pursuers, or one or other of them, had a maritime lien over the "Abbey Holme," and granting warrant of sale as craved, and finding the compearing defenders liable in the expenses occasioned by their compearance.*

* "OPINION.— . . . The compearing defenders are a corporation recognised and existing under the laws of the State of New York. They narrate that, on 5th December 1906, the 'Abbey Holme' arrived at New York in a damaged and unseaworthy condition, which made it necessary that she should go into dry dock for repairs; that they contracted with the owners to have her put into a seaworthy condition, and paid the ship-builder's account for repairs, and made other disbursements on behalf of the steamer. For those disbursements they drew a bill of exchange on Hine Brothers—the managing owners—dated 19th February 1907. This bill matured on 3d May, and on that day Messrs C. T. Bowring & Company, Limited, arranged to give further delay; and in lieu of the bill which had matured, they in their own name drew on Messrs Hine Brothers for the same amount. The bill was duly accepted, but was dishonoured when it became due on 5th July 1907. The compearing defenders say that they relied upon the credit of the ship in making these advances; and that, according to the maritime law of the United States, and of New York State in particular, they have a maritime lien upon the ship in respect of the sums expended by them on said repairs and necessities. At the debate they did not maintain that, according to the law of Scotland or the general maritime law of Great Britain, they could maintain the claim of lien; and as I can only apply our own law in determining the ranking of claims on a British ship, locally situated in Scotland, they must be treated as unsecured creditors of the bankrupt owner.

"These defenders have an obvious interest in resisting a judicial sale, for if the vessel were to go to an American port they would be able to enforce their alleged lien against her there, and that possibly notwithstanding that she might have changed hands under a private sale. If, on the other hand, the vessel is sold judicially, and declared by decree of this Court 'to pertain and belong to the purchaser, freed and disburdened of all bonds, mortgages, liens, rights of retention, and other incumbrances affecting the same,' in terms of the fifth conclusion of the summons, they are apprehensive—and I think with good reason—that the maritime lien which is said to exist in their favour in America might be completely destroyed. Hence their anxiety to prevent a judicial sale taking place. . . .

"In my opinion the compearing defenders have no title to defend. On their own statement of the facts it is plain that they are merely unsecured creditors of Hine Brothers—or of the registered owner, Mr Wilfrid Hine, for whom the firm acted as managers. As such they are represented by the trustee in bankruptcy, Mr Mounsey. It is said that Mr Mounsey has no interest to object to a sale, because the prior mortgages are so large as to more than absorb the estimated value of the ship; and that the defenders have the interest which I have already adverted to. That, however, in my opinion, does not entitle them to take up a position which the trustee—who represents the interests of the general body of unsecured creditors—regards as untenable. They are no doubt called as defenders in the present action, but that is because they claimed at one time to have a maritime lien, and in that view had an obvious interest to oppose the claims of the pursuers to a lien which

The ship was thereupon sold by public roup in Glasgow, and the purchase price consigned in bank in the name of the Accountant of Court, and on 29th February 1908 the Lord Ordinary pronounced an interlocutor appointing all parties claiming an interest in the consigned fund to lodge claims. Claims were accordingly lodged for the pursuers, for the mortgagees, and for Bowring & Company, and a new record made up in the competition.

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Bowring & Company in their claim averred as follows:—

“In or about the end of September 1906 they (the claimants) were notified by Hine Brothers, shipowners, Maryport, that a vessel belonging to the said Hine Brothers, called the ‘Abbey Holme,’ had been receiving temporary repairs in the Straits of Magellan, and that she was expected in a short period thereafter to arrive at New York. The claimants were not the regular agents of the said Hine Brothers, nor of the said ship, but Hine Brothers requested the claimants to advise the master with regard to the noting of a protest, and the signing of average bonds. They further informed the claimants, at a later date, that they had decided to send out their superintendent, Captain George Brown, to attend to the interests of the ship, and they requested the claimants to give him such assistance as they could in making any necessary arrangements for its survey. The said superintendent thereafter duly arrived.

“The ‘Abbey Holme’ reached New York on 5th December 1906, when it was discovered that it would be necessary to put her into dry dock for the purpose of undergoing extensive repairs. The question of the necessary repairs was gone into and decided upon by the superintendent of Hine Brothers, and the ship was thereafter dry-docked, and the requisite repairs duly executed by the Newport News Shipbuilding and Dry-Dock Company, at a cost of 32,860 dollars. These claimants, at the request of Messrs Hine Brothers, made the contract with the Newport News Company for the said repairs, and when the sum fell due, they, on 15th February 1907, paid the amount of the said account to the Newport News Company. These claimants also, prior to that date, expended other sums on the supply of necessities to the said ship, and they paid wages then due to the crew to an amount of 848 dollars or £176, 13s. 2d. In all they thus expended a sum of 36,162 dollars or £7537, 15s. 8d.

“But for the supply of said repairs and necessities the ship would have been unable to proceed on her voyage to England, as she was in an unseaworthy condition at the time when she arrived in New York. In expending said sums for said ship these claimants were acting according to the regular custom of shipping houses in the city of New

might take priority of theirs. It having now turned out that they cannot maintain any lien—according to the law which I am bound to administer—they are in no better position than any of the other creditors of Mr Hine, who must be taken to be fully represented by the assignee in bankruptcy. On that ground alone I would be prepared to repel their defences, and to proceed in this action thereafter as if it were undefended.

“The same result follows if I hold that the pursuers have in fact a maritime lien for all or any of the sums in respect to which the claim is made. [His Lordship then stated his reasons for holding that the pursuers were entitled to have the vessel judicially sold.] I shall accordingly grant a decree in terms of the fifth conclusion of the action—leaving to the pursuers to establish the specific amounts to which they are entitled to be ranked in the competition which will follow.”

July 16, 1908. York, and in doing so they were relying on the credit of the ship. In respect and to the amount of said disbursements and the amount paid for the wages of the crew, they acquired a maritime lien upon the ship, both according to the rule of English law and that of the maritime law of the United States of America.

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"Further, the agreement made by these claimants with Hine Brothers for the supply of said necessities and said funds was made in New York, and the rights incident to it fall to be determined according to the maritime laws of the United States of America. According to that law it is presumed that a person making repairs and furnishing supplies to a foreign ship looks to the credit of the ship, and he obtains a maritime lien over the vessel for such supplies and repairs. By said law also a person who advances funds for the purpose of settling accounts for such repairs and supplies has the same right of lien that the repairer and supplier himself has, and is surrogated to all the rights and remedies of the person whose claim he has paid."

They claimed a preferable ranking for £7537, 15s. 8d. or in any event, for £176, 13s. 2d., and pleaded, *inter alia*;—(1) These claimants having, on the credit of the ship, expended sums on repairs and necessities for said ship, and on payment of wages to the crew then due prior to 15th February 1907, they have a valid maritime lien over said vessel, and are entitled to be ranked and preferred in terms of their claim. (2) *Separatim*, these claimants having, according to the maritime law of the United States of America, by which the question falls to be determined, a maritime lien over the said vessel in respect of sums expended on necessities for said vessel and the wages of the crew then due, they are entitled to be ranked and preferred in terms of their claim.

The claim for the pursuers contained the following averment with regard to Bowring & Company:—"The sole claim of Messrs Bowring & Company, if any, is a personal one against Messrs Hine Brothers, or Mr Wilfrid Hine, the registered owner of the vessel, who have granted an assignment for behoof of creditors in favour of Mr William Edward Mounsey, chartered accountant, Liverpool. . . . Messrs Bowring & Company are shipbrokers in New York, and were Messrs Hine Brothers' agents there. The 'Abbey Holme' was a British vessel registered at Maryport, and the fund *in medio* is the price of the said vessel deposited in the name of the Accountant of Court after a sale conducted at Glasgow by order of the Court of Session, pronounced while the 'Abbey Holme' was lying in the harbour at Greenock. The order of ranking of the claims upon the said vessel, and all questions incident thereto, accordingly fall to be decided by the maritime laws of Great Britain and the law of Scotland."

They pleaded, *inter alia*;—(2) The claim of the claimants Bowring & Company should be repelled, in respect . . . (b) that the claim for said claimants Bowring & Company is irrelevant and untenable in law; (c) that said claimants have no maritime or other lien or preferable right over the said steamship, or the proceeds of sale thereof, in respect of the disbursements in question. Similar averments and pleas with regard to Bowring & Company's claim were stated by the other claimants.

On 13th June 1908 the Lord Ordinary (Salvesen) pronounced an interlocutor finding that the claim for the claimants Bowring & Company was irrelevant and untenable in law, and ranking the

other claimants in terms of their claims, and also finding Bowring & Company liable to the other claimants in the expenses of the competition.

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Bowring & Company reclaimed, and the case was heard before the First Division on 16th July 1908.

Argued for the claimants and reclaimers;—(1) The reclaimers had a good lien over the ship for the whole of their expenditure on her behalf, because by the law of New York such a lien was established, and this contract must be interpreted by the law of New York. There were no circumstances here to prevent the application of the general maxim that a contract must be interpreted by the *lex loci contractus* and the *lex loci actus*, and applying that maxim here the principles of the law of New York must be held to be embodied in this contract. (2) In any event, the reclaimers had a good lien for the amount of seamen's wages paid by them. A seaman had a lien over the ship for his wages, and in default of payment he might arrest the ship. That lien transmitted to the person relieving the ship by paying the wages, and it transmitted automatically without the necessity for any formal assignation.¹ The fact that the reclaimers had been in communication with the owners did not negative the presumption that they had made this payment on the credit of the ship. The analogy of a bottomry bond, or a payment made under contract, did not apply, for the lien claimed here was one which did not arise *ex contractu* but arose *ex lege*. Even a bottomry bond could be entered into by the agent for the owners.² The fact that this was a payment of a past due debt distinguished it from payments incurred for fresh expenses, before incurring which a master might be bound to obtain, if possible, the sanction of the owners.

Argued for the respondents;—(1) (The Court intimated that they required no argument on the first point.) (2) There was no lien in the pursuers for the wages they had paid. To create such a lien there must be some form of assignation.³ In the cases relied on by the reclaimers this point was not raised, and the reports did not establish that there was not some form of mandate or assignation.⁴ The seamen had a lien for their wages, and this payment was for the purpose of relieving the ship of that lien. It would not do so if the lien were merely transferred, and such floating securities as maritime liens were inconvenient, and based on necessity only, and were not lightly to be presumed. Further, the master had no power in this case to pledge the credit of the ship. A master, where there was communication with the owners as here, had no power at his own hand to grant a bond of bottomry.⁵ Similarly he could not at his own hand subject his vessel to a lien by requesting a third party to pay seamen's wages. In any event, a lien could only come into existence if the expenditure was incurred on the credit of the ship. Here, on the face of the

¹ "William F. Safford," 1860, Lush. 69; "St Lawrence," 1880, L. R., 5 P. D. 250; "Tagus," [1903] P. 44.

² Abbott's Law of Merchant Ships and Seamen, 14th ed. 207.

³ Stair (Brodie's) Suppl. 963, *per* Lord Ellenborough there cited in Hussey v. Christie, 1808, 9 East, 426, at pp. 432-3, 13 Ves. jr. 594.

⁴ "Ripon City," [1897] P. 226.

⁵ Bell's Prin. 452-3; Stainbank v. Fenning, 1851, 11 C. B. 51; Stainbank v. Shepard, 1853, 13 C. B. 418; "Hamburg," 2 Moore P. C. (N. S.) 289; Bell's Comm. (Lord M'Laren's ed.) i. 579.

July 16, 1908. record, it was clearly incurred on the credit of the owners, and not of the ship. The reclaimers were in communication with the owners the whole time, and took a bill for the amount of their expenditure, and afterwards renewed it.¹ These facts were utterly inconsistent with the view that they had made the payments on the credit of the ship and not of the owners.

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LORD PRESIDENT.—This is a competition upon the price of a ship that was sold at Glasgow. The claimants who are preferred are claimants who have a maritime lien on the ship, and are also mortgagees. The competing claimants are an American firm who paid certain moneys in New York during the voyage of the ship, and who in respect of these payments allege that they have a maritime lien which entitles them to be ranked *pari passu* with the other claimants here. Now, the position of these claimants in respect of their advances is different in respect of one portion of the money and of another. In respect of very much the largest sum they claim, they aver, and offer to prove, that by the law which would apply in the American Court in New York they have a good maritime lien. That is denied by the other claimants, but for the purposes of this argument we must hold that it could be proved as a matter of fact. But it is admitted by both sides of the Bar that according to the maritime law applied in this country there is no maritime lien for these particular sums. That being so, I think the Lord Ordinary was perfectly right when he practically disposed of this matter in a sentence in his first judgment where he said—"I can only apply our own law in determining the ranking of claimants on a British ship, locally situated in Scotland, and they (that is, these claimants) must be treated as unsecured creditors of the bankrupt owner." I think that is really too clear for argument, and Mr Horne, I am afraid, could not produce any authority on the point, nor could he appeal to any principle. It seems to me perfectly clear that the question of whether there is a good lien upon a ship must be determined by the Court where the question arises, and must be determined according to the local law, having regard to the flag of the ship and also to the *forum* in which the question is being raised. I think that so much was determined in terms by Mr Justice Phillimore in the case of *The "Tagus,"*² which has been cited to us. It is impossible by contract to impose a local law of New York—which *ex hypothesi* is different from the general maritime law of the world as applied in our Courts—it is impossible to impose that law in our Courts when the ship comes to our shores.

But the other advances are in a different position. They are advances of £176 odds, which were disbursed in payment of seamen's wages. Now there is no question that by the maritime law, as applied in our Courts, there is a good lien for seamen's wages. There is no question that that lien can be assigned. The question is whether these parties are in right of this lien? We had two questions argued to us. It was first argued by the competing claimants here at home that there could be no good lien without an actual written assignation. I am not inclined to assent to that doctrine. On the contrary, I think the contrary seems to be the case. It seems to me

¹ Bell's Prin. 452-3.

² [1903] P. 44.

quite clear from the report in the case of *The "St Lawrence,"*¹ that there July 16, 1908.
 was no assignation in that case, and I think the judgment of Sir Robert
 Phillimore in a single sentence excludes the idea. He is talking of parti-^{Clark v.}
 cular claims, and he says—"It is true that pilotage and towage claims are ^{Bowring & Co.}
 not mentioned by Dr Lushington in the case of *The 'William F. Safford'*² ^{Ld. President.}
 as claims which, if paid by a third party, confer any priority on the person
 so paying them; but the reason of that decision applies to such claims, and
 indeed I do not understand it to be disputed that a person who discharges
 claims of that character has the same rights and remedies for their recovery
 as the person to whom the money has been paid." That, I think, would be
 a singularly inaccurate statement if it were true that an actual assignation
 was needed, and I think the same thing is said by Mr Justice Phillimore in
 the case of *The "Tagus,"*³ where he says—"If the whole disbursements
 are, as apparently they are, payments of wages to the crew, who might have
 seized the ship, then I think that the doctrine that the man who has paid
 the privileged claims stands in the shoes of the privileged claimant should
 be applied, and he has a lien for any disbursements made, although he was
 not master, in payment of the wages of the crew." Accordingly, in that
 case, where there was obviously no assignation, the person claiming, who
 had been a mere supercargo at the time he paid the wages, but
 who had not taken any document of assignation from the sailors,
 was ranked and preferred for any sums which he had disbursed for
 the ship while he was supercargo in payment of the crew's wages. But
 I entirely concur with what Mr Dickson said, that what is at the bottom of
 this doctrine is that you must shew that the payment was made in reliance
 upon the credit of the ship. And no doubt in an ordinary case that would
 be shewn by the mere fact of the payments having been made. It is, of
 course, a common case. The master arrives at a port without money to pay
 his seamen's wages, and it being the fact that the seamen are then in a
 position to seize the ship, the master goes to a shipbroker or anyone else
 and gets him to pay the seamen's wages, and it is plain from the mere fact
 of payment that that person will rely upon the credit of the ship and not
 upon the credit of the master, who is probably a person whose credit is of
 very little worth. That always leaves behind the question of fact, and
 when you come to the facts of this case it seems clear that this payment of
 £176 was not made in reliance upon the credit of the ship. The ship had
 been in difficulties in the southern seas before it got to New York, and the
 owners had written to these shipbrokers in New York saying that their
 ship had been in difficulties and asking them to see to it on its arrival at
 New York. They undertook the agency, and that being so, they paid the
 repairers' bills and also seamen's wages, and they massed the whole of the
 sums which they paid in one account, and for that account bills were
 granted, and these bills, when they came to maturity, were renewed, and
 we should never have heard anything about this question of lien had the
 shipowners not gone bankrupt, so that the renewal bills were not met at
 maturity. All that shews that these disbursements were not made in
 reliance upon any maritime lien at all, but in reliance on the owners, who

¹ 1880, L. R., 5 P. D. 250.² 1860, Lush. 69.³ [1903] P. 44.

July 16, 1908. had requested these claimants to make these advances. That being so, I think that the claim upon the £176 falls, and accordingly I think that the Lord Ordinary's judgment remains undisturbed, and that we should adhere to it.

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LORD M'LAREN.—I am of the same opinion. The first question appears to be really too clear to require argument in its support. The determination of how a security is to be constituted no doubt depends upon territorial law, and if this had been an immoveable subject we should of course have gone to the sources of American law to ascertain whether the security required writing for its constitution, or whether it could subsist without writing as a lien. But then, in the case of a ship, a ship has no territory, or rather its territory is the whole world—any shore to which it is capable of being navigated; and therefore in order to constitute a security independent of written title, it is necessary that the lien or right should be recognised by the general maritime law of the world. It may be that as regards coast traffic the United States of America would be able to enforce the law peculiar to their own country, because they have the ship subject to their jurisdiction. The same thing might happen if a foreign ship should arrive in America and should be sold there. It would be for the Courts to determine whether they would apply their own law or the general maritime law. I think that the present question must be ruled by the general maritime law, and consequently that the claim fails.

On the question of the seamen's wages I agree with your Lordship that there is no conclusive authority to the effect that a formal assignation is necessary where an advance of wages is made at the request of the captain or crew, and in reliance on the right of lien which they have under maritime law. In certain cases, no doubt, a person who advances money must be able to produce an assignation of the right, but even in such a case the rule has been much relaxed; because, for instance, in the case of cautionary obligations, if the cautioner pays the money he has a right under the principle of *jus cedendarum actionum* to enforce his claim against any person who is in a greater degree of liability than himself. He is not required to produce an actual written assignation of the claim, but only to instruct that he has made a payment under his obligation. Unless the matter were concluded by authority I should not be in favour of applying a strict criterion to a case of this kind, because it is quite obvious that payments of this kind are generally made in an informal way, and naturally it would not occur to mercantile people to insist upon a legal assignation before witnesses, according to the forms of the country where the vessel might happen to be. But in the present case I agree that this cannot be treated as an advance made upon security of the lien, and that it is in reality an advance made upon the credit of the owners, or those who represent the owners. I think the Lord Ordinary's interlocutor should be adhered to.

LORD KINNEAR.—I agree with your Lordship in the chair on both points. As to the first, the law as laid down by the Lord Ordinary appears to me to be perfectly accurate, and no authority or principle of law was cited to the contrary, although if any authority or legal doctrine had been discover-

able Mr Horne would not have failed to bring it to our notice. He did July 16, 1908. say that there was one doctrine of law upon which he founded. It was ^{Clark v.} that according to our law contracts are to be construed according to the *lex* ^{Bowring & Co.} *loci contractus*. I am unable to admit that there is any general law to that ^{Lord Kinnear.} effect. It has been said over and over again in this Court, and in a comparatively recent case in the House of Lords, that the question whether the meaning and effect of a contract is to be determined according to the law of the place where it is made or of the place where it is to be performed is, according to the law of Scotland, a question of intention to be determined on the construction of the particular contract, and not by any absolute rule of law. In the present case I am not satisfied that the *lex loci contractus* ought to govern, even if the question depended solely on the construction of the contract. The true question is not what the contracting parties in New York intended, but whether the contract had the effect of creating a real security over a British ship, and consequently over the proceeds of the sale of that ship when it is sold in Scotland and the proceeds are put into the hands of the Court for distribution. I agree that that is a question for the *lex fori* to determine. We are to consider whether there is a good preference over the money in the hands of the Court where the sale takes place, and that must be determined according to our own law.

On the second point I agree with the doctrine by which it is held that when anyone in a foreign port is asked by the master of a ship to advance money for the payment of the wages of the crew, and agrees to do so, he is to be put into the shoes of the seamen whose wages he has paid so as to have the same rights and remedies against the ship as they would have had, because he is presumed to make advances upon the credit of the ship, which is the only fund of credit that, *ex hypothesi*, he knows anything about. He does not know the master nor the owners, and he makes the advances upon the credit of the ship. But it is consistent with that doctrine to hold that when a shipbroker is invited by the shipowners themselves to make advances, he may make what contract with them they choose to agree upon, and whatever his contract may be he must be supposed to rely upon their credit. If he desires to have a further security than their personal credit, it is open for him to stipulate for it; but if he does not—and in this case there is nothing to shew that the claimants did desire to make any stipulation—he is making a contract with the owners themselves to which the law does not attach as a consequence any right of lien over their property. I agree that the contract alleged is a contract by which the owners invited the claimants upon their credit to supply certain necessaries in order to enable their ship to proceed upon her voyage in England, and it appears to me that to say that they thereby acquired a right of lien over the ship is inconsistent with the agreement upon which they undertook to make the payment. On both points I agree with your Lordship in the chair.

LORD PEARSON was absent.

THE COURT adhered.

SMITH & WATT, W.S.—BOYD, JAMESON, & YOUNG, W.S.—Agents.

No. 173. JAMES FITZGERALD CROWE, Pursuer (Respondent).—*Dickson, K.C.*—*A. M. Anderson.*

July 17, 1908.

JAMES COOK, Defender (Reclaimier).—*Clyde, K.C.*—*R. S. Horne.*

Crowe v.
Cook.

Succession—Testament—Construction—Subject of gift—Words importing gift of heritage—Titles to Land Consolidation (Scotland) Act, 1868 (31 and 32 Vict. cap. 101), sec. 20.—Terms of a holograph testament containing the expressions "Everything else to be sold" and "I leave the remainder," which were held sufficient to import a bequest of heritage.

1st DIVISION.
Ld. Johnston.

ON 24th December 1907 James Fitzgerald Crowe, Ashbrook Terrace, Dublin, assignee of Mrs Mary Jolly or Musgrave, Braconfell, Redhill, Surrey, brought an action against James Cook, Wrangholm Lodge, Portobello, concluding for declarator that the late Mrs Mary M'Neil Jolly or Hall Maxwell died intestate *quoad* her heritable estate, that Mrs Mary Jolly or Musgrave, as her heir-at-law, was entitled to succeed to that heritable estate, and that the pursuer, as assignee of Mrs Mary Jolly or Musgrave, was entitled to that heritable estate; and for decree ordaining the defender to convey to the pursuer the whole of that heritable estate.

The pursuer averred that Mrs Mary M'Neil Jolly or Hall Maxwell died on 24th March 1907 leaving certain testamentary writings. "The said testamentary writings deal solely with Mrs Hall Maxwell's moveable estate. With reference to her heritable estate, Mrs Hall Maxwell died intestate." He also averred that the defender had confirmed as executor-nominate of Mrs Hall Maxwell, and had taken possession of and made up titles in his own name to her whole heritable estate. He further averred that Mrs Mary Jolly or Musgrave was Mrs Hall Maxwell's heir-at-law, and as such entitled to succeed to her heritable estate, and that, by assignation dated 30th November 1907, Mrs Mary Jolly or Musgrave had assigned to the pursuer her whole right and interest in the estate, heritable and moveable, of Mrs Hall Maxwell.

The defender lodged defences in which he averred:—"The said testamentary writings also dispose of Mrs Hall Maxwell's heritage"; and pleaded;—The heritable estate of the testatrix being carried by her testamentary writings, the declarator sought should be refused.

The testatrix left three testamentary writings, the testamentary writing in dispute, which was holograph, being in the following terms:—

"39 Melville St., Edinburgh.
"March 20th, 1903.

"I Mary M'Neil Hall Maxwell being in my proper mind, do hereby leave and Bequeath to James Cook the sum of ten thousand pounds Sterling—that is the said ten thousand that is at present lent to the Borough of Motherwell. I also wish him in case anything happens to me to see to my funeral and that all my animals are shot, and I appoint Mr Wedderburn of Carmet Wedderburn and Watson to assist him, all my Jewels—save a diamond Brooch Diamond pendant, which Mrs Jolly gave me, to be retured to her. eveythg else to be sold. I leave one hundred ponds to the Home for falln Sisters and one hundred to prevention of Cruelty to Animals, and Five hundred to my Mother, Mrs Margaret Jolly. Thre Hundred to my Aunt Miss Doro Fitzgerald who will also get all my Clothes that are of any use and I leave the remainder to fond and endow a small Home for old Colliers that have become unable to work, and the same to be furnished & a dinner given

at Xmas and New Year, the same to have Beer and tobacco, and I July 17, 1908. appnt the before said Mr Wedderburn and James Cook to see that this is carried out. A site to be got on Newarthill grond but not on that owned by Messrs Nimo the preference to be given to those Colliers that may have worked in Stevenston and Newarthill Pits. And I sign this on the above date being of sond mind. (Signed) MARY M'NEILL HALL MAXWELL. Witnessed by Jemima Sutherland. (Signed) Jemima Sutherland, wittness."

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Mrs Hall Maxwell, in addition to settled property, left moveable estate of the net value of £10,754, 13s. 9d., and heritable estate valued at £2066, 4s. 4d.

On 25th June 1908 the Lord Ordinary (Johnston) pronounced an interlocutor decerning against the defender conform to the conclusions of the summons.*

* "OPINION.—In the application of the enactments of the 20th section of the Titles to Land Act, 1868, to concrete circumstances, there are many cases, as was said by Lord M'Laren, as Lord Ordinary, in *M'Leod's Trustees*, 10 R. 1056, which come near the dividing line. It may be that this is one of them, though for my own part I think it not only does not cross, but is a good long way from reaching the Rubicon.

"Mrs Hall Maxwell left three documents of a testamentary nature. The first two, though informal, are exceedingly concise, businesslike, and clear in their intention. Mrs Hall Maxwell was in 1899 possessed of certain heritable property in Leith Walk, not, I gather, in itself of much intrinsic value, but possessing a potential or factitious value, because it was known that the Caledonian Railway Company wanted it for the purposes of their line. By a very brief document, dated 29th March 1899, by which time I think the railway company must have actually entered on possession, she bequeathed this property expressly to the defender, James Cook, and there is no doubt that by virtue of the 20th section of the Act of 1868 this document would have been a valid conveyance.

"But the sale to the railway company at £9000 was completed very shortly after, and on May 30th of the same year Mrs Hall Maxwell, on the narrative of the sale, bequeathed 'the said sum to James Cook.' Four years afterwards Mrs Hall Maxwell executed the third document, which is the cause of the present question. It does not expressly appoint executors. But it does so I think impliedly, and is an effectual, though informal, testament, and so good to transmit moveables. The question is, does it also carry heritage?

"It first bequeaths to James Cook £10,000, at present lent to the burgh of Motherwell. I think it was assumed that this included the £9000 derived from the Caledonian Railway Company, and that the prior bequest of this sum had been adeemed by its merger in Mrs Hall Maxwell's general estate, and its investment in this particular bond. The document then proceeds:—'I also wish him, in case anything happens to me, to see to my funeral, and that all my animals are shot, and I appoint Mr Wedderburn, of Carment, Wedderburn, & Watson, to assist him.' She then gives directions as to her jewels, leaves two small legacies to charities, two personal legacies, and a bequest of 'All my clothes that are of any use,' and then concludes 'I leave the remainder to found and endow a small house for old colliers that have become unable to work, and the same to be furnished and a dinner given at Christmas and New Year, the same to have beer and tobacco, and I appoint the before said Mr Wedderburn and James Cook to see that this is carried out, a site to be got on Newarthill,' &c.

"As I have said, I think that this must be read as, at least by implication, an appointment of executors, and, therefore, in the language of the above

July 17, 1908. The defender reclaimed, and the case was heard before the First Division on 9th July 1908.

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Cook.

Argued for the defender and reclaimer;—No technical words were now required to convey heritage in a *mortis causa* deed, provided that intention to do so was manifest from the deed.¹ In this case that intention was manifest. The words “everything else to be sold,” and “I leave the remainder,” clearly shewed an intention to dispose of the universitas of the estate, heritage as well as moveables, and the presumption was always against partial intestacy. Similar words had been held habile to carry heritage in a number of cases.² Further, the other construction of the deed, viz., that these words referred only to the jewellery, rendered the deed so absurd as to preclude the idea that that could have been the testatrix’s intention, for the value of the jewellery was only some £30, and quite inadequate to satisfy the legacies that followed. Indeed, it would be impossible to satisfy the

mentioned section confers upon such executors ‘a right to claim and receive’ the granter’s moveable estate, in fact, to confirm and administer. But I think that there is superadded to the executry appointment something of the nature of a continuing trust.

“But that does not naturally result in the granter’s heritage being carried to the executors or trustees, even if they be regarded as having the wider title and functions. That result must be reached, if at all, by virtue of the provisions of the 20th section of the Titles Act, 1868. Now, in applying that section, if a testator has not only failed to convey his heritage, but even shewn himself so incapable of expressing his intention as to have failed to bring himself within the provisions of that section, I do not think that the Court is concerned with conjectures as to whether he did, notwithstanding, really intend to convey his heritage. As the late Lord President (Ingليس) said in *Pitcairn’s* case, 8 Macph., at p. 608, the statute did not intend ‘to make every will of a proprietor of land effectual as a conveyance of heritage.’

“I do not think it necessary to quote the section which has been so often canvassed. Shortly it provides that it shall no longer be necessary, in the *mortis causa* conveyance of land, to use words of *de presenti* conveyance or any *voce signate*, provided the document purports to convey or bequeath land, and by way of making this operative adds, that where such document ‘shall contain *with reference* to such lands any word or words which would if used in a will or testament with reference to moveables be sufficient to confer upon the executor of the granter, or upon the grantee or legatee of such moveables a right to claim and receive the same,’ such document shall be deemed and taken to be equivalent to a general disposition of such lands. The essential words are then ‘purports to convey or bequeath lands,’ and ‘with reference to such lands.’ Now, what the statute intended to cover was, I think, such a case as *M’Leod’s Trustees*, 2 R. 481. But though in my view it was contemplated that the ‘purporting’ and the ‘reference’ to land, either in general or special, was to be express, I recognise that by a series of decisions it has been accepted that the ‘purporting’ and the ‘reference’ may be implied. Still the question must always be, as put by Lord Young in *Forsyth v. Turnbull*, 15 R., at p. 176, shortly repeating what had already

¹ The Titles to Land Consolidation (Scotland) Act, 1868 (31 and 32 Vict. cap. 101), sec. 20. Quoted *supra*, p. 719, note.

² *Jack’s Executor v. Downie*, 1908, S. C. 718; *Copland’s Executor v. Milne*, 1908, S. C. 426; *Forsyth v. Turnbull*, Dec. 16, 1887, 15 R. 172; *M’Leod’s Trustees v. M’Luckie*, June 28, 1883, 10 R. 1056; *Attree v. Attree*, 1871, L. R., 11 Eq. 280; *Smyth v. Smyth*, 1877, L. R., 8 Ch. Div. 561.

testamentary bequests unless the heritage were included in the estate July 17, 1908. disposed of by the will.

Argued for the pursuer and respondent;—The Lord Ordinary was right, for the presumption in law was that a testator intended his estate not otherwise disposed of to go to his heir or next of kin. Here the heritable estate was not otherwise disposed of. Section 20 of the Titles to Land Act only dispensed with formal words of conveyance where informal words “purporting to convey or bequeath lands” and “with reference to such lands” were used. Here there were no words purporting to convey or bequeath lands, and no reference to lands at all. The phrase “the remainder” had no antecedent words embracing heritage to which it could refer. The only antecedent words were “everything else,” and these words clearly referred to jewellery only,—to all her jewellery, with the exception of the diamond brooch. There was no appointment here of an executor or of trustees, and there was neither a disposition by habile words of the heritage, nor a bequest of the universitas of the estate. In these circumstances it was impossible to maintain that the heritage had been validly bequeathed.¹

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been said by the Lord President Inglis in *Pitcairn's case*, *supra*, at p. 609, the question is not as to the sufficiency of the language to convey property, but as to the sufficiency to include land of the description of the property intended to be conveyed.

“In the present case there is certainly nothing which, in the document of 1903 under construction, expresses the intention to convey lands. But counsel for the defender sought to imply such intention from words which I have not yet quoted, viz., ‘everything else to be sold’, as raising the implication of a universal settlement. I abstained from quoting these words till now, because I think their meaning and relation has been entirely misunderstood. They occur in connection with the direction as to jewels, thus:—‘All my jewels—save a diamond brooch diamond pendant, which Mrs Jolly gave me, to be returned to her. everything else to be sold.’ This is ungrammatical and elliptical, but what it clearly means is, ‘my two special jewelled ornaments, which Mrs Jolly’ (her mother) ‘gave me are to be returned to her, and all my other jewels are to be sold.’ By no admissible construction can the words be twisted to imply the description of the lady’s universitas, heritable and moveable. But it was on this premiss only that it was contended that when the testator came to leave ‘the remainder’ to found her endowment, she meant the remainder of the realisations from her universal estate after paying her legacies. Neither can I accept the premiss, nor can I accept the conclusion without the premiss—indeed it was not pressed that I should do so—for this could only be on the suggestion that the testator was not likely to found such a charity, unless she contemplated devoting to it the whole residue of her estate, both heritable and moveable. It may be so, but the conclusion would require an excursion into the realms of conjecture, which I am not entitled to make.

“I have carefully considered all the other cases cited—(*M'Leod's Trustees v. M'Luckie*, 10 R. 1056; *Forsyth v. Turnbull*, 15 R. 172; *Copland's Executor*, 15 S. L. T. 733; *Hunter (Jack's Executor)*, 15 S. L. T. 989, for the defender; and *Urquhart*, 6 R. 1026; *Campbell*, 15 R. 103; *Grant v. Morren*, 20 R. 404, for the pursuer, and they confirm me in the conclusion which I have reached.

“I shall therefore grant decree as craved.”

¹ *Pitcairn v. Pitcairn*, Feb. 25, 1870, 8 Macph. 604; *M'Leod's Trustees v. M'Leod*, Feb. 28, 1875, 2 R. 481; *Urquhart v. Dewar*, June 13, 1879, 6 R. 1026; *Campbell v. Campbell*, Nov. 30, 1887, 15 R. 103; *Grant v. Morren*, Feb. 22, 1893, 20 R. 404.

July 17, 1908. At advising on 17th July 1908,—

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LORD PRESIDENT.—In this case the question is whether the will of the late Mrs Hall Maxwell does or does not carry heritage. I need not minutely examine the law generally on the subject, because the matter was so recently before us in the case of *Jack's Executor v. Downie*,¹ and I have nothing to add to what was then said. The only point is the application to this particular case. The case is, doubtless, a narrow one, and is narrow because of the very inartistic language in which the will is expressed, but on the whole I have come to a conclusion adverse to that of the Lord Ordinary. We have got the length, in *Jack's Executor*,¹ of holding that where an executor was told to realise "all my estate," and then the residue was disposed of, that indicated a clear intention to dispose of the testator's whole estate, and could receive effect. Now here, we have got almost the same thing. We have got "everything else to be sold," and "I leave the remainder to found and endow a small Home." I think the Lord Ordinary would have come to the same conclusion had he not considered that the "everything else to be sold" was limited, by the context in which the expression is found, to everything of a class which had been mentioned before, namely, jewels. I do not think that is the meaning. The will is the will of a very uneducated person. It is full of mistakes in spelling, and it complies with no rules of grammar. It shews evidently that the writer first put down things which came into her head, and then broke off as occasion offered. After making a special bequest, and then providing for her funeral, and for the disposal of certain animals of which she seems to have been fond, she appoints a certain gentleman to assist the person already named to whom she has left this legacy, and the care of the animals, and then she goes on thus,—“All my jewels—save a diamond brooch diamond pendant, which Mrs Jolly gave me, to be returned to her. everything else to be sold.” If you take that sentence as it stands, it is hopelessly ungrammatical. The words “all my jewels,” are never followed by any verb at all. Accordingly I think the natural meaning of what she wrote is this. She began by talking about her jewels. Then the mention of her jewels suddenly brought into her mind the existence of this particular brooch and diamond pendant, which she wished to be given to Mrs Jolly (who, I believe, was her mother), and, having provided for that, she then forgets that she has not supplied any verb to the jewels and goes on—“everything else to be sold.” I think what she means is “all my jewels and everything else to be sold,” and I think that is pretty apparent from what follows afterwards. She immediately goes on to leave a legacy of a hundred pounds to certain homes, and a hundred pounds “to prevention of cruelty to animals,” five hundred pounds to her mother, and three hundred pounds to her aunt, “who will also get all my clothes that are of any use.” There again is an instance of how this testatrix had her memory suddenly spurred by the phrase she used. I cannot accept the idea that she was leaving these legacies out of the proceeds of her jewels. We are told that the jewels were valued at the time of her death at about thirty pounds. Whether that valuation was small or large, it is perfectly evident that the testatrix never could have had the idea that

¹ 1908, S. C. 718.

she had jewels to such an amount as would meet these legacies. Then she July 17, 1908.
 goes on and leaves the remainder to found and endow a small home. The
 result of the whole matter is, that I have no moral doubt that the testatrix ^{Crowe v.} Cook.
 meant to deal with her whole estate. Of course I quite recognise that there ^{Ld. President.}
 must be words which carry out that intention, but I think that there are
 such words, if you take "everything else to be sold" in a general sense, and
 not merely as applicable to the jewels. I am prepared to take them in a
 general sense, because I think that is the meaning with which they were
 written in a badly constructed sentence. The result is, in my opinion, that
 the will carries heritage as well as moveables.

LORD M'LAREN.—I incline to think that in this case we are going further
 in the direction of giving a liberal construction to the 20th section than has
 been found necessary in previous cases. As to the word "estate" I have
 never had any difficulty. It is not ambiguous. It has been described as
genus generalissimum, and it includes heritable estate not in virtue of a
 special meaning derived from the context, but because in its primary and
 proper meaning the word applies to immoveable as well as moveable sub-
 jects. The same may be said of the word "property"; in the absence of
 limiting words property means everything that belonged to the testator,
 with the possible exception of an unexercised power of appointment.

But the word "remainder" is ambiguous, or at least incomplete, because
 it means the result of subtraction, or what is left over out of property which
 the testator has announced an intention of dealing with. We must there-
 fore look to the antecedent clauses of the will to discover whether this is a
 remainder of the heritable and moveable estates or of the moveable estate
 only. Now, I confess I have difficulty in finding in Mrs Hall Maxwell's
 will an antecedent to the word "remainder" from which I can infer an
 intention to deal with heritable estate. But I think I may say that such
 difference of view as exists does not touch any question of principle,
 because I think we are agreed that, in order to the 20th section taking
 effect on the heritable estate, we must find in the will evidence of an inten-
 tion to dispose of a remainder which includes heritable estate. It has not
 been shewn that the money and household effects if sold would have sufficed
 to endow the home for old colliers which the testatrix meant to establish,
 and this is an element of evidence of intention to bring the heritable estate
 within the scope of the will. My doubt is whether in this particular will
 the word "remainder" is sufficiently proved, or defined, to be a remainder
 of the whole estate. But where so much depends on impression, I cannot
 say that my doubt is so strong as to induce me to dissent from the judgment
 proposed.

LORD KINNEAR.—I agree with your Lordship in the chair. I do not
 think that any difficulty arises in this case from the construction of the
 statute or from the general rules of law, because I take the law to be well
 settled as it is stated by Lord President Inglis in the case of *Pitcairn*.¹
 The statute requires, in order to give effect to what is called a "bequest of
 heritage," that such words of bequest shall be used with reference to lands

¹ 8 Macph. 604.

July 17, 1908. or heritable estate as would be sufficient to make a good bequest if they were used with reference to moveables; and, as the Lord President says, that is a provision which does not dispense in the least in regard to a bequest of land any more than of any other property with the necessity for specification of what is meant to be bequeathed. Therefore it appears to me that the only real difficulty that arises in this case is not in the construction of the statute but in the construction of the will. As to that, I may say that I am not surprised that there should be a difference of opinion. It is extremely difficult to make out what this lady meant. I do not think we are advanced very far by any attempt at grammatical analysis of language that was never intended to be grammar. We must take the words as they stand and try to get at what the testatrix really meant. If we read the words of her direction, "everything else to be sold," as covering everything except what has previously been otherwise bequeathed, then the conclusion that, when she goes on, after directing everything else to be sold, to provide for the application of "the remainder" in a certain way, she intends to dispose of her whole estate, follows of necessity. But then the sentence in which these words occur is so incoherent that it is impossible to be confident as to its meaning, and I am by no means certain that when she directs "everything else" to be sold, she does not mean merely that all her jewels are to be sold, except the diamond brooch. She begins to explain what is to be done with her jewels in general, and before she has explained it she turns off to make an exception, and having made that clear enough, she goes back again to her original notion about the other jewels and says what she wishes to be done with them. This is, I think, a possible construction, but supposing it to be correct, there still remains a distinct bequest "of the remainder," which she directs to be applied for a certain purpose. Now, it appears to me that the natural and ordinary meaning of these words is "the remainder of my estate." "I direct certain jewels to be sold. I direct certain provisions to be made for animals, and I leave certain sums of money and certain personal clothing, and all the remainder is to go to found and endow a Home for old colliers." I should say that means the remainder of her estate,—that is to say, all that is left after the previous bequests have been satisfied, and if that be a right construction of these words, then it is quite as effectual a method of describing her whole estate, heritable and moveable, as if she had inserted the word "whole" before the word "remainder," and the words "of my estate" after it. If she directed "the whole remainder of my estate" to be applied in founding a home for colliers, there could be no difficulty in the construction of these words, and no doubt as to the effect of the law introduced by the Act of 1868. On the whole, therefore, I come to the conclusion that this is a good bequest of the residue of this lady's estate, heritable and moveable, for the purpose of founding and endowing a Home for colliers.

LORD PEARSON was absent.

THE COURT recalled the Lord Ordinary's interlocutor, and assolizied the defender.

INGLIS, ORR, & BRUCE, W.S.—A. C. D. VERT, S.S.C.—Agents.

THE RIGHT HONOURABLE JOHN CAMPBELL, BARON OVERTOUN AND ANOTHER (Mackenzie's Marriage-Contract Trustees), Pursuers (Reclaimers).—*Dickson, K.C.—J. G. Jamieson.* No. 174.
 DAVID M'LEAN AND OTHERS (William Beveridge's Trustees), AND OTHERS, Defenders (Respondents).—*Hunter, K.C.—Chree.* July 17, 1908.
 Mackenzie's Trustees v. Beveridge's Trustees.

Marriage-Contract—Election—Whether wife's conveyance of acquirenda to marriage-contract trustees carried her right to elect between legitim and a testamentary provision.—By her antenuptial contract of marriage a wife conveyed to the trustees therein named the whole estate then belonging to her, "or to which she may succeed or acquire right during the subsistence of the marriage." Her father having died during the subsistence of the marriage, leaving a settlement under which she was a beneficiary, questions arose between herself and her marriage-contract trustees as to the exercise of the right to elect between legitim and her testamentary provision.

Held that the right to elect remained with the wife, and had not been carried to the trustees by the conveyance of *acquirenda* in the marriage-contract.

On 6th March 1907 The Right Honourable John Campbell, Baron Overtoun of Overtoun, and another, being a majority and quorum of the trustees acting under the marriage-contract entered into between Robert Mackenzie and Mrs Elizabeth Hill Beveridge or Mackenzie, brought an action against David M'Lean and others, being the trustees acting under the trust-disposition and settlement of the late William Beveridge senior (Mrs Mackenzie's father), and also against certain members of the family of the late William Beveridge as individuals. The summons concluded for declarator that the pursuers, as trustees and as assignees of Mrs Mackenzie under the marriage-contract, were entitled to payment of one-ninth of the late William Beveridge's personal estate, being Mrs Mackenzie's share of the legitim falling to her on her father's death. There were also conclusions directed against William Beveridge's trustees for accounting and payment.

The action was defended by William Beveridge's trustees, and also by individual members of William Beveridge's family, including Mrs Mackenzie.

The antenuptial contract of marriage, under which the pursuers held office, was signed on 30th May and 2d June 1873 by Robert Mackenzie and Miss Elizabeth Hill Beveridge. By the terms of that contract Robert Mackenzie conveyed to the trustees therein named policies of insurance on his life for £3000, and bound himself on his father's death to pay to them a further sum of £2000. He provided for his wife, in the event of her surviving him, an annuity of £300 per annum, and the whole of his household furniture and plenishing. He also discharged his legal rights in his wife's estate.

By the same contract Miss Elizabeth Hill Beveridge on her part assigned, conveyed, disposed, and made over to the trustees "All and sundry the whole means, estate, and effects, heritable and moveable, real and personal, now belonging to the said Elizabeth Hill Beveridge, or to which she has right, or to which she may succeed or acquire right during the subsistence of the marriage hereby contracted, with the whole rights, titles, and vouchers of the means, estate, and effects above conveyed by her, and the said Elizabeth Hill Beveridge binds and obliges herself to complete titles in her person to said means, estate, and effects, and to execute and deliver all such further deeds in

July 17, 1908. **Mackenzie's Trustees v. Beveridge's Trustees.** favour of the said trustees as may be necessary for carrying out the purposes of this trust." The purposes for which this property was conveyed were declared to be—payment of the income to Mrs Mackenzie during her life, and to her husband for his life should he survive her; on her death, subject to the husband's liferent, the funds were to be held for, or paid over to, the children of the marriage, in such proportions and subject to such conditions as the spouses should direct; failing such direction then to the children equally. At the date of the marriage Mrs Mackenzie had no estate to convey to the trustees, and subsequently, prior to her father's death, only a legacy of £50 had come to the trust funds through her. Two sons were born of the marriage, Robert Duncanson Mackenzie and William Beveridge Mackenzie.

William Beveridge senior, Mrs Mackenzie's father, died on 23d January 1905, leaving moveable estate valued at approximately £130,000. He was survived by his widow, two sons, and his only daughter, Mrs Mackenzie. He left a trust-disposition and settlement by the seventh purpose of which he directed his trustees to make payment to his daughter (therein designed as Leila Beveridge or Mackenzie), of the sum of £2000, "but with and under the express provisions and declarations hereinafter mentioned." By the last purpose his trustees were directed, upon the death of his widow, to divide the residue of the trust-estate into five parts, and to pay two of such parts to each of his two sons and one part to his daughter, Mrs Mackenzie; his daughter's part, should she predecease the term of payment, to go to his grandson William Beveridge Mackenzie. The trust-disposition further provided as follows:—"Declaring always that my grandson Robert Duncanson Mackenzie, or his issue, shall not take any part in the succession to my means and estate, both he and they being hereby expressly excluded from any interest therein. Declaring always, as it is hereby expressly provided and declared, that, both in respect of the said legacy of £2000 and to the share of the residue of my estate bequeathed as aforesaid to the said Leila Beveridge or Mackenzie, it shall be in the absolute power and discretion of the said trustees either to pay over to my said daughter the whole or any portion of the said legacy and share of residue bequeathed to her as aforesaid, and that at such time or times as may to them seem most expedient, or to postpone, so long as they may think it expedient to do so, the payment of the whole or any portion of the said legacy and share of residue bequeathed to her as aforesaid, or to retain the same during the said period of postponement vested in their persons as trustees aforesaid, or by deed under their hand to vest the same in the person or persons of other trustees or trustee, whom I hereby authorise them to appoint, so that the interest or annual produce of the said legacy and share of residue bequeathed to the said Leila Beveridge or Mackenzie as aforesaid may be paid to or applied for her behoof for her alimentary use during her life, or for such time as the said trustees may fix, and so that the capital shall be settled on, for behoof of, or be paid to the said William Beveridge Mackenzie under such restrictions and limitations, and at such times, and in such manner as the said trustees may in their own discretion deem most expedient, of which expediency and of the time and manner of exercising the powers and option hereby given they shall be the sole and absolute judges, and in the event of the decease of the said Leila Beveridge or Mackenzie

before payment to her of the whole or any portion of said legacy and July 17, 1908. share of residue bequeathed to her as aforesaid, or before the exercise by the said trustees of the powers of distribution before specified, then ^{Mackenzie's Trustees v. Beveridge's Trustees.} I direct and appoint the said trustees to hold and apply the said legacy and share of residue, or so much thereof as may remain, to and for behoof of the said William Beveridge Mackenzie or his issue, in the event of his having died leaving issue, and that equally among such issue *per stirpes*."

The pursuers, besides setting forth the foregoing facts, also averred that William Beveridge's trustees refused to make payment of the testamentary provisions in favour of Mrs Mackenzie, but insisted on retaining these sums in their own hands with the object of defeating the purposes of the marriage-contract. That these purposes would be thereby defeated in respect, *inter alia*—(1) that Mr Mackenzie would lose his liferent interest on survivorship; (2) that the elder son of the marriage, Robert Duncanson Mackenzie, would be excluded from all interest in these sums; (3) that it would be in the discretion of William Beveridge's trustees to withhold from Mrs Mackenzie the whole or any part of these sums, or to subject them to such conditions as they might think proper to impose. They also averred that Mrs Mackenzie became entitled on her father's death to one-third of a third, or one-ninth part, of his free moveable estate as legitim, that she had declined to concur with the pursuers in claiming payment of her share of legitim, and that William Beveridge's trustees, though called upon, refused to make payment of that share of legitim to the pursuers.

In answer the defenders referred to a survivorship provision in William Beveridge's trust-disposition, whereby, on the death of either of his sons, that son's share should accrue to the surviving children, and averred:—"The defender Mrs Elizabeth Hill Beveridge or Mackenzie disputes the right of her marriage-contract trustees to claim legitim on her behalf. The amount of said claim for legitim will not exceed £13,000, whereas the provision made in her favour in Mr William Beveridge's trust-disposition and settlement amounts to, at least, £14,500; while, in the event of either of her brothers predeceasing her mother without issue, they will amount to, at least, £27,000, and may amount to over £43,000. The provisions in her favour are thus more valuable than her claim to legitim, and it would be greatly to her prejudice to elect to claim legitim. She maintains that the pursuers are not entitled to elect to claim legitim for her or to her prejudice."

The pursuers pleaded, *inter alia*;—(1) The said Mrs Elizabeth Hill Beveridge or Mackenzie having become entitled at her father's death to one-ninth part of his moveable estate in name of legitim, the pursuers, as her assignees under the said marriage-contract, are entitled to payment thereof. (2) The defender Mrs Mackenzie, being a party to the said marriage-contract, is barred thereby from disputing the pursuers' right to claim legitim, or from herself discharging legitim to the prejudice of her conveyance in the marriage-contract and of the trust purposes therein contained.

The defenders pleaded;—(1) No title to sue. (2) The pursuers, not being in right of the testamentary provision in favour of Mrs Mackenzie, and being unable to discharge the defenders William Beveridge's trustees thereof, are not entitled to elect between said provisions and legitim. (3) The pursuers not being entitled to claim

July 17, 1908. *Mrs Mackenzie's legitims without her consent and against her wishes, the defenders are entitled to absolvitor. (4) The testamentary provisions in favour of Mrs Mackenzie being more valuable than the claim to legitim, the pursuers are not entitled to make and insist in that claim.*

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On 22d June 1907 the Lord Ordinary (Mackenzie) assolizied the defenders from the conclusions of the summons.*

* "OPINION.—The object of this action is to have it declared that the pursuers, the marriage-contract trustees of Mr and Mrs Mackenzie, are entitled, under the conveyance in the marriage-contract of the wife's *acquiritenda*, to payment of the legitim to which she is entitled from her father's estate. By the marriage-contract, dated in 1873, the husband made the provisions for his wife which are set out in cond. 1. The wife's father was not a party to the marriage-contract. On her part she conveyed, assigned, and disposed to the trustees her whole means, estate, and effects then belonging to her, or to which she had right, or to which she might succeed or acquire right, during the subsistence of the marriage, and bound and obliged herself to complete titles in her person to said means, estate, and effects, and to execute and deliver all such further deeds in favour of the trustees as might be necessary for carrying out the purposes of the trust.

"The trust purposes were (2) for payment of the income to her; (3) on her death for payment of the income to her husband should he survive her; (4) on her death, but subject to her husband's liferent, for the children of the marriage in such proportion as the spouses should direct, or failing appointment, equally. There were two children, Robert Duncanson Mackenzie and William Beveridge Mackenzie. The wife, at the date of the action, had contributed nothing but a legacy of £50 to the marriage trust.

"The wife's father died on 23d January 1905, leaving a trust-disposition and settlement, by which he conveyed his estate to the defenders in this case.

"By the seventh purpose of his settlement he left Mrs Mackenzie £2000, under the provision and declaration thereafter mentioned. A legacy of £2000 was left to the testator's grandson William Beveridge Mackenzie. One-fifth of the residue was left to Mrs Mackenzie. The testator's grandson Robert Duncanson Mackenzie was expressly excluded from any interest in his estate. The trustees were given absolute power and discretion, with regard both to the £2000 legacy and the share of residue left to Mrs Mackenzie, to pay or postpone payment, or to retain the same vested in their persons, or to vest the same in other trustees, so that the interest might be paid or applied for her alimentary use during her life, or for such time as the trustees might fix, and so that the capital should be settled on the testator's grandson, William Beveridge Mackenzie, as the trustees might deem expedient.

"The purposes of the marriage-contract and of Mr Beveridge's settlement were thus at variance as regards (1) the husband's contingent liferent; (2) any interest of R. D. Mackenzie; and (3) the discretionary power to the testamentary trustees over Mrs Mackenzie's capital.

"The marriage-contract trustees (with one exception) resolved to claim payment of Mrs Mackenzie's legitim to which she became entitled on her father's death. Mrs Mackenzie was called on by the pursuers to concur in this claim, but declined, and is a defender in the case.

"The figures given in ans. 7 were not disputed. The legitim will not exceed £13,000. The testamentary provision is at least £14,500. It was pointed out that, as payment of this is postponed till the widow's death, the legitim may prove to be as valuable. In the event of either of Mrs Mackenzie's brothers predeceasing her mother, without issue, the testamentary provisions will be, at least, £27,000, and may amount to over £43,000.

"It was argued on behalf of the pursuers that, on the death of Mrs

The pursuers reclaimed, and the case was heard before the First July 17, 1908. Division on 17th, 18th, and 19th March 1908.

Argued for the pursuers and reclaimers;—The clause under inter-pretation here was couched in well-known terms that had always been held to carry the universitas of the grantor's estate. The right to legitim vested *ipso jure* in the daughter on her parent's death; it was then an *acquisitum* of the daughter and formed part of her estate, and was therefore carried to the trustees in virtue of this universal assignation, and election was no longer competent to the daughter.¹ In any event, if the legitim itself was not carried, the right to elect to take it was carried to the trustees under this clause. The right of election with regard to legitim was in a different position from the right to elect between alternative provisions in a settlement by a third party, for the right to legitim existed as an expectancy during the lifetime of the parent and could not be defeated by him, although it

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Mackenzie's father on 23d January 1905, a right to legitim vested in her; that she had, by her marriage-contract, conveyed her whole *acquirenda* to the trustees; that the right to legitim which had vested in her passed under this conveyance to them; and that she could do nothing to defeat the right they had so acquired. This argument was stated by counsel for the pursuers to be independent of any question of the amounts of the legal and conventional provisions respectively. It was maintained that, where the trusts upon which conventional provisions are to be held are inconsistent with the trusts of the marriage-contract, it is then not merely the right, but the duty, of the trustees under a marriage-contract, which contains a conveyance of *acquirenda* such as the present, to demand payment of legitim. According to this argument, a wife, by becoming a party to a marriage-contract such as the present, destroys her right to elect. It may be that the legitim would only give the wife £5000, and that a heritable estate worth £5000 a year has been settled on her by her father. The wife, however, could only take what would fall under the marriage-contract. She would not be entitled to elect at all, because by her conveyance of *acquirenda* she had already given the £5000 to her marriage-contract trustees.

"There is no doubt that legitim vests *ipso jure* by mere survivance. It was pointed out in *M'Murray v. M'Murray's Trustees*, 1852, 14 D. 1048, that this had been settled since 1843 by *Fisher v. Dixon*, 2 Bell's App. 63. Although, however, it is true that the right to legitim vests, it is equally true that another right completely vests, and that is the right to the testamentary provisions. This is emphasised by Lord Moncreiff and Lord Gillies in their opinion in *Stevenson v. Hamilton*, 1 D. 181, at p. 197, where they say—'That right (to the testamentary provision) is perfect and effectual to herself (the wife) unless the claim to legitim can be put forward in her right. A choice is to be made between these rights; and the material question is, who shall be entitled to make this election?' The question in *Stevenson's* case was, whether the creditors of the husband were entitled to maintain that all the personal rights of the wife became vested in him *jure mariti*, and that the right to the legitim having passed to him by the legal assignation of the marriage, he had an absolute right to claim it. The minority there held that the interest of the husband in the wife's legitim was one which she could not surrender, and the grounds upon which this

¹ Douglas's Trustees v. Kay's Trustees, Dec. 2, 1879, 7 R. 295; Campbell's Trustees v. Whyte, July 11, 1884, 11 R. 1078; Simson's Trustees v. Brown, March 11, 1890, 17 R. 581; M'Murray v. M'Murray's Trustees, July 17, 1852, 14 D. 1048; Fisher v. Dixon, April 6, 1843, 2 Bell's App. 63; Stevenson v. Hamilton, Dec. 7, 1838, 1 D. 181, Lord Moncreiff, at p. 197.

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was not until his death that the exact amount of it could be ascertained.¹ It was here the duty of the trustees to elect to take legitim, for that was in the interest of the beneficiaries of the trust, and the wife could not defeat that by exercising her election against the wishes of the trustees, who were onerous assignees, as thereby she would be derogating from her own grant.² The trustees' position was analogous to that of a trustee in bankruptcy, whose right to elect to take legitim had been a matter of decision.³ The case of *Stevenson v. Hamilton*,⁴ relied on by the respondents, did not rule this question. That decision, which dealt with a husband's *jus mariti*,⁵ really turned on the view, which then prevailed, that the husband's right was a right of administration only, and not a right of property; that he was really exercising a curatorial power for his wife, and must exercise it in her interest. Had there been a direct conveyance of the wife's property to the husband in *Stevenson v. Hamilton*,⁴ as there was to the trustees

view was put support the pursuers' argument in the present case. The Court, however, negatived this view upon the ground that the husband's *jus mariti*, though it has many of the effects of a right of property, is in its proper nature a right of administration only. It was held that the right to elect was primarily in the wife, and that if the husband forced his wife to her injury to reject the testamentary provision which excluded the *jus mariti*, the Court would interfere.

"The interlocutor bears that, as the mutual claims of the husband and his creditors and of the wife did not admit of adjustment and division of the fund between them being made by the Court, the wife's claim was sustained. *Stevenson's* case was referred to in the *Duchess of Buckingham v. Winterbottom*, 16 D. 1129, and was followed in *Lowson v. Young*, 16 D. 1098. See also *Macdougall v. Wilson*, 20 D. 658. In the case of *Aikman*, 30 S. L. R. 804, it was held (by the Lord Ordinary, Lord Low) that an undischarged bankrupt was not entitled to reject his legitim, and take, instead, testamentary provisions, from which his creditors were purposely excluded. This was upon the ground that a right to legitim which vested in the bankrupt after the date of the sequestration, and while he was undischarged, was clearly 'estate' as defined in section 103 of the Bankruptcy Act, and that, therefore, the trustee was entitled to the vesting order asked. It was pointed out that the decisions of *Stevenson* and *Lowson* were not applicable to such a case.

"It was argued in the present case that as a claim to legitim cannot be given up to the prejudice of ordinary creditors, neither can it to the prejudice of marriage-contract trustees, who are in the position of creditors also.

"No doubt in regard to what the marriage-contract includes, it is onerous in the highest degree. The right of election, however, is personal and not transmissible, and until it is exercised by the only person who is entitled to do so, it cannot, in my opinion, be said that, within the meaning of the conveyance in the marriage-contract, the wife has succeeded to the legitim more than to her testamentary provisions. It appears to me that the right to elect remains, notwithstanding the terms of the conveyance. The wife may be barred from exercising that right, *e.g.*, if she has granted a specific

¹ *Stevenson v. Hamilton*, 1 D. 181, Lord Fullerton, at p. 195.

² *Douglas's Trustees v. Kay's Trustees*, 7 R. 295, Lord Shand, at p. 315.

³ *Aikman*, March 2, 1893, 30 S. L. R. 804; *Wishart v. Morison*, June 4, 1895, 3 S. L. T. 29.

⁴ 1 D. 181.

⁵ *On the nature of jus mariti the following authorities were referred to:—* Ersk. Inst., i. 6, 13; Stair's Inst., i. 4, 9, and 17; Bell's Com. i. 59; Bell's Prin. 1561.

here, the decision would have been different. That that was really the ground of decision of the majority in *Stevenson v. Hamilton*¹ was clear from the comments on it in subsequent cases.² A right of election was not a purely personal right, it could be exercised by a curator,³ and legitim could not be discharged by a wife without her husband's consent.⁴ The case of *Reid v. Morison*⁵ was not in point, for it dealt only with a *spes successionis*,⁶ while the subjects in dispute here were really *acquisita*.

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Argued for the defenders and respondents;—The father not being a party to this marriage-contract, the question turned solely on the transaction between the wife and her marriage-contract trustees. The right to legitim was really of the nature of a *spes successionis*,⁷ and a *spes successionis* was not a right of property, and was not carried by such an assignation as this, which assigned nothing but property.⁸ A *spes* would require a special assignation to carry it.⁹ Such a *spes* as a right to legitim did not become property until (1) the succession had opened, and (2) the child had elected to take the legitim, and these two events had not occurred here. It was wrong to say that the legitim provision vested in the child on the parent's death; it did so no more than did the testamentary provision;¹⁰ in fact what really vested was the right to choose between them. The obligation of the wife to the marriage-contract trustees was to hand over to them any property she acquired; she undertook no obligation to acquire property to her own prejudice for the benefit of the trust. The right of election was a personal right, and did not even pass to a curator.³ The assignation here could not be read as assigning to the trustees the right to compel the wife to exercise her personal right of election as they should dictate. The analogy from bankruptcy¹¹ was quite inapplicable, for the "estate" conveyed to the trustee in bankruptcy included "all rights, powers, and interests

conveyance of her legal rights. Or, again, if she has become bankrupt, in like manner, she would forfeit her right to elect. I think, however, that unless there is something in the contract to bar her election, her right to elect remains. I am not able to hold that the terms of the marriage-contract under consideration are sufficient to operate as a bar.

"Nor do I think that there are circumstances in the case which necessitate the interference of the Court.

"I am accordingly of opinion that the defenders are entitled to be assoilzied, with expenses."

¹ 1 D. 181.

² *Duchess of Buckingham v. Winterbottom*, June 13, 1851, 13 D. 1129; *M'Murray v. M'Murray's Trustees*, 14 D. 1048, Lord Ordinary (Rutherford), at p. 1051; *MacDougall v. Wilson*, Feb. 20, 1858, 20 D. 658.

³ *Morison's Curator Bonis v. Morison's Trustees*, Dec. 3, 1880, 8 R. 205; *M'Call's Trustee v. M'Call's Curator Bonis*, July 16, 1901, 3 F. 1065.

⁴ *Millar v. Galbraith's Trustees*, March 16, 1886, 13 R. 764.

⁵ March 10, 1893, 20 R. 510.

⁶ *Obers v. Paton's Trustees*, March 17, 1897, 24 R. 719.

⁷ *Bell's Prin.* 1582.

⁸ *Reid v. Morison*, 20 R. 510; *Boyd's Trustees v. Boyd*, July 13, 1877, 4 R. 1082.

⁹ *Trappes v. Meredith*, Nov. 3, 1871, 10 Macph. 38.

¹⁰ *M'Murray v. M'Murray's Trustees*, 14 D. 1048, Lord Rutherford, at p. 1050, Lord Ivory, at p. 1054; *Stevenson v. Hamilton*, 1 D. 181, Lord Moncreiff and Lord Gillies, at p. 197.

¹¹ *Aikman*, 30 S. L. R. 804; *Wishart v. Morison*, 3 S. L. T. 29.

July 17, 1908. therein capable of legal alienation."¹ This case was really ruled by the decision in *Stevenson v. Hamilton*,² and by the cases in which that decision had been followed.³

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At advising on 17th July 1908,—

LORD M'LAREN.—This is an action by marriage trustees concluding that they should be found entitled to the legitim which they say vested in the wife on her father's death, with further conclusions for accounting and payment.

Defences were put in by Mrs Mackenzie and her father's trustees setting forth that Mr Beveridge (Mrs Mackenzie's father) by his will had made certain provisions in favour of his daughter, which she considers more advantageous to her than the share of the father's estate which she might claim as legitim. The question then is whether Mrs Mackenzie has a personal right of election between legitim and the testamentary provisions in her favour, or whether the right of election lies with her marriage trustees in virtue of a general conveyance of her estate, acquired and to be acquired, contained in the contract of marriage.

The Lord Ordinary's opinion contains a full statement of the facts of the case, to which I refer, and I shall proceed at once to consider the case in its legal bearings. By the contract of marriage, executed in 1873, Mr Mackenzie assigned to the trustees two policies of insurance (£3000), and undertook to provide a further sum of £2000 for the purpose, *inter alia*, of securing an annuity of £300 to his wife.

Miss Beveridge conveyed to the same trustees "the whole means, estate, and effects, heritable and moveable, real and personal, now belonging to her, or to which she has right, or to which she may succeed or acquire right during the subsistence of the marriage hereby contracted," for the purposes of the marriage trust. These purposes include payment of the life interest or income of the estate to Mr Mackenzie in case of his survivance of his wife. Mr Mackenzie was called as a defender, but has not appeared to maintain his individual interests in his wife's estate, but I think it may be taken that the action of the marriage trustees sufficiently raises for consideration all the beneficiary interests that arise under the marriage-contract trust.

As regards Mr Beveridge's settlement (1902), we are only concerned with it in so far as it makes provision for his daughter and her family. Under the settlement Mrs Mackenzie is entitled to a legacy of £2000 and one-fifth share of the residue, and as to both provisions Mr Beveridge's trustees are empowered either to make immediate or postponed payment of the capital or to vest the money in trust for her life for alimentary use, and so that the capital may be settled on her son, William Beveridge Mackenzie. This son also receives £2000 in his own right. Nothing is given to the other son of Mr and Mrs Mackenzie.

¹ Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), sec. 4.

² 1 D. 181.

³ *Duchess of Buckingham v. Winterbottom*, 13 D. 1129; *Lowson v. Young*, July 15, 1854, 16 D. 1098; *Millar v. Birrell*, Nov. 8, 1876, 4 R. 87.

Mr Beveridge's settlement makes no reference to his daughter's marriage—July 17, 1908. contract, and we do not know how far he was acquainted with its provisions. But under his own settlement his trustees are empowered to pay the capital of his daughter's provisions to herself, and if they choose to exercise the power, this capital sum, i.e., the £2000, and one-fifth share of residue would apparently fall as *acquirenda* to the marriage trustees, subject it may be to a question whether Mrs Mackenzie's son Robert would be entitled to participate. This follows from the decisions in *Simson's Trustees v. Brown*¹ and *Douglas's Trustees v. Kay's Trustees*.² Mr Beveridge's trustees do not say, and are probably not bound to say, how they propose to exercise the powers conferred on them, and I only refer to the power of paying the capital to Mrs Mackenzie because I think it may be inferred that Mr Beveridge's directions were meant for the benefit of his daughter, and were not conceived in any hostile spirit towards her husband, of which indeed the will bears no evidence.

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In considering the legal question, I think we must approach it from the point of view that *in general* the right of election between legal and testamentary provisions is personal to the child.

With the exception of two cases in bankruptcy (to which I shall refer), the decisions are uniform to this effect. In the earliest case, *Stevenson v. Hamilton*,³ the decision was that of a majority, but in the later case of *Lowson v. Young*,⁴ where the point was raised under different circumstances, the decision was unanimous. This is a strong authority in favour of the wife's personal right of election, because the lady had at first proposed to claim legitim, but afterwards, and shortly before her husband's supervening bankruptcy, she changed her mind and accepted her father's testamentary provision (which excluded her husband's rights), and it was held that her election must be sustained.

In the argument for the pursuers much reliance was placed on the principle that the right of legitim vests by the death of the father; but this argument does not influence me, because it is equally true that the right to a testamentary provision vests. All that is meant is that no proceeding of the nature of adiation is necessary to fortify the right in either case. The truth is that each right vests conditionally on the other right not being claimed. The fact that there is an election proves that neither the legal nor the testamentary provision attracts the estate in a higher degree than the other.

The distinction was also taken that in the case of *Stevenson v. Hamilton*³ the competitors were the husband or his creditors, while in the present case the competing parties are the wife's disponees.

But I am not prepared to admit that under this contract of marriage the right of election between legal and testamentary provisions was conveyed to the trustees. The general rule is that a universal conveyance of estate does not carry an unexercised power, and this principle is very well illustrated by the decisions as to the effect of a general disposition in a testamentary deed. In such cases it has been inferred from the terms of the will, especially if the testator knew that he had the power, that the will was equivalent to an

¹ 17 R. 581.

² 1 D. 181.

³ 7 R. 295.

⁴ 16 D. 1098.

July 17, 1908. exercise of the power, But in the absence of indications of intention, the bare fact that the testator has a power of disposal is not sufficient to bring the subjects over which he has the power under the operation of his will.

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Now, it may be that if Mrs Mackenzie had in plain terms conveyed her power of election to her marriage trustees, or, which is the same thing, had expressly authorised them to exercise her right of election, this action would be well founded. But I am unable to infer from the general conveyance of estate which she might acquire, that she intended to make over to marriage trustees the personal privilege of determining whether her legal or her testamentary provision was in all the circumstances the more advantageous in her own interest and that of her family.

It is pointed out by the Lord Ordinary that in certain events the legitim claim may be the more valuable, and that in other events the testamentary provision would be the more valuable of the two. This seems to be a fair case for personal election by the person who is to receive the benefit, and there is no question here as to unfairness in the exercise of the power.

If it is assumed, either absolutely or for the purposes of the argument that in this case the marriage trustees are in the position of assignees of the legitim, I do not think that their right is any stronger than that of the husband in the cases of *Hamilton*¹ and *Lowson*.²

The *jus mariti* is now only a shadow, but at the time when these questions were raised, it was a right very strongly founded in the law. It was considered to be founded on the "assignation of marriage," and that is exactly the nature of the assignation on which the case of the pursuers is founded. I can see no substantial distinction as regards the discretion or the onerosity of the right in the two cases, and I think that the decisions in question govern the present case.

The last point in the case is the argument founded on the two cases in bankruptcy—*Aikman*,³ and *Wishart*,⁴ where a trustee in bankruptcy was held entitled to claim legitim, against the wishes of the bankrupt, who naturally preferred that his rights should be left to the operation of his father's will. These are decisions in the Outer-House by Judges whose opinions are deserving of the greatest respect. In *Wishart's* case⁴ there is no considered opinion; the report only says, "held, following *Aikman*,"³ and states the decision.

Now, in effect these are decisions as to the extent and effect of the vesting clause of the Bankruptcy Act, 1856. I do not doubt that under that clause a power may be adjudged by the trustee, because a power is in its nature adjudgeable, and the trustee without going through the form of an adjudication has all the rights of an adjudger. If we compare these cases with *Lowson v. Young*,² we see that in the one case the right of a bankrupt husband's trustee was not allowed to prevail against the right of the wife to choose the provision which protected her own money against her husband's creditors, while in the other case, where the question was between the husband and his creditors, no other person being interested, the right of the trustee was sustained. The cases are not inconsistent, because the questions

¹ 1 D. 181.

² 30 S. L. R. 804.

³ 16 D. 1098.

⁴ 3 S. L. T. 29.

were different, and as at present advised I should agree with Lords Kyllachy July 17, 1908. and Low in regard to the trustee's claim. In this connection Lord Kinnear has called my attention to the rule that a bankrupt is not entitled to renounce a succession where the renunciation will be productive of injury to his creditors without benefit to himself. But then I think the present case, if it is governed by authority at all, must be held to fall within the principle of *Lowson*¹ rather than that of *Aikman*,² because the principle is that where the interests of the wife, real or supposed, conflict with those of the husband or children, or trustees representing their interests, the election lies with the wife herself. It is only necessary to read the judicial opinions to see that the grounds of decision in *Lowson's* case¹ and the earlier case of *Hamilton*³ are absolutely different from anything that could be put forward in a question between a bankrupt and his trustee. I am therefore for adhering to the Lord Ordinary's decision.

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LORD KINNAR.—I agree with Lord M'Laren. I am, however, disposed to rest my opinion rather upon the construction of this particular marriage-contract than upon general rules of law. Taking this view, I am not disturbed by the difficulties which were experienced by the learned Judges who decided the cases of *Hamilton v. Stevenson*⁴ and *Lowson v. Young*,¹ with reference to the operation of the *jus mariti*, and the consequent right of the husband or his creditors to interfere with the wife's election between legitim and testamentary provisions.

These cases seem to me to be different from the present in two very material respects. In the first place, the assignation of moveable property implied in marriage was universal, and, in the next place, over and above the right of property which was carried *jure mariti* to the husband, there was in him a right of administration which enabled him to control the wife's management of property belonging to herself; and accordingly the real point of difficulty in the cases of *Stevenson v. Hamilton*⁴ and *Lowson*¹ seems to have been whether the husband and his creditors could be allowed to interfere, to the disadvantage of the wife and for their own advantage, in the exercise of her right of election. The Court held that while they had an equitable power to control the right of election if it were used wrongly and to the disadvantage of persons having an interest in the subject-matter, in the cases in question there was no reason for interfering or allowing the husband to interfere with his wife's choice. It does not appear to me that a question of that kind arises at all in the present case, because on the construction of this marriage-contract I am of opinion that neither the legitim itself nor the right of choosing between legitim and testamentary provisions is conveyed to the trustees.

What is conveyed to the trustees is the whole means, estate, and effects belonging to the wife, or to which she had right at the date of the marriage-contract, or to which she might succeed or acquire right during the subsistence of the marriage. That assignation, of course, took effect immediately as regards the rights already acquired by the wife; but in order that it should take effect upon the other rights which she had not yet acquired, it

¹ 16 D. 1098.² 30 S. L. R. 804.³ 1 D. 181.

July 17, 1908. *was necessary in the first place that she should acquire them, and until she acquires right to it by succession or otherwise during the subsistence of the marriage, no estate falls within the terms of the conveyance. I do not think that she can be held to have acquired right to legitim before she has considered whether she will take legitim or something else which is offered by her father's testamentary settlement. It appears to me that, before that right can be included among *acquisita* as distinguished from *acquirenda*, it must be acquired by her determining that she shall take it. I cannot read the conveyance in the marriage-contract as equivalent to an assignation to the trustees of a right of election so as to commit to them the right of choice which belongs to the wife herself. I cannot go quite so far as I think the Lord Ordinary does, when he says that it is a right which is personal and not transmissible, because I am unable to see any sound reason in law why a child may not assign to trustees, if he or she thinks fit, the power to make a choice between two alternative rights. But I think it is necessary that she should do so in perfectly plain terms if it is to be maintained against her that she has conveyed her right from herself to anybody else; and there is nothing in this contract of marriage which to my mind can bear that meaning. What is conveyed is property. There is no special function committed to the trustees which could involve a right to exercise a discretion of this kind. Their duty is to ingather the estate when it becomes estate, and to administer it in a certain way, but to that their duty is confined.*

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When the question arises whether the child shall take legitim or take the testamentary provisions, there may be conflicting interests which the trustees can have no power to determine. I do not say that there are in this case, but for the purpose of construing this contract we must keep in mind that the marriage trustees are not to determine between the spouses and the children whether the interest of the one is to be sacrificed to the interest of the other in making an election. It may very well be that the interests of the spouses conflict, and that the interests of the children conflict with both. There is nothing in this deed that I can see giving power to the trustees to determine any such conflict according to their discretion.

It was maintained to us in an ingenious argument that inasmuch as the right to legitim vests *ipso jure* on the death of the father, the assignation to the trustees took effect upon the legitim fund by the mere survivance of the daughter, and therefore that, when the father's will put it in her power to accept certain testamentary provisions provided she gave up her legitim, it was no longer within her option to make that bargain with the testamentary trustees, because she could not, as it was said, pay the price; the legitim fund had already gone to her own marriage-contract trustees; she could not account for it because it was theirs, and therefore she could make no choice between the two funds. I think that argument is open to the objection that it is an attempt to extend the verbal terms of a proposition in law to conclusions altogether beyond the intention of those who originally laid it down. I quite agree that we must accept the propositions laid down by so exact a lawyer as the first Lord Moncreiff,¹ from whose opinion this phrase was quoted in the course of the argument, and that we must follow

¹ 1 D., at p. 197.

them out to their necessary conclusions. But we must, in the first place, July 17, 1908. see exactly what Lord Moncreiff meant. When he says that the right to legitim vests *ipso jure*, that really means nothing more than this, that on the death of the father it passes to the child without the necessity for completing any formal title. That is the whole force and effect of the words *ipso jure*, and the same thing may be said of the right to a legacy under a will. The right to legitim passes by operation of law, the right to a bequest passes by operation of the will, but they both pass entirely and absolutely upon the child's survivance of the father; and the one, as Lord M'Laren has pointed out, is as conditional a right as the other, because the child cannot take legitim out of his father's estate except upon the condition of leaving the rest of the estate to go by the will, and he cannot take the testamentary provisions in lieu of legitim, except on condition of allowing the will to operate upon the legitim fund. Therefore there is, to my mind, a perfectly clear right of election which must be exercised before the child can take either the one provision or the other.

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I quite agree also with Lord M'Laren with reference to the case of *Aikman*.¹ I should be very sorry to say anything inconsistent with Lord Low's judgment in that case, which appears to be perfectly sound. But then I think it rests upon a ground in law which stands quite clear of that upon which the present case ought to be decided, namely this, that the right to legitim having vested in the bankrupt he could not be allowed to surrender it, to the prejudice of his creditors. It was really an equitable power to control the exercise of a right which a man *sui juris* would certainly have been entitled to exercise, but which the bankrupt, whose whole property belongs to other people, cannot be allowed to exercise to their prejudice. The bankrupt's father had left him a provision in his will on condition that if he were not discharged—he had already been sequestered before the will was made—it should not be paid to him but held for the benefit of his children, and he very naturally maintained that he should prefer this money to go to his children rather than let the legitim go to his creditors. The whole question was whether he could be allowed to sacrifice his creditors' interests in that way, and Lord Low held that he could not. I agree with him, but I do not think that throws any light upon the construction of this contract of marriage.

LORD PRESIDENT.—I confess I have myself found this case attended with great difficulty, but I had the opportunity of perusing the opinion which has just been delivered by my brother Lord M'Laren, and I am prepared to concur in that opinion. I do so the more easily because your Lordships both take the same view as the Lord Ordinary.

I think the case in the end comes to depend on a very small though not simple proposition, and that is, does or does not a conveyance of *acquiritenda* in a marriage-contract convey the right of election? I have come to the conclusion that it does not. There is one consideration which to a certain extent affects my mind. It is this: I see great difficulties in working out the idea that the trustees in a marriage-contract should have the right of

July 17, 1908. election, because what is to be their criterion in exercising it? To whom is their duty? The duty of trustees is of course to the whole of the beneficiaries under the settlement, and yet the question, whether it is better to take legitim or to take the testamentary benefit that is offered instead may raise perfectly cross interests, if I may use the phrase, among the beneficiaries to whom the trustees have got an equal duty. That class of difficulty never arises in a bankruptcy case, because the trustee in a bankruptcy case has one duty and one duty alone, which is to take whatever will bring in ready money for the creditors. He would never have any doubt whatsoever as to what he had better do in taking either legitim or testamentary provisions. With other trustees it is quite different, and therefore it is only the natural result to hold here that a conveyance of *acquiritenda* does not convey the right of election, but only binds the lady to hand over to her marriage trustees whatever she gets after she has got it.

Ld. President.
LORD PEARSON was absent.

THE COURT adhered.

BOYD, JAMESON, & YOUNG, W.S.—J. & A. PEDDIE & IVORY, W.S.—Agents.

No. 175.

JOHN CARTER, Claimant (Appellant).—*Munro—J. A. Christie.*

July 17, 1908.

JOHN LANG & SONS, Defenders (Respondents).—*D.-F. Campbell—D. Anderson.*

Carter v. Lang
& Sons.

Master and Servant—Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), Sched. I., secs. 1 (b) and 2 (a) and (c)—Amount of Compensation—“Average Weekly Earnings”—Mode of Computation.—In ascertaining the amount of the average weekly earnings of a workman entitled to compensation under the Workmen's Compensation Act, 1906, the leading canon is, as stated in sec. 2 (a) of the First Schedule, that “average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated.”

In an ordinary case the average weekly earnings of a workman are to be ascertained by dividing the total amount earned during the relevant period of his employment by the number of weeks actually worked within that period, and, if there are regularly recurring trade holidays when no work can be done, by deducting from the result thus obtained a fraction equal to the fraction of the year during which for this reason no wages can be earned.

In ascertaining the average weekly earnings the question whether those days in any week on which the workman was absent from work are to be disregarded depends on the nature of the employment, and in an employment where it is customary to work for only a limited number of days in the week, the amount earned in these days may be taken as the weekly earnings of the workman.

In the application of sec. 2 (c) of the First Schedule, “absence from work due to illness or any other unavoidable cause” means absence from work due to a cause personal to the workman, as distinguished from causes due to the work, such as trade holidays or an accidental stoppage of machinery.

The question whether, in view of the shortness of the employment or of the other considerations indicated in sec. 2 (a) of the First Schedule, it is practicable to compute the rate of remuneration at the date of the accident from the facts of the workman's own employment, is a question of fact for the determination of the arbitrator, and is to be settled in each case by a consideration of the whole circumstances of the employment.

A workman who had been incapacitated by accident, and who was July 17, 1908. entitled to compensation, had been at the date of the accident for thirteen weeks in his employment. During that period he had earned for one week nothing, and for another week very little, on account of illness, and again for one week had earned nothing, and for another week very little, on account of trade holidays. The arbitrator calculated his average weekly earnings by dividing his total earnings by thirteen. Carter v. Lang & Sons.

In an appeal by stated case, the Court, after enunciating the general rules above stated, *recalled* the determination of the arbitrator, and *remitted* to him to proceed.

Bailey v. G. H. Kenworthy, Limited, [1908] 1 K. B. 441, *commented on*.

In an application for compensation under the Workmen's Compensation Act, 1906, in the Sheriff Court at Paisley, at the instance of John Carter, labourer, against John Lang & Sons, engineers, the Sheriff-substitute (Lyll) awarded certain compensation, and at the request of the claimant stated a case. 1ST DIVISION.
Sheriff of Renfrew and Bute.

The case stated :—"This is an arbitration in which the following facts were admitted :—

"On 8th August 1907 the appellant, who was a workman in the employment of the respondents, sustained personal injury by accident arising out of and in the course of his employment, whereby he was and is incapacitated. He had been in the said employment and in the same grade, and the relationship of master and servant had existed between the parties, from Wednesday, 8th May 1907, till Thursday, 8th August, the day of the accident. The trade week in the works of the respondents runs from Wednesday to the following Tuesday, and the period of his employment had thus embraced thirteen weeks and two days, inclusive of the day of the accident. During that time there had been certain short periods in which the pursuer had earned no wages owing to his absence on account of (1) illness, and (2) Johnstone general holidays. As thus—for the week ending 11th June 1907, the appellant had earned nothing on account of being off work through illness; for the week ending 2d July he had earned only 15s. 11d., being off work for part of the time through the same cause; for the week ending 16th July he had earned nothing, and for the following week, ending 23d July, he had earned only 3s. 8d., on account of the occurrence of Johnstone general holidays.

"I held that the period of the pursuer's employment with the defenders was from 8th May to 8th August 1907, that the said period of employment was continuous and uninterrupted by the necessary absences above detailed, that the said period consisted of thirteen weeks and two days, and that it was practicable, at the date of the accident to the appellant to compute his rate of remuneration. I found further that the proper method of computing the appellant's average weekly earnings during that period, in the manner best calculated to give the rate per week at which he was being remunerated, was to discard the amount earned during the two days of the week when the accident occurred, and to divide the total of the rest of the earnings by the number of weeks in the period of employment, viz., thirteen, and that the compensation to be awarded should be 50 per cent of the sum so arrived at."

The questions of law for the opinion of the Court were :—" (1) Whether the said period of employment was so short as to make it impracticable at the date of the accident to compute the rate of the appellant's remuneration? (2) Whether the said period of employ-

July 17, 1908. *ment should have been regarded as continuous and uninterrupted by the said short periods of absence due to illness and the occurrence of Johnstone general holidays ? or (3) Whether the times of absence from the said unavoidable causes should have been, in the first place, discounted in reckoning the said period of employment, before the arbiter proceeded to compute the average weekly earnings of the appellant ?*"*

Carter v. Lang & Sons.

Argued for the appellant ;—The leading rule for the calculation of average weekly earnings was that they were to be computed in the manner best calculated to give the rate per week at which the workman was being remunerated.¹ The method adopted by the arbitrator was in direct violation of this rule, for it gave, not the normal weekly rate, but the rate at which a workman was remunerated who was always out of work for four out of every thirteen weeks. This method had been disapproved in the English Courts.² It perpetuated the anomalies³ which the Act of 1906 had been expressly designed to remove. The proper method was to ignore those weeks in which the workman had been absent either through illness or on account of holidays, and to divide his total earnings by the number of weeks during which he was at work. Weeks when he had only worked for a few days should be reckoned as part of a week and not as a whole week. The words "uninterrupted by absence from work" in section 2 (c) of the First Schedule meant that such absences were to be *excluded* from the calculation, not *included*, which would be the effect of the respondents' contention. The Court should answer the third question in the affirmative, and find it unnecessary to answer the second question. The appellant was willing that the first question should be answered in the negative.

Argued for the respondents ;—The phrase "average weekly earnings" first appeared in the clause dealing with the case where the injury resulted in death.⁴ In such a case the first event which was provided for was where the man had worked for three years in the same employment. In such an event there was no doubt that his actual earnings were the measure of compensation, and that no allowance was made for his having been absent from illness or from any other cause. This was the leading principle, and it was not to be presumed that a different method was to be adopted where the injury resulted in incapacity, or where the man had been employed for a shorter period than three years. There was no authority for dropping out of the calculation any time when the man was not at work for any reason. Section 2 (c) was no authority to this effect, for that section was only intended to provide that employment was to be considered continuous although in fact broken by absence through illness.⁵ Having provided that, its purpose was spent, and it could not be further invoked to support the proposition that no account was to be taken of idle weeks.

At advising,—

LORD PRESIDENT.—The question raised in this case is a very important

* The sections of the Act under consideration are quoted in the opinion of the Lord President.

¹ Workmen's Compensation Act, 1906, First Sched., sec. 2 (a).

² *Bailey v. G. H. Kenworthy, Limited*, [1908] 1 K. B. 441.

³ *Jones v. The Ocean Coal Company, Limited*, [1899] 2 Q. B. 124; *Grewar v. The Caledonian Railway Co.*, June 19, 1902, 4 F. 895.

⁴ Sched. I., sec. 1 (a) (1).

⁵ *Grewar v. Caledonian Railway Co.*, 4 F. 895.

one, not because of the amount involved, but because we are, I think, bound July 17, 1908
to give what guidance we can as to the way of arriving at an average wage
under the recent Workmen's Compensation Act, 1906. Carter v. Lang
& Sons.

The facts upon which the case arises are these: The appellant was taken Ld. President.
into the service of the respondents on Wednesday, 8th May 1907, and he
worked till Thursday, 8th August 1907, upon which day the accident
happened. The history of his employment, so far as his wages were con-
cerned, is this: The period within the dates which I have specified extends
to thirteen weeks and two days. Discarding the two days, he worked nine
out of these weeks at what may be called full wages. For the week ending
11th June he earned nothing, on account of being off work through illness;
for the week ending 2d July he earned only 15s. 11d., from the same cause,
being partially off through illness; for the week ending 16th July he earned
nothing, and for the week ending 23d July he earned only 3s. 8d., the
reason for that shortage being that there intervened the period of the John-
stone general holidays. What the learned Sheriff-substitute as arbitrator
did is set forth in the case. He said:—"I found that the proper method of
computing the appellant's average weekly earnings during that period, in the
manner best calculated to give the rate per week at which he was being remun-
erated, was to discard the amount earned during the two days of the week
when the accident occurred, and to divide the total of the rest of the earnings
by the number of weeks in the period of employment, viz., thirteen, and that
the compensation to be awarded should be 50 per cent of the sum so arrived
at." The question is whether he was right in that determination. The ques-
tions of law that the learned Sheriff has put to your Lordships are, first,
"Whether the said period of employment was so short as to make it imprac-
ticable at the date of the accident to compute the rate of the appellant's
remuneration"; and second, whether his method of computation was right.

We were referred to the only case that has been decided upon this part
of the recent Act—namely, four cases decided together of *Perry, Cain,*
Bailey, and *Gough*,¹ decided by the Court of Appeal in England. I have
exceedingly carefully considered what was said by the learned Judges in
that case. We are, of course, not bound to follow them. On the other
hand, their opinions are entitled to the greatest respect, and there will
doubtless be sooner or later an occasion when both these opinions and any
opinions which your Lordships may deliver to-day will be subjected to the
review of the House of Lords. Therefore, I am very anxious that we should,
if possible, lay down once for all what we consider to be general rules under
the statute.

Your Lordships are well aware that this question really arises upon a new
section which makes its appearance in the Workmen's Compensation Act,
1906, and which was not in the Workmen's Compensation Act, 1897. But
the sections which are before and after are precisely the same in the two
Acts. The point arises under the Schedule, and the Schedule runs in both
cases thus²:—"Scale and conditions of compensation. The amount of com-
pensation under this Act shall be (a) where death results from the injury
(i) if the workman leaves any dependants wholly dependent upon his earn-

¹ [1908] 1 K. B. 441. .

² Schedule I., sec. 1.

July 17, 1908. there had been several times that he did not actually work—once by reason of a canal having burst its bank and stopped the whole works; once by reason of accidents in the works to boilers and machinery; and twice by holidays—one being what is called “Wakes Week,” when all the mills at Ashton were closed—which corresponds with the Johnstone trades holidays in this case—and one being the usual Bank Holidays, when the works were not open. The problem was to reduce piecework payments to an average weekly wage. What the County Court Judge did was simply to take this £83, 2s. 1d. and divide it by 52. The Court of Appeal held that was wrong; but I do not think the three Judges came to quite the same conclusion as to what was right. So far as I am concerned, I agree with the method of Lord Justice Moulton. Lord Justice Moulton points out that there is a distinction between absences which are due to something personal to the workman—such as illness, or to accidental stoppages of the works—and absences owing to regular holidays in the course of the employment. Accordingly the calculation which he made in that case, and I think it was a correct calculation, was this: He assumed that the man had been absent for three weeks in the year. One of these weeks he took as due to temporary stoppages owing to accidents to boilers and machinery, and a fortnight as due to the fact that there were regular holidays, during which the works were not open. Well, he says there are forty-nine weeks that the man has actually spent in labour in order to earn £83, 2s. 1d., which he was paid by piecework; and therefore he began by dividing the £83, 2s. 1d. by 49. But then he says if I take that to be the average weekly wage of the man, I should really be putting him in a position of earning more in the year than any man *de facto* could earn, because any man in this particular trade could only have fifty weeks’ work in the year, there being two weeks’ holidays, and he says the employer must not be compelled to pay more to an injured workman than a sound workman could have earned. Inasmuch as two weeks is a twenty-sixth of the whole year, he reduces the dividend which he first got by dividing £83, 2s. 1d. by 49 by a twenty-sixth, which is a perfectly right method of proceeding. But in the course of his opinion he uses the expression that if a man in receipt of £2 per week does not choose to go to work for a particular week, that does not alter the fact that the weekly rate at which he is being remunerated is £2;¹ and that is what has crept into the rubric. If by that he only means that when you are thinking of a week’s average wage, and considering the week as a unit, you are not necessarily to take into the computation another week in which the man gives himself a holiday, I agree with him; but if it be said that in every case, as is put in the rubric, days in which no work is done are to be disregarded, I do not agree. It depends upon the nature of the employment. For instance, in the colliery trade, we are well aware that colliers, who are paid by each day that they go down into the pit, as a matter of fact rarely work six days a week, and sometimes when wages are exceedingly high they work very few days in the week. Supposing you had a collier whose general method was to work two or three days a week, and who was paid so much

¹ [1908] 1 K. B., at p. 459.

a day, it would be out of the question to compute that man's average July 17, 1908. weekly wage as being six times the amount he earned each day as if he had worked for six days. As the first clause of the section is the dominating clause telling us that the average weekly earnings are to be computed in such manner as is best calculated to give the rate per week, the real practical experience of that collier's life is that for him a week's wage is the wage he earns for working on three or four days a week. Therefore I think it necessary to be very precise about this, because otherwise I am afraid that that rubric would be misunderstood.

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& Sons.

Ld. President.

Now, I come to the difficult part of the question in regard to this subsection (c) which says that employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness "or any other unavoidable cause." The English Court of Appeal have considered that directly in the case of *Bailey*¹ with reference to a case of illness. Lord Justice Moulton² held that these temporary absences, due to holidays and accidents to machinery, were neither here nor there as far as this subsection was concerned, because he held that "other unavoidable causes" must be *ejusdem generis* with illness. What I think he means by *ejusdem generis* with illness must be *ejusdem generis* not in the strictest sense of the word, such as a broken bone, which is not an illness but something like it. Unavoidable causes referred to in section 2 (c) must be causes personal to the workman,—that is to say, anything which has to do, not with the workman, but with the work, such as those stoppages referred to in the case of *Bailey*,¹ was not touched by this clause. I agree with another observation that was made in that case, namely, that you cannot argue as to the true meaning of what you are to do in a shorter period from what you find done in a longer period of three years.³ That disposes of a somewhat ingenious but rather too fine argument of the learned Dean in this case.

I think the view of the Legislature in subsection (c) was simple enough, and it applies not only to the three year period but also to the one year period. Where you have got a workman with one year's experience, then you have got a long enough period, and you may take it that the length of the period will give a fair average for the person concerned. The difficulty comes in where you have not got a long period, but where you have to find out the weekly average for the whole of the man's working life by a short period of work. It is in regard to that that this subsection comes in. The meaning of it seems to me to be this: If you have not got twelve months' experience, which will give you a law for that particular man, and if you find that the period is so short during which he has been working that you have to go to somebody else, not him, for an illustration, then you must take somebody else's history as that history is uninterrupted by illness or absence from any other unavoidable cause. In other words you are not to assume that because A has been ill for so many weeks, and consequently has reduced the practical amount of his earnings—you are not to assume that B, if he had been

¹ [1908] 1 K. B. 441.

² [1908] 1 K. B., at p. 446.

³ [1908] 1 K. B., at p. 460.

July 17, 1908. working, would have been ill in the same way. No doubt that has the effect of doing away with what I call the hardship in such a case as *Grewar*.¹ Being such a rough provision, it no doubt cuts the other way also. Where you have a really long period practically you get such illnesses as a man in his life is subjected to, but where you calculate upon a short period, as evinced by somebody else, you really practically assume that the man would never be ill at all. I cannot help that, that is the way the statute has put it, and after all these things are done in a statute with a very rough axe.

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& Sons.

Id. President.

That is all I have to say except one thing about the question of the shortness of time making it impracticable for the Sheriff to calculate an average. There are very good instances in the three English cases other than the case of *Bailey*,² where the question was raised of whether it was impracticable from shortness of time. Although we are asked here to answer the question as one of law, I think the question as to whether the time was so short as to make it impracticable to calculate an average is a question of fact. Accordingly if the Sheriff, acting as arbiter, had come to the conclusion that the time which this particular workman worked was either so short as to make it impracticable, or was long enough to make it practicable, I should be very slow to disturb his judgment. I cannot help disturbing the Sheriff's judgment here, because he has, for the reasons I have already stated, gone altogether wrong upon the principle, and accordingly his judgment such as it is about the shortness of time was a judgment, based upon the assumption that he had thirteen weeks to go on, whereas as a matter of fact he only had nine. But as little am I inclined to lay down as a fact in this case that it was impracticable to reckon an average on account of the shortness of time, because I think that also depends upon considerations which are not before me, but which could be before the Sheriff. Supposing there is a trade in which there is an absolutely steady wage, as, for example, the case of an ordinary man employed in a shop at so many shillings weekly during the whole year, and supposing that the man had only been in the particular service two or three weeks, yet inasmuch as it was an engagement by the week, which would have lasted on to the end of the year, I think these two or three weeks, or even one week, would be quite sufficient to shew what was the average weekly wage. But on the other hand, where you have classes of employment which vary very much in different times, in which the wages per week would be very different at one period of the year from those of another, and in which employment is very much more abundant at one period of the year than at another, then a very much larger number of weeks might be required in order to calculate a proper average. Lord Justice Moulton also notices this, and gives the illustrations of a ferryman and a charwoman.³

Therefore I do not think that the question of the shortness of time making it impracticable to reckon an average can be settled by a mere question of figures. It must be settled in each case by a consideration of the whole circumstances of the employment. I think that is a matter which the Sheriff has got to look into and determine. Therefore, I am not for answering the question of the Sheriff, but am for telling him that, with

¹ 4 F. 895. ² [1908] 1 K. B. 441. ³ [1908] 1 K. B., at p. 459.

such help as he may get from the views we are now laying down, he must July 17, 1908. determine that matter for himself. If he holds that the experience he has got of this man's nine weeks' work is sufficient, that the work is always very much the same in this employment, and that nine weeks at this time of the year will enable him to have the proper factors for arriving at an average, then I think he must proceed with his sum as Lord Justice Moulton did, that is to say, he must divide what the man earned by the number of weeks in which he earned it, and then go on to consider whether the man would have worked fifty-two full weeks in the year. If there were holidays he must make a deduction. Assuming that he has holidays extending over two weeks, he must deduct a twenty-sixth from the average sum obtained by dividing the total amount earned by the number of weeks during which the man was working. Without answering the question as put, we should, I think, remit the case to the Sheriff to inquire for himself whether he considers, in the whole circumstances, that the period was or was not too short to allow him to judge from the man's own wages what a proper average wage would be. If he thinks it is long enough he could then proceed arithmetically to determine the average. If he thinks it is not long enough he must take somebody in the same work and in the same grade, if he can find him. If there is no such person, then he must take somebody in the same grade in some other work in the neighbourhood, keeping steadily in view the first sentence of subsection 2 (a), to find what that man in the course of the year would earn fairly one week with another, and not pinning his attention particularly to the week or the few weeks preceding the time at which the accident actually happened.

Carter v. Lang
& Sons.

Ld. President.

LORD M'LAREN.—I concur in the opinion of your Lordship in the chair, and only add a few words on the construction of section 2 (a) of the First Schedule. That portion noted as (a) consists of two provisions, the first being a direction as to how the average weekly earnings are to be ascertained, and the second being a proviso to the effect that where it is impracticable to obtain a sound average in the ordinary way, the arbitrator may draw his conclusion by considering what would be the average wage earned by a person in the same class and grade of employment. Under the statute of 1897 we had no difficulty in knowing what to do, because the statute gave right to a sum described as average weekly earnings. The week was the unit, and whether the number of weeks was great or small, the arbitrator, and the Court in reviewing his judgment, had only to perform the operation of ascertaining the arithmetical mean by adding together the wages received in various weeks and dividing them by the number of weeks. In cases like *Grewar*,¹ where the method was applied to short periods—in that case consisting of two broken weeks—the mean of two broken weeks would certainly not give a proper approximation to the wage that a healthy man might earn in the course of the year. But then no other mode of estimating the wage was open to the arbitrator or to the Court, and after all it was for the benefit of the workman that he should be awarded a sum based on this computation, small as it was, because in no other way could he get anything. It seems to have been brought to the notice of the Legislature that there

¹ 4 F. 895.

July 17, 1908. were cases where, owing to the shortness of the period, or the irregularity of the work, it was impossible to get fair results in this way. No doubt, if there are only two weeks, you may perform the operation of obtaining the amount by adding the two sums of wages together and dividing. But that is a mere arithmetical operation, and it does not follow that it would give a true estimate of the average earnings of the workman over a year. The principle of obtaining the mean result is to suppose there is some rule or permanent element underlying the varying elements of the computation. The object of taking the average is to eliminate all irregularities or incidental circumstances, and, of course, the greater the number of factors that are to be averaged, the greater is the probability of arriving at a true result. This is really elementary, and I only mention it because I think it explains the motive of the Legislature in this provision of rule 2 (a). I judge from the terms of the statute that we are not intended to lay down any definite criterion as to the number of weeks which would in all cases be sufficient to enable the arbitrator to arrive at a true average. The proviso has reference to particular cases, and it may be that while in this case, owing to the interruptions and other causes, we do not see that a fair average can be got out of nine weeks' employment, there may be many cases where three or four weeks would be quite sufficient to enable the arbitrator to get an average, as for example, in a case in which a man works steadily, and for the full number of working hours during the whole time. With regard to the mode of proceeding where there are irregularities in the period of service, I think we are safe in availing ourselves of the aid of so distinguished a mathematician and scientist as Lord Justice Moulton, and I quite agree that the mode of calculation which he proposes is sound, and applicable to the circumstances of the present case. I agree with your Lordship that the proper course is to remit the case to the Sheriff, as arbitrator, to proceed in terms of the rules we have referred to.

LORD KINNEAR.—I concur in the opinion of the Lord President.

LORD PEARSON was absent.

THE COURT pronounced this interlocutor:—"Find it unnecessary to answer the questions of law as put in the case: Recall the determination of the Sheriff-substitute as arbitrator, and remit to him to proceed."

ST CLAIR SWANSON & MANSON, W.S.—CADELL, WILSON, & MORTON, W.S.—Agents.

No. 176.

THOMAS FREDERICK FENTON LIVINGSTONE AND ANOTHER,
Complainers (Reclaimers).—*Aitken, K.C.—R. S. Horne.*

July 18, 1908. WILLIAM GIBSON AND OTHERS (Hew Hamilton Crichton's Trustees),
Respondents (Respondents).—*Cullen, K.C.—Hon. W. Watson.*

Fenton
Livingstone v.
Crichton's
Trustees.

Right in Security—Heritable Security—Personal obligation—Transmission to heir—"Personal right"—"Taking estate by succession"—Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. cap. 94), sections 9 and 47.—Section 9 of the Conveyancing (Scotland) Act, 1874, enacts, that a personal right to every estate in land shall vest in the heir by survivance. Section 47 enacts, that a heritable security for money constituted over an estate in land, together with any personal obligation to pay the debt, shall transmit against

any person "taking such estate by succession," and that the personal obligation may be enforced against such person by summary diligence. July 18, 1908.

Held that a person in whom a personal right to an estate in land has been vested by survivorship, but who has not made up a title thereto, or entered into possession, has not "taken" such estate by succession within the meaning of section 47 of the Conveyancing Act, 1874, and is not liable to personal diligence for the debts of his predecessor secured by bond over the lands. Fenton Livingstone v. Crichton's Trustees.

ON 18th May 1908 Thomas Frederick Fenton Livingstone, mid-shipman, H.M.S. "Bedford," a minor, and John Johnstone M'Murdo, solicitor, Airdrie, as his curator bonis, were charged at the instance of William Gibson and others, trustees of the deceased Hew Hamilton Crichton, W.S., and of the deceased Miss Margaret Crichton, to make payment of two sums of £1200 each contained in a bond and disposition in security over the lands of Easter Moffat, near Airdrie, granted by the deceased George Frederick James Fenton Livingstone. The bond was in ordinary form, and contained a personal obligation for payment of the amount due. The charge proceeded upon a warrant obtained in virtue of the Conveyancing (Scotland) Act, 1874. 1st Division.
Bill-Chamber.

Mr Thomas Frederick Fenton Livingstone and his curator presented this note of suspension.

The complainers averred:—(Stat. 1) "Thomas Frederick Fenton Livingstone is the eldest son of the late George Frederick James Fenton Livingstone of Easter Moffat, near Airdrie, who died on the 16th day of August 1907, survived by his widow and three children.

" (Stat. 2) "George F. J. Fenton Livingstone was the proprietor of the fee of the estate of Easter Moffat. The estate was, and is still, held in liferent by his mother, Mrs Christian Margaret Waddell or Fenton Livingstone, widow of the late Thomas Fenton Livingstone. At the date of the death of George Fenton Livingstone there were three bonds over the said property—(1) a first bond for £13,000 held by certain trustees; (2) a bond for £5000 in favour of Mr Livingstone Clarke; and (3) a bond of £3400 paid off to the extent of £1000, which was assigned to the extent of £2400 to the late Hew Hamilton Crichton, W.S., and his sister, Margaret Crichton, and the survivor of them, and is now held by the respondents, who are trustees under the trust-disposition and settlement of each of those parties. These bonds rank in the order above mentioned. Further, the estate is burdened with a secured annuity of £400 a year payable to the widow of George Livingstone, which comes into force on the death of the present liferentrix." (Stat. 3) "The late George F. J. Fenton Livingstone died intestate, and the complainer, Thomas F. Fenton Livingstone, has not made up any title to the estate of Easter Moffat.

" (Stat. 4) "The respondents, acting as trustees respectively of the late Hew Hamilton Crichton and the late Miss Margaret Crichton, have called upon the complainers to pay off the said bond which is held by them over the said estate of Easter Moffat. The complainers, in view of the fact that the said heir-at-law has not made up a title to said estate, have not paid said bond, and the respondents have charged the complainers by four separate charges, dated 18th May 1908, to make payment to them, as trustees foresaid, of the two several sums of £1200, with interest at 4 per centum per annum from the term of Martinmas 1907 until payment." (Stat. 6) "The estate of Easter Moffat is at present being enjoyed by Mrs Christian Margaret Waddell or Fenton Livingstone in virtue of the

July 18, 1908. **Fenton Livingstone v. Crichton's Trustees.** liferent right which she holds therein. . . . It is believed and averred that if the fee of the estate were put on the market at present, subject to the said liferent and annuity at present heritably secured thereon, it would not realise the sum of £18,000, being the amount of the prior bonds thereon. Even if Thomas F. F. Livingstone made up a title to the said estate he would not be *lucratus* thereby."

The complainers' statements were not in substance disputed.

The respondents stated :—"The said bond was duly called up, as at Whitsunday 1908, by intimation, dated 29th November 1907, addressed to and accepted by the firm of the complainer John Johnstone M'Murdo, as agents for the other complainer. They subsequently carried on negotiations on behalf of the said Thomas Frederick Fenton Livingstone for the continuation or partial repayment of said bond. The presentation of the present note is the first occasion on which the complainers have maintained that the complainer Thomas F. F. Livingstone is not the debtor in the bond held by the respondents."

The complainers pleaded ;—(3) The complainer Thomas F. Fenton Livingstone not having taken up said estate by succession, any personal obligation prestable against his father cannot be enforced against him by said charges, and they ought accordingly to be suspended.

The respondents pleaded ;—(2) The complainer Thomas F. F. Livingstone having succeeded to the security subjects, and the respondents' securities having transmitted against him, under and in terms of the Conveyancing (Scotland) Act, 1874, the complainers are liable to the diligence complained of, and suspension of said charges should be refused.*

On 12th June 1908 the Lord Ordinary officiating on the Bills (Guthrie) refused the note.†

* The Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. cap. 94), enacts :—

Sec. 9. "A personal right to every estate in land descendible to heirs shall, without service or other procedure, vest or be held to have vested in the heir entitled to succeed thereto, by his survivorship of the person to whom he is entitled to succeed, . . . and such personal right shall, subject to the provisions of this Act, be of the like nature, and be attended with the like consequences, and be transmissible in the same manner as a personal right to land under an unfeudalised conveyance, according to the existing law and practice."

Sec. 47. "Subject to the limitation hereinbefore provided as to the liability of an heir for the debts of his ancestor, an heritable security for money duly constituted upon an estate in land shall, together with any personal obligation to pay principal, interest, and penalty contained in the deed or instrument whereby the security is constituted, transmit against any person taking such estate by succession, gift, or bequest, or by conveyance, when an agreement to that effect appears *in gremio* of the conveyance, and shall be a burden upon his title in the same manner as it was upon that of his ancestor or author, without the necessity of a bond of corroboration or other deed or procedure ; and the personal obligation may be enforced against such person by summary diligence or otherwise, in the same manner as against the original debtor ; a warrant to charge may be applied for and validly granted in the Bill-Chamber or in a Sheriff Court in the form set forth in Schedule K hereto annexed. . . ."

† "OPINION.—The complainer's late father granted a bond for £3400 over his estate of Easter Moffat. To the extent of £2400 that bond is held by the respondents. The complainer is the eldest son and heir of his late

The complainers reclaimed.

July 18, 1908.

Parties were heard on 23d and 24th June 1908.

Argued for the complainers;—The personal obligation in the bond was enforceable only against a person who had “taken” the estate by succession.¹ “Taking” involved the idea of doing something, either by making up a title, or by intromitting with the estate.² It would be a complete novelty to enforce such an obligation against a person in whom a personal title had vested by survivorship, but who had taken no steps to complete his title or to accept the succession. If mere survivorship were enough to effect this result, it would do away with the right of the heir to a period of six months in which to decide whether or not to make up a title. The respondents’ argument was inconsistent with section 13 of the Conveyancing Act, according to which the period when the title of an heir could be challenged commenced at the date of his infestment, and not the date of his predecessor’s death. Section 9 of the Act merely conferred the right to take up the succession. The charge should further be suspended on the ground that, even if the complainer be held to have taken the estate, he was liable only in so far as he was thereby *lucratus*,³ and that in fact he was not *lucratus*, the estate being insufficient to pay the debts secured upon it. This could competently be pleaded in the present action, and the complainer’s position was not prejudiced by the fact that he had not renounced the succession. Renunciation was an answer in an action of adjudication, but had no place in the present process. The respondents had mistaken their remedy, which was to sell the estate.

Fenton
Livingstone v.
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Argued for the respondents;—The object of section 9 of the Conveyancing Act was to abolish the gap between the date of the ancestor’s death and the date on which the heir took steps to complete his title, and to confer on the latter, as from the date of death, the rights in, and the correlative liabilities with respect to, the estate to which he succeeded. By the operation of that section, and by the mere

father. He has not made up any title to his father’s estate. He has been charged by the respondents to pay the £2400 in the bond granted by his late father.

“The question of the complainer’s liability turns on the construction of section 47 of the Conveyancing Act of 1874. If he has taken his father’s estate by succession in the sense of that section, then he is liable. But if, before the section can apply, an heir must make up a title to the estate, then he is not liable; for he has made up no title.

“Contrary to my first impression, I think the section applies. The expression ‘taking such estate by succession’ is capable of being read either actively as equivalent to ‘taking up the succession by making up a title thereto,’ or passively as equivalent to ‘becoming entitled to the succession.’ I prefer the latter reading. It seems to me that the scheme of the Act is, under section 9, to confer on an heir the benefit of a transmissible personal title to his ancestor’s estate without making up a title, and, under section 47, to impose on the heir the corresponding burden of liability for the debts of his ancestor, even although he has not made up a title. The reference in Schedule K to a person in the position of the complainer as ‘the present proprietor’ does not imply that a title has been made up. He has become proprietor by virtue of section 9 of the Act. See *M’Adam*, 6 R. 1256.”

¹ Conveyancing (Scotland) Act, 1874, sec. 47.

² *Lamb v. Field*, Oct. 30, 1889, 27 S. L. R. 242.

³ *Welch’s Executors v. Edinburgh Life Assurance Co.*, May 29, 1896, 23 R. 772; Conveyancing Act, 1874, sec. 12.

July 18, 1908. fact of survivance, he became the proprietor,¹ and as such liable to personal diligence for the debt due under the bond. He was the person described in Schedule K (which contained the statutory form of minute of charge in connection with section 47), as "the present proprietor of the lands"—"lands" including "any interest in land,"² such as the personal right conferred by section 9. Accordingly a person in whom a personal right had vested under section 9 was a person who had "taken" the estate by succession within the meaning of section 47. The case of *Lamb*,³ cited by the complainers, was an Outer-House decision, and the case of *M'Adam*⁴ was apparently not before the Court when it was argued. Neither under the Conveyancing Act, 1874, nor under the previous law, was completed infetment required in order to make an heir liable for his ancestor's debts. If he desired to escape this liability, it was necessary for him to renounce the succession. This was the law prior to 1874,⁵ and it had not been altered by section 12 of the Conveyancing Act, 1874. As the complainer had failed to renounce, he was liable for the whole debt.

At advising on 18th July 1908,—

LORD KINNEAR.—This is a note of suspension by Mr Thomas Fenton Livingstone, midshipman, a minor, and his *curator bonis*, of a charge to make payment to the respondents of two several sums of £1200 with interest. The ground of charge is that the complainer is the eldest son and heir-at-law of the late George Frederick Fenton Livingstone, who was proprietor of the estate of Easter Moffat, that the respondents are in right of a bond and disposition in security for £2400, granted over the estate by the father, and that the son as heir-at-law is by force of the Conveyancing Act of 1874 liable in the personal obligation undertaken by the father, so as to be subject to direct personal diligence for payment. The position of the estate is not, perhaps, material to the question, but I infer from statements on the record that the chargers, whose bond is postponed to two prior bonds for larger sums, do not expect to recover the full amount of their security from the estate, and therefore they desire to fix a personal liability on the complainer. The latter, however, has made up no title to the estate; he has not entered into possession or taken any advantage from it whatsoever; and the only ground on which he is said to be liable is that he stands in the relation of heir-at-law to the actual debtor. He is, in fact, the eldest son as well as the heir-at-law, but the ground on which his liability is alleged would obviously be equally applicable to any other heir of the investiture, however distant his blood relationship to the deceased might be, and however ignorant he might be of the succession. It is enough, according to the respondents' argument, to make any person liable by mere survivance for the debts of a deceased landowner if they are secured over the land, that the one should

¹ *M'Adam v. M'Adam*, July 15, 1879, 6 R. 1256; Conveyancing Act, 1874, sec. 10.

² Conveyancing Act, 1874, sec. 3.

³ 27 S. L. R. 242.

⁴ 6 R. 1256.

⁵ Bell's Comm. (7th ed.), vol. i., p. 706; Ersk. Inst. iii., 8, 68; Parker on Adjudications, pp. 72-74; Strachan's Heirs v. His Creditors, 1738, M. 5348; Act 1695, c. 24.

stand in the legal relation of heir-at-law to the other, or, as the Lord Ordinary puts it in his opinion, that he "becomes entitled" to the succession, whether he does anything to appropriate the succession, or derive any benefit from it or not. I must confess I should have had no difficulty in rejecting that proposition without hesitation, were it not for my respect for the judgment of the Lord Ordinary, which is entitled to all the more weight because his Lordship explains that his conclusion is contrary to his own original opinion, and has therefore not been reached without consideration. I must confess, however, that my own original opinion was exactly the same as that of the Lord Ordinary, and that it is not shaken, but, on the contrary, confirmed, by further consideration of the clauses of the statute upon which the respondents' case is founded.

The respondents' argument is rested on sections 9 and 47 of the Conveyancing Act. The 9th provides that a "personal right to every estate in land descendible to heirs shall, without service or other procedure, vest or be held to have vested in the heir entitled to succeed thereto by his survivance of the person to whom he is entitled to succeed . . . and such personal right shall, subject to the provisions of this Act, be of the like nature, and be attended with the like consequences, and be transmissible in the same manner as the personal right to land under an unfeudalised conveyance, according to the existing law and practice." The legal effect of that enactment is to my mind perfectly clear and simple. The heir-at-law, without making up a title, and, as the Lord President puts it in the case of *M'Adam*,¹ without even beginning to make up a title by serving heir to his predecessor, has by force of the statute a complete personal right to the lands. He is in the same position as if he had obtained a deed on which he might have been infeft but had not taken infeftment. He may therefore deal with the estate if he pleases as freely as any owner not infeft but standing on a good personal right. He may sell it or grant bonds over it to creditors. But all that will not make him liable for the debts of his predecessor, provided he does nothing to subject himself to such liability, either by taking up the estate formally by completing title or by taking possession of it and so incurring a passive representation. It is said that a person in this position is referred to in Schedule K as proprietor of the lands. That may or may not be a very apt expression for defining his position. It is unnecessary to consider whether it is so or not, because the statute itself has told us, in the enacting part of the clause, what is meant by the proprietor. It is a person having a personal right, who may have done nothing to make his personal right effectual. That entitles him to take the estate if he pleases, but it does not oblige him to do so. A disponee under a deed of conveyance does not become liable for the debts of the disponer on the mere delivery of the conveyance, and the legal position of the heir in whom a personal right is vested by mere survivance is exactly the same as that of such a disponee. So far, therefore, as the 9th section goes, I am unable to see that it advances the respondents' claim in any way.

But then they found upon the 47th section, and I think the true question between the parties arises out of that section. It provides

¹ 6 R. 1256.

July 18, 1908. that subject to a certain limitation as to liability of an heir for the debts of his ancestor, "an heritable security for money duly constituted upon an estate in land shall, together with any personal obligation to pay principal, interest, and penalty contained in the deed or instrument whereby the security is constituted, transmit against any person taking such estate by succession, gift, or bequest, or by conveyance, when an agreement to that effect appears in *gremio* of the conveyance," and so on. Now, that is the clause upon which it is said that mere survivance of a person who has effected a security over his estate will subject his heir-at-law to direct personal diligence without any steps being taken to constitute a debt against him, and without his having done anything to indicate that he has taken over the debt or the estate of his ancestor who originally undertook the liability. The whole question seems to me to depend on what is meant by words that are perfectly plain words according to our legal language. What is meant by "taking the succession"? The Lord Ordinary says it means to become entitled to a succession. I cannot give that meaning to the words even taking them as words of ordinary language, because it is one thing to become entitled to a right and another to take it, and if a person who becomes entitled does not desire to take it, he may let it alone with all the encumbrances with which it is affected. But it is in truth a term of legal language, and if we come to the first book which naturally suggests itself to one as an authority for ascertaining how successions are to be taken up and how a successor is subjected in liability for his predecessor's debt—I mean Mr Bell's Principles—we find that in starting his exposition of the law of passive representation he uses exactly the phrase of the statute, and says a person may become liable for his ancestor's debts by taking the *hereditas*, which is only substituting the Latin word for the English one—by taking the succession he will be liable for his ancestor's debts; and he goes on to explain how he may take the succession so as to have that effect. The methods by which he undertakes that liability are, of course, perfectly well known and elementary. He may make up a title or he may take benefit from the estate so as to subject him to passive representation; but if he holds aloof from it and does nothing, there is no ground in law, so far as I can see, for saying that he has become subject to personal diligence for the debts of a man whose property he has not taken up and may not intend to take up. I am therefore very clearly of opinion that the interlocutor which the Lord Ordinary has pronounced is not well founded, and that the charge is baseless and must be suspended. I say nothing at all as to the other remedies which may be open to the respondents. What the proper proceedings may be for realising the subject of their security, or attaching the other estate of their debtor, are questions for them to consider. They are not before the Court; but so far as this charge is concerned I am of opinion that the statute gives them no right to use personal diligence against the complainer.

LORD MACKENZIE.—In my opinion the complainer has not taken the estate by succession within the meaning of sec. 47 of the Conveyancing Act of 1874, and therefore cannot be charged to pay the sums contained in the bond granted by his late father. He has not made up a title to the

estate, nor has he subjected himself to the responsibilities of an heir by any July 18, 1908.
passive title. He has done nothing. In these circumstances, I am unable
to take the view that he has subjected himself to personal diligence.

It was said that this liability attaches to the complainer because of the
operation of sec. 9, by which a personal right to the estate vested in him
by mere survivance. This personal right, however, is by the section declared
to be of the like nature and to be attended by the like consequences, and
to be transmissible in the same manner, as a personal right to land under an
unfendalised conveyance, according to the existing law and practice. If
this be so it cannot involve the consequence for which the respondents
contend.

I am accordingly of opinion that the charges should be suspended.

LORD M'LAREN.—I concur in Lord Kinnear's opinion. We recall the
Lord Ordinary's interlocutor, sustain the third plea in law, which is the
ground on which he proceeded, and remit to the Lord Ordinary to pass the
note and to give decree for expenses.

The LORD PRESIDENT and LORD PEARSON were absent.

THE COURT recalled the interlocutor reclaimed against, and
remitted to the Lord Ordinary to sustain the third plea in law
for the complainers, to pass the note of suspension, and to
proceed as accords.

DRUMMOND & REID, W.S.—TAIT & ORICHTON, W.S.—Agents.

MRS ISABELLA SIMPSON OR HENDRY, Appellant.—*Dickson, K.C.*— No. 177.
Moncrieff.

THE UNITED COLLIERIES, LIMITED, Respondents.—*Hunter, K.C.*— July 18, 1908.
Carmont.

Master and Servant—Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), secs. 1 (1) and 2, and First Schedule, sec. 1 (a) (i).—Dependant—
Dependant's Executor—Personal or Transmissible—Title to sue.—Held (diss.
Lord M'Laren) that the right to compensation, conferred by the Workmen's
Compensation Act, 1906, on the dependant of a deceased workman, vests in
the dependant on the death of the workman, and transmits to the repre-
sentatives of the dependant, although the dependant may have made no
claim for compensation during his lifetime.

Darlington v. Roscoe & Sons, [1907] 1 K. B. 219, followed.

O'Donovan v. Cameron, Swan, & Company, [1901] 2 I. R. 633, dis-
approved.

MRS ISABELLA SIMPSON OR HENDRY, executrix-dative of the deceased 1ST DIVISION.
Mrs Marion Wilson or Simpson, claimed, as such executrix, from the Sheriff of
United Collieries, Limited, the sum of £300, which she alleged to Lanarkshire.
have been due to the deceased Mrs Simpson as compensation under
the Workmen's Compensation Act, 1906,* for the death of her son,

* The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), enacts,
sec. 1 (1).—"If in any employment personal injury by accident arising out
of and in the course of the employment is caused to a workman, his employer
shall, subject as hereinafter mentioned, be liable to pay compensation in
accordance with the First Schedule to this Act."

Sec. 2 (1). "Proceedings for the recovery under this Act of compensation

July 18, 1908. **Alexander Simpson.** The matter was referred to the arbitration of the Sheriff-substitute of Lanarkshire, at Hamilton (Thomson), who refused compensation and, at the request of the applicant, stated a case for appeal.

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The case set forth :—"The following facts were admitted or proved:—(1) That the said Alexander Simpson was in the employment of the respondents as a miner on 9th July 1907; (2) that on said date he was knocked down by a train of waggons which were being shunted on the respondents' premises, and received injuries from which he died on 14th July following; (3) that his mother, the said deceased Mrs Marion Wilson or Simpson, who was as is averred dependent upon the said Alexander Simpson, died upon the 16th October 1907, without making any claim upon the respondents for the death of her son; (4) that a claim was first made on 10th December 1907, and was at the instance of the present applicant; (5) that shortly after the accident the present applicant's husband called on the respondents' cashier and inquired whether the accident had been reported and was informed that it had, and on his calling again a few days later he was informed that the respondents considered that no compensation was due in respect of the accident: That it is not proved that he was then acting on the instructions of his mother-in-law: That he made no claim nor intimated any intention to make a claim either on behalf of his mother-in-law or of the present applicant.

"In these circumstances I found that the applicant, as executrix of the said Mrs Marion Wilson or Simpson, had no title to take proceedings for compensation under the Act, and I therefore assoilzied the respondents, with expenses."

The question of law for the opinion of the Court was :—"Whether, in the circumstances above set forth, the right of the mother of the deceased workman to make a claim and to take proceedings under the Act vested in the applicant so as to entitle her to insist in the present application?"

The case was heard before the First Division on 26th and 27th May 1908.

Argued for the applicant and appellant;—As soon as a workman died from the result of an accident leaving a dependant, a right to a specific sum as compensation vested in that dependant in virtue of sec. 1 (1) of the Act of 1906 and the First Schedule thereto, sec. 1 (a) (i). If that right vested it transmitted in ordinary course to his representatives on his death, and could be enforced by them. Such an interpretation was doing no violence to the words of the Act, for there was no provision in the Act limiting the right of recovery to the dependant himself. Nor was there anything in the Act to limit

for an injury shall not be maintainable unless . . . the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death."

First Schedule. (1) "The amount of compensation under this Act shall be—

"(a) where death results from injury—

"(i) if the workman leaves any dependants wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of One hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case Three hundred pounds. . . ."

the transmission of this right to cases where the dependant had him- July 18, 1908.
self made a claim during his lifetime. There was no analogy between
a claim for compensation under this Act and an *actio personalis*, and
therefore the maxim *actio personalis moritur cum persona* had no
application. The right to compensation was a right conferred by
statute; it was really a civil debt, and bore no analogy to an *actio*
personalis arising out of delict.¹ No doubt *O'Donovan v. Cameron,*
*Swan, & Co.*² was against the appellant's contention, yet that case
was not binding in Scotland, and it had been doubted in *Darling-*
*ton.*³ The views expressed in *Darlington*³ were sound, and should
be followed.

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Argued for the respondents;—It was a false construction of the Act
to say that by its provisions a right to a specific sum vested in a
dependant on survivance of the injured workman. All that the Act
did was to create a contingent liability in the employer to pay com-
pensation, the contingency being that the compensation should be
claimed. The claim, too, must be definite, it must be for a specific
sum.⁴ Without a claim no specific sum vested in a dependant, as
was clear from secs. 5 and 8 of the First Schedule, which provided
for the allocation of the compensation fund amongst the dependants.
Further, the appellant was not a person entitled to claim under the
Act. The persons entitled to claim were defined in sec. 13 of the
Act, viz., the dependants. There was no mention in the Act of
representatives of dependants. The decision in *O'Donovan*² was
directly applicable here, and should be followed, and that decision
was to the effect that the making of a claim by the dependant was
a condition precedent.⁵ In spite of the remarks made in *Darlington*⁶
the weight of the decision in *O'Donovan*² was not really shaken in
the later case, for there a claim had been made. The contention for
the appellant was directly opposed to the policy and intention of the
Act, which was to provide compensation as an alimentary fund to
the dependants, not to give it to those who were not dependants, and
might in fact be persons of independent means.

At advising on 18th July 1908,—

LORD KINNEAR.—I have found this to be a question of difficulty not only
because there is a difference of opinion on the Bench, but because I am
unable to follow a judgment of very high authority pronounced by the
Court of Appeal in Ireland in the case of *O'Donovan v. Cameron, Swan,*
*& Company.*³ But the question is the same as that which has arisen under
the 1st section of the Workmen's Compensation Act of 1897 when read
along with the 1st section of the First Schedule; and the true construction
of that enactment is, in my opinion, that adopted by the Court of Appeal
in *Darlington v. Roscoe*,⁶ with which, if I may respectfully say so, I

¹ *Darlington v. Roscoe & Sons*, [1907] 1 K. B. 219; *Peebles v. Oswald-*
twistle Urban District Council, [1896] 2 Q. B. 159; *Bern's Executor v.*
Montrose Asylum, June 22, 1893, 20 R. 859; *Auld v. Shairp*, Dec. 16, 1874,
2 R. 191.

² [1901] 2 I. R. 633.

³ [1907] 1 K. B. 219, Cosens-Hardy, L. J., at pp. 229-230.

⁴ *Kilpatrick v. Wemyss Coal Co., Limited*, 1907, S. C. 320.

⁵ [1907] 1 K. B. 219, Collins, M. R., at p. 225.

⁶ [1907] 1 K. B. 219.

July 18, 1908. entirely concur. The condition of fact upon which the question arises is, as I understand it, exactly the same, because the sole dependant who would have been entitled to compensation for the death of a workman has died before compensation could be awarded, and a claim is now made by her representative. With reference to such a state of things the Master of the Rolls in the case I have referred to, after reading the sections which I have mentioned, says,—“It appears to me that these enactments give to the person wholly dependent on the deceased workman a statutory right to a quantified sum by way of compensation for the death of the workman. There is no action at all, nor is it a question of any wrong done by the employer, for the accident may not have happened through any negligence of his, or for which he was responsible. The statute confers upon the dependant, under the given conditions, a right to be paid by the employer a measured sum of money, the amount of which is quite irrespective of any probabilities as to duration of life or other such considerations, which might involve the making of elaborate calculations. . . . It appears to me that a statutory right to this ascertained sum accrued to the widow in her lifetime and passed to the respondent as her legal personal representative.” Now, if there is a statutory right to a sum of money accrued, I am unable to see any ground in law for holding that it does not transmit to the representative of the person to whom it accrued. It is a right to a sum of money given, not by way of *solatium* to an injured person, but for the benefit of the personal estate of the dependant who has suffered a patrimonial loss by the death of the person on whom she depended, and according to our law I hold it to be quite settled that a right of that kind once vested as a moveable claim passes to the personal representatives or to assignees.

I do not think it necessary to examine the authorities in detail, because the principle I have stated is elementary; but I refer in general to the opinion of Lord Neaves in *Auld v. Shairp*,¹ because that opinion was cited by Lord Watson in *Darling v. Gray & Sons*,² as a sound exposition of the law of Scotland, and I take the result of it to be that even where a claim is made by way of compensation for a personal wrong it is a claim which according to our law transmits to the representatives of the claimant and against the representatives of the wrongdoer. The decision comes to this, that a civil debt is transmissible to executors. Lord Neaves was dealing there with a case which, I agree with his Lordship in the chair, is not that which arises here, because it was an action in respect of a wrong done by the defender, but then I think the exposition of the general law is none the less valuable or the less apt in its bearing upon the present discussion, because the point of the judgment was that the transmissibility of such a right of action depends upon the same law as that of an ordinary civil debt; and we are relieved from any difficulty which might otherwise have been supposed to arise as to the extent to which the law so laid down should be qualified in construing a statute, applicable to England and Scotland alike, by the doctrine embodied in the maxim *actio personalis moritur cum persona*, since it appears from the decision in *Darlington v. Roscoe*,³ that,

¹ 2 R. 191.

² July 14, 1891, 18 R. 1164.

³ [1907] 1 K. B. 219.

even in the law of England where that maxim is accepted, it has no bearing on the question of the Workmen's Compensation Act. As Lord Watson points out, it is only to a very limited extent that that maxim has been recognised in Scotland, but so far as I understand it, I am very clearly of opinion that it has no bearing, because it is applicable only to actions arising out of a wrong. In the case of a person injured by a legal wrong, if the person injured dies, his claim does not transmit to his representatives; if the wrongdoer dies, the claim against him does not transmit against his representatives. I have no difficulty in holding with the learned Judges in England that that is not a rule of law which can be applicable to the right given to a workman under the Compensation Act. That is not technically a right of action, and it arises independently altogether of any wrong. It is statutory compensation for a patrimonial loss.

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But then, if that maxim does not apply, I am unable to see any plausible ground for holding that a vested right in the compensation money does not transmit. I confess I am not moved by any consideration as to the policy of the statute, because while I entirely agree that the persons favoured by this statute are the immediate dependants of the workman, and not any remoter relations or any dependants of theirs, the question is not Who are the persons favoured by the Act, but What is the character of the right which the Act has conferred upon them? If it is a right to a sum of money which vests as a moveable right, then under our law it transmits, and we cannot deny the effect of a settled doctrine of law from deference to any speculation as to the purpose of the Legislature in conferring a particular benefit.

But the question remains, which it was not necessary to decide in *Darlington v. Roscoe*¹—and it is one which, to my mind, is more difficult because of the judgment in the Irish case of *O'Donovan*²—whether it is not a condition precedent that a claim shall be made within six months from the occurrence of the accident causing the injury. I think it is a condition precedent to the institution of statutory proceedings for obtaining an award, but not precedent to the vested right. It is not so expressed. The first clause, which creates the liability, and therefore the corresponding right, is absolute in its terms, and when read along with the clause in the section which fixes a specific compensation in a particular case, it amounts to the creation in favour of a person defined of an absolute right to a definite sum of money. That a right so conferred should vest so as to be transmissible, and yet that the person in whom it has vested should be required to take proceedings within a definite time in order to make it effectual, is a condition which is perfectly familiar to our law. There is a familiar instance in the Triennial Act. A creditor in certain debts must bring his action within three years, otherwise “he shall have no action.” It is exactly the same kind of enactment as that of the Compensation Act, that proceedings shall not be maintainable unless made within six months. But no one ever doubted that the creditor's right, although it must be enforced within a certain time, was nevertheless transmissible to his executors, subject always to the same condition as to the time when an action might be brought.

¹ [1907] 1 K. B. 219.

² [1901] 2 I. R. 633.

July 18, 1908. Accordingly it seems to me that the vesting of the right is not affected by the condition as to procedure.

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It is said that this is a claim which must be made by the dependant himself, that it can only be made by a living dependant, and therefore that when the dependant has died there is nobody to make it. I am unable so to read the words. The condition is that proceedings are not to be maintainable unless the claim for compensation shall be made within six months. It must be made, of course, by the person entitled to make it, but if it should be held that it is a vested right which is transmissible to executors, there is nothing in the words which will not be satisfied if the executor makes the claim. The question as to the force of the condition really depends upon the meaning of the section creating the right. If it means that a right shall accrue, but that proceedings must be taken within six months, that condition will be satisfied if they are taken within that time by the person in whom the right is then vested. If it means that no right shall accrue unless and until a claim shall be made, and that within six months, it follows that no right passes to the representatives of a dependant who has not made a claim. I prefer the former view, although, for the reason I have stated, I cannot hold it with confidence. I am therefore unable to agree with your Lordship in the chair and the Sheriff, and I think the question which the Sheriff puts to us must be answered in the affirmative.

LORD MACKENZIE.—Alexander Simpson, a miner, met with an accident on 9th July 1907, while in the employment of the United Collieries, Limited, and received injuries from which he died on 14th July following.

The mother of the deceased, who was, as is averred, dependent on him, died upon 16th October 1907 without making any claim for compensation. A claim was first made under the Act of 1906, on 10th December 1907, by the present appellant, who is the executrix of the mother of the deceased.

The question in the case is "Whether, in the circumstances above set forth, the right of the mother of the deceased workman to make a claim and to take proceedings under the Act vested in the applicant so as to entitle her to insist in the present application?"

The statute, by section 1 (1) and the First Schedule, section 1 (a), imposes an obligation upon the employer, subject as thereafter mentioned, to make payment of compensation. The liability is one not founded upon contract or delict. It does not require to be established in an action. The compensation, in the case of the death of the workman leaving any dependants dependent upon his earnings, is to be paid as a capital sum. This is not calculated with reference to the expectation of life of the dependant. The liability to pay, once the right has vested, is the same whether the dependant survives the workman days or years.

The contention of the respondents is that no right in this capital sum, the amount of which is fixed by the Legislature, accrues to the dependant unless and until, in terms of section 2, "the claim for compensation with respect to such accident has been made, in the case of death, within six months of the time of death." It appears to me that the purpose of this section was to protect employers from claims which had been deferred for an indefinite period. The claim for compensation in the present case was

made within six months of the time of death, therefore what would appear July 18, 1908. to me to be the purpose of the section has been served. The respondents, however, say that no right to receive the compensation which they are liable to pay vests, unless the claim is made by the dependant himself or herself, and that, therefore, if the dependant dies without having made a claim, his or her representative cannot do so. The contrary view, that the right does vest, although subject to a limitation, is one not unfamiliar to the law of Scotland. A vested right may be subject to limitation imposed either by convention or statute. An example of this is the limitation attached by statute to cautionary obligations. It seems more likely that it was intended that the right to compensation should vest from the time of death, so as to form a fund of credit. The necessities of the dependant commence with the death. There seems to be no sufficient reason why the right to compensation should not vest at the same date.

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kenzie.

It was said that the applicant here was not one of the persons who, under the statute, could make a claim. Section 13 declares that "any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative, or to his dependants or other person to whom or for whose benefit compensation is payable." The contention is that the omission of any reference to the personal representatives of the dependants excludes the idea that it was intended they could make "the claim for compensation" under section 2. The omission of any reference to the representatives of the dependants is quite consistent with the idea that the statute vests a right to compensation in the dependant by survivance of the workman. Any rights which they obtained under the Act would, without any statutory provision, be vindicated by their executors or assignees under the ordinary law. Nor are sections (5), (7), and (8) of the First Schedule, which provide for the apportionment of the compensation partly to total and partly to partial dependants, contrary to the theory of vesting. There may be vesting in a class, subject to variation as regards the extent of the interest taken by each member of the class.

The fallacy at the root of the respondents' argument appears to me to be the supposition that the claim for compensation, which is made in order to compel performance of a statutory duty, is analogous to an action in which damages are sought on the ground of delict. The two are not analogous. They are brought into contrast by the Act itself, *e.g.*, in section 1 (4), which provides—"If within the time hereinafter in this Act limited for taking proceedings an action is brought to recover damages independently of this Act." So also in section 6. Upon this *Powell v. Main Colliery Company*¹ may be referred to. It was there held that the claim for compensation does not mean the initiation of proceedings before the tribunal by which the compensation is to be assessed, but a notice of claim for compensation, which does not require to be in any prescribed form, sent to the workman's employer.

In the Irish case of *In re O'Donovan v. Cameron, Swan, & Company*,² (under the 1897 Act), it was held, in circumstances similar to the present, that because no claim for compensation, as required by section 2 had been

¹ [1900] 2 Q. B. 145, A. C. 366.

² [1901] 2 I. R. 633.

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made during the dependant's lifetime, a claim could not be made by the dependant's legal personal representative. With all deference to the opinions expressed in that case, I am unable, for the reasons stated, to reach this result.

In the case of *Darlington v. Roscoe & Sons*¹ (also under the 1897 Act) the dependant made a claim under the Act of 1897, but died before any award was made in respect of that claim, and it was held that the right of compensation survived, and passed to the legal personal representative of the dependant. This case was therefore distinguishable from that of *O'Donovan*.² The opinions, however, expressed in *Darlington*,¹ as I read them, support the view that the right to compensation accrued to the mother in her lifetime, and passed to the appellant as her legal personal representative. There is no material difference between the 1897 and the 1906 Acts as regards this question.

I am therefore of opinion that the question should be answered in the affirmative.

LORD M'LAREN.—I regret that I am unable to concur in the opinions which have been delivered, but as my opinion will not affect the judgment of the Court, I shall confine myself to a brief statement of the grounds on which I conceive that the respondents are not liable to pay compensation money to the appellant.

My opinion is founded mainly on the view I take of the policy of the Act of Parliament, which, as I think, was not intended to constitute any general obligation on the part of employers to pay a sum of money in respect of the death of an employee from accident arising in the course of his service, but was only intended to secure to those who were dependent on his earnings compensation for pecuniary loss which they might sustain by being deprived of the support which they had been in use to receive from their deceased relative.

It is true that where compensation has been awarded to a dependant who dies before he or she has been able to make use of the money, the compensation money, or what remains unexpended, will pass to the executors as part of the deceased's estate; but that is only because in the case of death resulting from an accident the compensation is given in the shape of a capital sum, and where the sum has been awarded it vests in the dependant, and is assignable and transmissible to executors or next of kin. If a claim is made within the statutory period, and the dependant dies before an award has been made, I should consider that a right to an award of compensation had vested in the dependant, and that a right to follow out the proceedings in the arbitration passed to the legal personal representative, because a vested right is property and is transmissible as such. But then I think it is a condition of the dependant's right to compensation that he shall make a claim within the statutory period, and if he does not choose to make a claim, or if he is prevented by death from making a claim, the employer's liability (which is contingent on a claim being made) comes to an end. In this case the claim was made within the prescribed period, but it was not

¹ [1907] 1 K. B. 219.

² [1901] 2 I. R. 633.

made by the dependant, but by her executrix, and I cannot find in the July 18, 1908. language of the statute that a claim is allowed to anyone other than the dependant. The appellant does not profess to have been dependent on the earnings of the deceased miner; she sustained no loss through his death, and her claim does not seem to me to fall within the scope or object of the statute, which is to provide compensation to those who have suffered. The distinction may be illustrated by supposing the case of a workman who is survived by more than one dependant. One of the dependants dies without having made a claim. I should have thought that in such a case the compensation money would go to the surviving dependants, but according to the decision proposed this would not be a good award unless a share of the money were allotted to the next of kin or executor-dative of the deceased dependant—a person who had not suffered, and who might not be in want.

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On this question the decisions of the English and Irish Courts are conflicting. My opinion has the support of the Appeal Court of Ireland in the case of *O'Donovan*,¹ but I do not wish to be understood as concurring in their Lordships' decision in so far as it is founded on a rule of law expressed by the maxim *actio personalis moritur cum persona*. I do not think that a claim under the Workmen's Compensation Act can be described as *actio personalis*, and I see difficulty in extending the maxim by a supposed analogy to cases of this description, because the maxim is merely a statement of an arbitrary rule without the necessary limitations, and because it does not embody anything that I can recognise as a principle capable of extension to cognate cases.

My opinion in the case of *Bern*,² which was referred to in the arguments in this case, did not proceed on the assumption that this law maxim had been recognised as a rule of practice by the Scottish Courts. My opinion was founded partly on the Roman law, which in the passages quoted from the Digest negatived the right of the representatives of an injured person to prosecute the *actio injuriarum*, partly on the absence of any authority in our own law which could support such a claim, but also on the inconvenience and injustice of allowing representatives to make a claim which the injured person might have good reasons for not preferring in his own name.

I do not consider that the case of *Darlington*³ is conclusive one way or the other, because it only decides that a claim which has been made by the deceased dependant may be followed to its conclusion by the representatives, and that, I think, is a sound interpretation of the statute. While it may be that the authority of the case of *O'Donovan*¹ is somewhat shaken by the observations of the learned Judges in *Darlington's* case,³ I am of opinion that the claim is not well founded, and that the judgment of the arbitrator is right.

The LORD PRESIDENT and LORD PEARSON were absent.

THE COURT answered the question of law in the affirmative, recalled the determination of the Sheriff-substitute as arbiter, and remitted to him to proceed as accords.

SIMPSON & MARWICK, W.S.—W. & J. BURNES, W.S.—Agents.

¹ [1901] 2 Irish Rep. 633.

² 20 R. 859.

³ L. R., [1907] 1 K. B. 219.

No. 178. WILLIAM JACKSON ANDREW AND ANOTHER (Mrs Margaret Baillie or Hay's Trustees), Pursuers and Real Raisers and Claimants (Reclaimers).—*M'Lennan, K.C.—Mair.*

Hay's
Trustees v.
Baillie.

MISS JESSIE BAILLIE AND OTHERS, Claimants (Respondents).—*Macmillan.*

MRS CHRISTIAN CROSS STIRLING OR MORRISON, Claimant (Respondent).—*Black.*

Charitable and Educational Bequests and Trusts—Uncertainty—“Societies or institutions of a benevolent or charitable nature.”—A testatrix directed her trustee or trustees to apportion and pay over the proceeds of the residue of her estate “amongst such societies or institutions of a benevolent or charitable nature in such proportions as he or they shall in their own discretion think proper.”

Held (rev. judgment of Lord Johnston) that the bequest was to be construed as a bequest in favour of charitable societies and institutions, and was not void from uncertainty.

1st Division.
Ld. Johnston.

MRS MARGARET BAILLIE OR HAY, who resided at Holmwood, Uddingston, died on 29th December 1898, leaving a trust-disposition and settlement whereby she conveyed her whole estate to William Jackson Andrew and another, as trustees for the purposes therein set forth.

The last purpose of the trust-disposition and settlement was as follows:—“In the last place, I direct my trustees or trustee on the death of the survivor of me and the said Margaret M'Donald to apportion and pay over the free proceeds of the whole residue of my means and estate, after giving effect to the above provisions, to and amongst such societies or institutions of a benevolent or charitable nature in such proportions as he or they shall in their own discretion think proper, but excluding all societies or institutions either connected with the Roman Catholic body or under the control or management or even general management of those connected with that body.”

Margaret M'Donald, who was liferented in a portion of the estate, survived the testatrix and died on 5th January 1905. On her death the residue of the estate was set free to be distributed by the trustees.

A doubt having been expressed as to whether the bequest of the residue was not void from uncertainty, the trustees were advised that they would not be in safety to distribute the residue until the validity of the bequest had been determined by the Court. Accordingly, on 19th January 1907, they brought an action of multipoleinding, to which the whole heirs *ab intestato* of the testatrix were called as defenders, for the purpose of determining the disposal of the residue of the estate which formed the fund *in medio*.

A claim was lodged for the trustees (the pursuers and real raisers) in which they maintained that the residuary bequest was valid and should receive effect, and claimed “to be ranked and preferred to the whole fund *in medio* in order that the same may be administered by them in terms of the residuary clause of said trust-disposition and settlement; or, alternatively, in order that they may administer and divide the same amongst such of the testatrix's heirs *in mobilibus* as may be found thereto entitled.”

They pleaded;—(1) Said bequest of residue being valid and falling to receive effect, the claimants are entitled to be ranked and preferred to the whole fund *in medio* in terms of their primary claim. (2) In

any event, the claimants are entitled to be ranked and preferred thereto for the purpose of administration in terms of their alternative claim.

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Claims were also lodged for certain of the heirs *ab intestato*, who maintained that the bequest of the residue of the estate was void from uncertainty, and that it had accordingly fallen into intestacy, and fell to be distributed among the heirs *ab intestato* of the testatrix.

On 14th November 1907 the Lord Ordinary (Johnston) pronounced an interlocutor finding that the bequest in dispute was void from uncertainty, and therefore sustaining the claims for the defenders, and ranking and preferring the pursuers and real raisers to the fund *in medio* in terms of their alternative claim.*

* "OPINION.—The late Mrs Hay of Holmwood, Uddingston, directed her trustees to apportion and pay over the free portion of the residue of her estate 'to or amongst such societies or institutions of a benevolent or charitable nature in such proportions' as in their discretion they should think proper, but always to the exclusion of Roman Catholic societies or institutions. The validity of this bequest is challenged by the testator's next of kin, who maintain that it is void on the ground of uncertainty, in respect that though 'charitable' has, since the case of *Crichton* in 1828, 3 W. & S. 329, been recognised as sufficiently descriptive of a class of objects or institutions to receive effect in discretionary bequests of this nature, the alternative word 'benevolent' is not so descriptive, and has not been so recognised.

"The trustees, who support the bequest, did not, I think, go the length of maintaining that 'benevolent' and 'charitable,' taken by themselves as words in common use in the English language, are identical in meaning.

"But, I think, I may state their contention as embraced in these three propositions:—

"(First) That in the collocation of words used by the testatrix the disjunctive 'or' must be read as equivalent to the conjunctive 'and.'

"(Second) That 'benevolent' is identical with 'charitable,' or, at least, is used by the testatrix as equivalent to 'charitable,' so that the use of both words is a mere redundancy or surplusage.

"(Third) That the law of Scotland shews such favour to charitable bequests that to give effect to the bequest it will read 'benevolent or charitable' as intended to express no more than charitable—in fact, appeal is made to the principle of benignant interpretation of charitable bequests.

"Taking these points in their order:—

"(First) It is true that the conjunctive 'and' is sometimes read as having the same effect as the disjunctive 'or.' I cannot better illustrate this construction than by comparing the two cases of *Cobb's Trustees*, 1894, 21 R. 638, and *Williams v. Kershaw*, 1835, 42 R. R. 269. In *Cobb's* case the words were 'useful, benevolent, and charitable institutions.' In *Williams v. Kershaw* they were 'benevolent, charitable, and religious purposes.' In the former case the three adjectives were capable in natural combination of qualifying the same institutions, and there was no call therefore to read the 'and' as otherwise than conjunctive. Whereas in the latter case the three qualifications were not naturally found combined in the same institutions, and therefore to give a reasonable interpretation to the adjectives in combination, it was necessary to read the 'and' as distributive and not conjunctive, and that necessity is the only justification of the interpretation—(see Lord Rutherford Clark in *Cobb's* case at page 641). But where the distributive 'or' is used there can never be the similar necessity for interpreting it as conjunctive. If the qualifying adjectives are merely equivalents, it does not matter whether they are connected conjunctively or disjunctively. If they are not mere equivalents, but being distinctive in

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The claimants, the pursuers and real raisers, reclaimed, and the case was heard before the First Division on 2d and 3d July 1908.

Argued for the reclaimers;—(1) It could not be disputed that if the word "charitable" alone had been used, the bequest would have been good.¹ But in the phrase "benevolent or charitable" the use of "or" was really conjunctive, not disjunctive. The words were in fact employed as synonymous or as exegetical of one another, and not for the purpose of describing institutions of a distinctive character. It was impossible to draw any distinction between "charitable" and "benevolent." The interpretations that had been put upon the word "charitable" were equally applicable to "benevolent."² The use of the words as qualifying "institutions" emphasised the view that they were synonymous or exegetical. The phrase was, in fact, equivalent to "benevolent and charitable," and that phrase had again and again been construed as forming a good bequest.³ (2) Even if

meaning, are capable of alternative use, there is no necessity to construe the distributive 'or' in any other than its natural meaning, and every reason for construing it in that meaning. And this, I think, will apply, even though the adjectives disjunctively used have, in part, a common sense—that is, to a certain extent, overlap.

"I cannot therefore read 'or' as equivalent to 'and.' No instance was quoted to me in which this has been done.

"Nor do I think it possible to accept the argument in an alternative form, viz.:—that the terms 'benevolent' and 'charitable' are merely exegetical of one another. So to read them would be to go against a cardinal canon of interpretation of such documents. It would be to deny to each word its natural and ordinary meaning, without any compelling reason. Presumably when a testatrix says 'benevolent' she means benevolent, and when she says 'or charitable' she means something different from benevolent. Moreover, which word is exegetical of the other? It must be contended that it is 'charitable' which is exegetical of 'benevolent,' as the latter comes first—as if the lady had said 'benevolent' and then caught herself up, seeing that she had used too wide a word, and added 'by which I mean charitable.' I cannot think it possible to put such a gloss upon her words, without finding an intention for her by my own surmise, and not from the words she uses.

"(Second) Is 'benevolent' equivalent to 'charitable'? I think not. I think it may be said that everything which is 'charitable' is 'benevolent,' as the less is included in the greater. But I do not think that everything 'benevolent' can be included in the term 'charitable,' whether that term be used in the more technical English sense, or in the less technical Scottish sense. On the contrast between the two words, I refer to Lord Bramwell's judgment in *Pemsel's case*, L. R., [1891] A. C. 531.

"I approach this question from the point of view expressed by Sir William Grant, M. R., in *Morice v. Bishop of Durham*, 7 R. R. 232, where he says, 'the question is not whether the trustees may not apply it upon purposes strictly charitable, but whether he is bound so to apply it.' This has been repeatedly stated by other Judges, and cannot be controverted. If then 'benevolent' covers more than 'charitable,' though the trustees might

¹ *Dundas v. Dundas*, Jan. 27, 1837, 15 S. 427.

² *Income-Tax Commissioners v. Pemsel*, [1891] A. C. 531, disapproving *Baird's Trustees v. Lord Advocate*, June 1, 1888, 15 R. 682; *Allan's Executor v. Allan*, *supra*, p. 807.

³ *Hill v. Burns*, 1826, 2 W. & S. 80; *Miller v. Black's Trustees*, 1837, 2 S. & M'L. 866; *Cobb v. Cobb's Trustees*, March 9, 1894, 21 R. 638; *Dick's Trustees v. Dick*, 1907, S. C. 953, *aff. supra* (H. L.) 27.

"or" was to be read in its disjunctive sense, the word "benevolent" July 18, 1908. was in itself sufficient to constitute a good bequest. All that was necessary was, in the words of Lord Chancellor Loreburn,¹ that the description should be sufficiently certain to enable men of common-sense to carry out the expressed wishes of the testator.² "Benevolent" satisfied that test. For the reasons already given it was practically indistinguishable from "charitable," and "charitable" admittedly satisfied the test. The Scottish cases where the disjunctive addition of another descriptive word had been held to vitiate such a bequest were all cases where the additional word was wider and vaguer in its significance than "benevolent."³ The English cases⁴ founded on by the Lord Ordinary were not authoritative in Scotland, for they turned on the technical rules of interpretation of charitable bequests in England, based on the statute of Elizabeth.⁵ There was no question of the power of the Court in Scotland to put a benevolent construc-

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confine themselves to what was strictly charitable, that would not support the bequest, if they need not so restrict themselves, and might apply the funds committed to them to what is benevolent, but not charitable. And if benevolent is not descriptive of a particular class of which the law can take cognisance, the bequest must, according to the now well-established rule, fail.

"The term 'benevolent' has occurred in a number of cases in Scotland and England (1) by itself, (2) along with 'charitable' or other terms used conjunctively, and (3) along with charitable or other terms used disjunctively. Where used by itself and where used disjunctively it has been rejected as indefinite, but where used conjunctively it has been sustained as not vitiating the bequest, provided its colleague is sufficiently definite, on the ground that if a purpose is, for instance, charitable, and therefore in the eye of the law definite, it does not render it indefinite that it must be not only charitable but also benevolent—*ça va sans dire*, though the converse may not hold true.

"But before referring to the cases, a word as to the applicability of English cases in this question. I shall, under the third head, have to consider the specialties of the English law with regard to charities. But I find nothing in it which precludes English authorities, on this particular aspect of the question, being received in Scotland. Both in England and in Scotland 'charitable' is accepted as in the eye of the law sufficiently descriptive of a particular class of purposes to be definite. There may be a question whether the limits of the class are quite the same in the law of the two countries, and I think, notwithstanding a certain generality of statement on the subject sometimes found, that they are narrower in Scotland rather than the reverse. But I apprehend that the question, whether another descriptive term not 'charitable' is sufficiently definite, or is too indefinite to be recognised, is the same question, whether it arises in Scotland or in England, and I am therefore prepared to accept English decisions

¹ Weir v. Crum-Brown, *supra* (H. L.) 3, at p. 4.

² Allan's Executor v. Allan, *supra*, 807, Lord Kinnear, at p. 814.

³ Blair v. Duncan, Dec. 17, 1901, 4 F. (H. L.) 1; Grimond or Macintyre v. Grimond's Trustees, March 6, 1905, 7 F. (H. L.) 90; Shaw's Trustees v. Esson's Trustees, Nov. 2, 1905, 8 F. 52.

⁴ Morice v. Bishop of Durham, 1804, 9 Ves. 399, 10 Ves. 521; James v. Allen, 1817, 3 Merivale, 17; Williams v. Kershaw, 1835, 5 Cl. & Fin. 111, 42 R. R. 269.

⁵ Cobb v. Cobb's Trustees, 21 R. 638, Lord Stormonth-Darling (L. O.), at p. 638-9; Blair v. Duncan, 4 F. (H. L.) 1, Lord Robertson, at p. 6.

July 18, 1908. tion on charitable bequests and to enforce the will of the founder,¹ and this was clearly a case for the exercise of that power.

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Argued for the respondents;—The rule of law as to giving effect to such bequests was the same in England and Scotland, and was as follows:—A testator could not delegate the making of his will to third parties. But if he described a class of purposes of a sufficiently definite and restricted character, and appointed persons to select within that class, the bequest would be good. One class of purposes had, by decision, been artificially established as sufficiently definite and restricted, and that was "charitable" purposes. To bring this bequest, therefore, within those which the Court would uphold, it must be shewn either to fall within the region of "charitable" purposes, or else to be for a class of objects sufficiently defined and restricted. This bequest satisfied neither of these requisites. (1) It was not for a "charitable" purpose. The use of the word "or" was

on that point, not as authorities indeed, but as guides which I should hesitate to discard.

"(1) In *James v. Allen*, 17 R. R. 4, the word 'benevolent' was used by itself, and Sir William Grant, M. R., holding that 'though many charitable institutions are very properly called "benevolent," it is impossible to say that every object of a man's benevolence is also an object of his charity,' determined, that as the property might, consistently with the will, be applied to other than strictly charitable purposes, the trust was too indefinite for the Court to execute, and could not receive effect. I acknowledge that by 'charitable' purposes he means those purposes which are specified 'in the statute of Queen Elizabeth,' or which have been held to be within the analogies of that statute, but, as already stated, I find these purposes at any rate no narrower than 'charitable purposes' as understood in Scotland.

"In the preceding case of *Morice v. Bishop of Durham*, *supra*, where the expression used was 'objects of benevolence and liberality,' the same conclusion had been reached. Sir William Grant, M. R., points out, what is as true in Scotland as in England, that the general rule is that every trust must have a definite object, but that this doctrine does not hold good with regard to trusts for charity. 'It is now settled,' he says, 'upon authority, which it is too late to controvert, that where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object,' and the words might, since the case of *Crichton*, *supra*, have been used by a Scottish Judge. But then, he asks, 'Is this a trust for charity? Do objects of liberality and benevolence mean the same as objects of charity?' And these questions he answers in the negative.

"There is a further passage in Lord Eldon's judgment in that case which has an important bearing on the present. 'The principle upon which that trust' (referring to *Broune v. Yeall*, 6 R. R. 78) 'was ill-declared is this: As it is a maxim that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control, so that the administration of it can be reviewed by the Court; or if the trustee dies the Court itself can execute the trust; a trust, therefore, which in case of maladministration could be reformed, and a due administration directed; and unless the subjects and the objects can be ascertained upon principles familiar in other cases, it must be decided that the Court can neither reform maladministration nor direct a due administration. That is the principle of that case.' Now, although the Court in Scotland has not developed its Chancery jurisdiction on such precise and perhaps technical lines as that in England, and although it has not been so ready to interfere in trust matters

¹ *Ross v. Governors of Heriot's Hospital*, Feb. 14, 1843, 5 D. 589, Lord Cuninghame, at p. 609.

disjunctive,¹ and extended the bequest beyond the limits of charitable July 18, 1908.
institutions to the wider and vaguer region of benevolent institutions, Hay's
and thus rendered the bequest void. That had been definitely decided Trustees v.
in England.² So too in *In re MacDuff*,³ where the word was "philanthropic," a word of narrower significance than "benevolent," the Baillie.
bequest was held to be bad. With these cases fell to be contrasted *In re Best*,⁴ where the use of the conjunctive "and benevolent" was interpreted as meaning "such charitable purposes as are benevolent," and was therefore held to form a good bequest. (2) If "benevolent" was not synonymous with "charitable," it was in its own nature, on the authority of the cases already cited, not sufficiently definite and restricted to make the bequest good. Therefore the matter was foreclosed by English decisions, and the reclaimers had been able to cite no Scottish authorities to the opposite effect. There was no reason, founded on the technical rules of interpretation of the word "chari-

as the Court of Chancery does, by way of suits for administration and otherwise (see Lewin on Trusts, ch. 24, sec. 2 (15) and (16) 11th Edn., p. 753, and compare the Irish case of *Hagan v. Duff*, 23 L. R. Ir. 516), it does intervene in its own way to correct abuses, prevent diversion, and settle and alter schemes. And I conceive that the principle enunciated by Lord Eldon is just as applicable in Scotland as in England, and that the reason why a trust for an indefinite purpose is refused effect in Scotland as in England is just because the Court could not control its execution if called upon.

"(2) Again 'benevolent' and 'charitable' in conjunction have been sustained on the ground that the 'charitable' bequest was not vitiated by the further qualification of 'benevolent,' as in *Hill v. Burns*, 1826, 2 W. & S. 80; *Millar v. Black's Trustees*, 2 S. & M. 866; *Cobb's Trustees*, 1894, 21 R. 638; and *In re Best* (1904), 2 Ch. 354, and compare *In re Sutton*, L. R., 28 Ch. Div. 464, where 'charitable' is qualified by 'and deserving.'

"With reference to the case of *Cobb*, I am bound to notice that Lord Trayner would appear to regard 'benevolent' and 'charitable' as synonymous. But I can hardly consider what he says as a judgment to that effect, but rather as the acceptance of an assumed admission. I say assumed, because I think the argument was misconceived, and that no such admission was made. It was admitted that, standing the authority of *Hill v. Burns*, *supra*, no objection could be maintained to the expression 'benevolent' and 'charitable' in conjunction. Such argument as could be submitted was based on the adjection of the word 'useful,' upon which necessarily the whole stress was laid in support of the contention that the 'and' should be read distributively.

"(3) Where 'benevolent' has been connected by the distributive 'or' with 'charitable,' the effect has been held to be destructive of the definiteness of the trust purposes—*Williams v. Kershaw*, 1835, 42 R. R. 269; *In re Jarman's Estate*, L. R., 8 Chancery Division, 584; *In re Riland's*, 1881, W. N. 173.

"In these cases the same conclusion of indefiniteness or failure to particularise the class intended to be benefited was reached which led to the judgments in the analogous cases of *Ellis v. Selby*, 43 R. R. 188, where the expression was 'charitable or other purposes'; *Duncan v. Blair*, 3 F. 374 and 4 F. (H. L.) 1, where the expression was 'charitable or public'; and

¹ *Grimond or Macintyre v. Grimond's Trustees*, 7 F. (H. L.) 90; *Blair v. Duncan*, 4 F. (H. L.) 1.

² *Williams v. Kershaw*, 1835, 5 Cl. & Fin. 111, 42 R. R. 269; *In re Jarman's Estate*, 1878, 8 Ch. Div. 584; *Hunter v. Attorney-General*, [1899] A. C. 309, at 323.

³ [1896] 2 Ch. 451.

⁴ [1904] 2 Ch. 354.

July 18, 1908. table " in England, to make these English decisions inapplicable in Scotland, for the interpretation of "charitable" in England was really wider than in Scotland, and covered everything that would be admitted as "charitable" in Scotland.¹ The use of the word "institutions" did not help the reclaimers' case. What the Court had to look at was the "objects" of the institutions, not the fact that they were institutions.

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At advising on 18th July 1908,—

LORD M'LAREN.—The question we have to consider under this reclaiming note relates to the validity and effect of Mrs Hay's residuary bequest, under which her trustees are directed to apportion and pay over the free residue "to or amongst such societies or institutions of a benevolent or charitable

Grimond's Trustees, 6 F. 285 and 7 F. (H. L.) 90, where the expression was 'charitable or religious.'

"*Grimond's* case is, I think, of special importance, as the last pronouncement of the House of Lords on the subject, and because the Lord Ordinary and the majority of the Inner-House were in different ways prepared to give that restricted meaning to 'religious' which would have made it, in their own opinion at least, as definite as 'charitable,' and which, had the judgment stood, would have justified such a restriction of 'benevolent' as would have made it synonymous with 'charitable.' My own opinion is that 'benevolent' is a word of too wide meaning to be descriptive of a particular class of objects, and I find confirmation of this opinion in the English cases cited.

"(Third) Is there in Scotland such favour to charitable bequests that our Court will, to give effect to a testator's beneficent intention, read 'charitable' so wide as to be the equivalent of 'benevolent,' or so restrict 'benevolent' as to be the equivalent merely of 'charitable'?

"Much has been said of the difference of Scottish and English law in the use of the word 'charitable,' and it is maintained that in England the word has a narrow and technical, and in Scotland a wider and more liberal meaning. I admit that it has in England a technical meaning, but if not the same in result, I think it is wider rather than narrower than that which it has in Scotland.

"In contrasting the law of England and Scotland, I am unable to follow the reasoning of one of the learned Judges in *Cobb's* case, *supra*, where he says that 'nothing can illustrate more strongly the vital distinctions between the two systems than to contrast the English cases of *Williams v. Kershaw*, *supra*, and *In re Jarman's Estate*, *supra*, with the judgments of the House of Lords sitting as a Court of Appeal from Scotland in *Hill v. Burns*, *supra*, and *Millar v. Black's Trustees*, *supra*.' I have endeavoured to trace this contrast without success. The different results arrived at in these cases by the Courts of the two countries depend upon no distinction between their two systems of jurisprudence, but merely on the fact that the English Courts were dealing with terms actually or constructively distributive, and the Scottish Courts with terms actually conjunctive. But for this fact there would, I am satisfied, have been no difference in the judgments.

"In England the expression 'charitable' derives its meaning from the Act of Queen Elizabeth passed to provide a control over maladministration of charities. That Act has received from the Court a wide interpretative application, in the same manner as our triennial prescription Act has, and it covers charitable purposes of the eleemosynary character, educational purposes, religious purposes, and certain public purposes, such

¹ *Baird's Trustees v. Lord Advocate*, 15 R. 682, Lord Ordinary, at pp. 684-5.

nature" as the trustees may approve, but to the exclusion of Roman Catholic institutions. July 18, 1908.

I desire to concur in the opinion which will be delivered by Lord Dundas, Hay's
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in which the authorities bearing on this interesting question are fully considered, and shall only add a short statement of my view as to the principles Lord M'Laren.
which I think should be applied in the construction of bequests of this character. And first in order, though not in importance, I may say that in many cases relating to special and general legacies, to ademption and the interpretation of ambiguous words of bequest, this Court has been aided by the consideration of the decisions of the English Courts, where it appeared that the principles which governed these decisions were such as we should ourselves apply; and in this case counsel have very properly and usefully brought under our notice the English decisions which may throw light on the question before us. It is a principle common to the two systems of

as supply of water to a locality, building of sea-dykes, &c., but subject to this condition—that each and all of these purposes must be public and not private in their purview, an excellent example of which is the case of *Cocks*, L. R., 12 Eq. 574 (585.) It is clear that some of these purposes would be benevolent, but hardly charitable in any ordinary sense, and I think that there can be no doubt that trustees in Scotland, with a discretionary power to apply funds to charitable purposes, would be restrained from applying them to some of them.

"In Scotland, on the other hand, there is no statutory foundation for the interpretation and no statutory jurisdiction conferred on the Court. But I think much has been borrowed from England. Apart from decision, it has often been stated from the bench that 'charitable' is indefinite in itself, and but for favour to charity would never have been accepted as descriptive of a sufficiently particular class of objects. But two leading decisions made it a *vox signata* in Scotland, and thenceforth determined that it must be accepted as sufficiently particular.

"In *Hill v. Burns*, 1826, 2 W. & S. 80, the main question at issue was whether a testator could invoke *alienum arbitrium* to any effect in the distribution of his estate. On a review of prior Scottish cases Lord Gifford deduced the conclusion that the law of Scotland was more liberal in the construction of charitable than of other bequests, and held that the above position had been accepted. He then sustained, without further reasoning, a bequest in favour of institutions for 'charitable and benevolent purposes' established or to be established in or near Glasgow.

"In *Crichton's* case, 1828, 3 W. & S. 329, Lord Lyndhurst, after laying down the proposition that to admit of discretion being conferred on trustees, the object of their discretion must be a particular class, decided that 'charitable' by itself must be accepted as sufficiently particular. And that has been the law of Scotland ever since. But in determining this he had no direct authority except *Hill v. Burns*, *supra*, and it is clear that he went a good deal beyond it, and I cannot help thinking was much influenced by his English Chancery experience.

"But although *Crichton's* case is the rule of Scottish law, it does not determine what the limits of 'charitable' are, and it does not follow from that decision that the favour for charity which has induced the Court to accept 'charitable' as definitive of a sufficiently particular class of objects will further induce the Court to give to 'charitable' a loose and vague meaning, so as to cover anything which may be classed as benevolent.

"This subject has been matter of discussion in two later cases—in *Baird's Trustees*, 15 R. 685, and *Pemsel's* case, L. R., [1891] A. C. 531. In the former case in Scotland the opinion of the Court was, that 'charitable'

July 18, 1908. law that bequests for charitable purposes should receive an indulgent and favourable criticism with a view if possible of giving effect to the testator's benevolent intentions. In the development of this principle the rule against giving effect to bequests of a wholly undefined character has been relaxed

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Lord M'Laren. in favour of charities. I note in passing that it appears from the reported cases that the Courts of England in considering whether a particular bequest falls within the description of charity have been guided by the statute of Elizabeth, and the judicial interpretation that has been put on the expressions "charitable" or "charity" as there defined. But the range of objects or purposes which have been considered to be charitable under the law of England is so wide that I think it may fairly be said that in the interpretation of bequests for charitable purposes the Courts of both countries may be taken as dealing with questions which are substantially the same.

The present case, however, does not raise any question as to the meaning of the word "charitable," because the direction is to apportion and pay the residue of the testator's estate "to or amongst such societies or institutions of a benevolent or charitable nature in such proportions" as the trustees in their discretion shall think proper. Now, it is settled by a series of decisions of the highest authority that a bequest to charitable institutions or for charitable purposes to be administered by the testator's trustees is a valid bequest, and these decisions will govern the present case unless the gift to the institutions which are there described is invalidated by the association of the word "benevolent" with "charitable."

In the arguments which were addressed to us the question was discussed whether the determination of this question would be different in the case of a bequest to benevolent *and* charitable institutions, and in the case of a bequest to benevolent *or* charitable institutions. There are cases where the

must in interpreting the sections of the Income-Tax Act, which gives relief to charitable institutions, have the meaning which they conceived it to have in the class of cases with which I am dealing, viz., the restricted sense of eleemosynary or material relief to physical necessity.

"In the latter case, where the same question under the income-tax had arisen in England, opinions were expressed that too narrow a view had been taken by the Scottish Court in *Baird's Trustees*, *supra*, and that, whatever the term 'charitable' might cover, if it required to be interpreted in applying a bequest such as that in the present case, the statutory meaning of the expression was much wider than they had assumed. Perhaps the most general definition of the view of the majority of the Court, for Lord Halsbury (Lord Chancellor) and Lord Bramwell dissented, was that given by Lord Herschell to the effect that charity included even in Scotland everything done in relief of human need, whether physical, educational, or religious.

"It has yet to be determined in a proper case of the application of such a bequest in Scotland, as distinguished from a case under the Income-Tax Acts, whether the view of the First Division in *Baird's Trustees*, or that of the majority of the House of Lords in *Pemsel's* case is the correct view. But in no event is there any ground for saying that 'charity' and 'charitable' in Scotland can receive a wider signification than it has received in England, or than Lord Herschell's attempted definition in *Pemsel's* case, and that is, I think, and on the authorities I have cited, very far short of 'benevolent.'

"For these reasons I have come to the conclusion that I must hold the bequest void from uncertainty."

use of "and" as contrasted with "or" may be important, but I do not think July 18, 1908.
that this is one of them.

If in the present case we substitute "and" for "or" it is clear enough, and indeed it was not disputed, that the bequest would be valid, because there could be no difficulty in finding institutions which were alike benevolent and charitable in their objects; and, being charitable, such institutions would have the benefit of the rule that a charitable bequest to be administered by trustees would not fail for want of further specification. But it is impossible to state this proposition without seeing that in such a case the real ground of decision is that "charitable" is the determining characteristic, and that the addition of the word "benevolent" neither enlarges nor restricts the scope of the bequest.

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In contrast to the case here put I will suppose the case of a bequest for charitable and public objects. Now a bequest for charitable or public objects has been held to fall within the rule against indefinite bequests, because the trustees might apply part of the money to public objects which are undefined; and I have difficulty in admitting that the use of the word "and" would make the bequest any better, because there are two objects, the one undefined and the other in contemplation of law sufficiently defined, and the trustees in fair administration would be bound to allot something to each class. I should therefore deprecate the use of a canon of construction which would make the validity or invalidity of the bequest to depend on the casual use of the word "and" in place of "or," or the use of the word "or" in place of "and," without any evidence from the context that the testator attached importance to the use of the conjunctive or disjunctive particle.

I agree with Lord Dundas that the true question in the present case must be, did the testator mean two classes of objects, one of which was not charitable in its nature, or did he mean one class which he described indifferently by the adjectives benevolent and charitable? If this is the question, I think it admits of only one answer. "Institutions of a benevolent nature" is, as I think, just a periphrasis for "charitable institutions." It may be that in a somewhat strained interpretation of "benevolent" we might conceive of an institution to which the word benevolent would apply, and which would not fall within the limits of charitable gift. But then we call in aid the principle of the benignant construction of charitable bequests. A construction which calls in aid the almost impossible case of a class of benevolent institutions which are not charitable, amongst which the residue is to be partitioned, and that for the purpose of defeating the express testamentary intention, would not, in my judgment, be a benignant or even a reasonable construction. But, applying the true canon of construction applicable to bequests of this description, I come without difficulty to the conclusion that the testator meant to use "charitable" and "benevolent" as equivalent terms. On this construction the use of the word "or" is grammatically correct, because it implies that, whether you describe the objects of the bequest as "benevolent" or "charitable," the meaning is the same, and therefore the gift is not void in respect of uncertainty.

LORD KINNEAR.—I am of the same opinion. We have, in all cases of

July 18, 1908. the validity of a bequest, two questions to consider—in the first place, what is the rule of law by which we ought to be governed in determining the question of validity? and, secondly, what is the true meaning of the particular will which we have to construe? It is only with reference to the first of these questions that, in my opinion, we are bound, or greatly aided, by previous decisions. What the law is must be determined in accordance with the authorities by which we are bound. What the true meaning of a particular testator is we must ascertain for ourselves, by reading the language which he or she has used, and putting upon it its natural meaning, without any special reference to what previous judgments have held to be the meaning of other testators using different language.

Now, upon the first of these two questions, I think it is clearly settled in the first place that a testator cannot commit to trustees the power of making a will for him. He must make the will for himself, and therefore he must define sufficiently the persons or purposes which he intends to be the objects of his bounty, to enable the trustees to carry out the intention that he has expressed, instead of committing to a trustee an unlimited power to find out objects of bounty for himself. I take it to be settled, however, in the law of Scotland, that a bequest will be valid if a testator points out to his trustees a definite class of persons or objects to be favoured, although he leaves the trustee to select individuals within the class. It is probably a question of degree whether the circumscribing line by which he defines this class is sufficiently distinct or not, but, of course, I concur with what your Lordship has said, that we must take it as now settled that where a trustee is directed to select among charitable objects, there is sufficient definition to enable him to carry out the intention of the testator.

So far I think the law is clear, but then the question comes to be whether the objects of the bounty of this particular testator are sufficiently defined to enable a trustee of ordinary common sense and ordinary familiarity with the business of life to satisfy himself that he is selecting among the class pointed out to him by the testator. It is conceded that if this testatrix had directed her trustees to apportion her residue among societies and institutions of a charitable nature, such as they should think proper in their discretion, but excluding societies or institutions connected with the Roman Catholic Church, that would have been a good bequest, but then it is said to be an invalid bequest because in place of confining herself to the word "charitable," she has used the words "of a benevolent or charitable nature." The real question is, whether upon the construction of the will that is a wider class of purposes than the word "charitable," taken alone, would have defined. It appears to me that the question whether this testatrix really meant "You are to select between two distinct classes of institutions, charitable institutions on the one hand, and a different class of institutions altogether, which I call benevolent, on the other hand," is not a question upon which previous decisions can guide us at all. I think the question is—What did the testatrix really mean? and I do not think that is to be ascertained by a strict grammatical analysis of the words she has used. Taking the whole will—taking the particular direction for the distribution of the residue with reference to its context, the question is—What did this testatrix mean?—and I confess that I have no doubt that by "charitable or

benevolent," she meant one thing, and not two things. The whole difficulty July 18, 1908. arises from what I think is a mere redundancy of expression, and we had cited to us several examples of a similar redundancy, in the expressions, ^{Hay's} Trustees v. not of testators, but of learned Judges who were discussing this kind of ^{Baillie.} question. I do not think that, in ordinary language, when a testator ^{Lord Kinnear.} describes institutions of a charitable or benevolent character, she means two different kinds of institutions, which she distinguishes from one another; and if not, I think that she has given a sufficiently definite description of the class of institutions which she intends to favour, to enable trustees of requisite common sense to carry out her intention.

I wish to add that I also, like Lord M'Laren, have had an opportunity of reading Lord Dundas's opinion, and I entirely concur in the view which he has expressed.

LORD DUNDAS.—I am of the same opinion, but I should like to add some words of my own, because the case is an interesting one, and because we are differing from an elaborately expressed opinion of the Lord Ordinary.

The decision of the case must really depend on the intention of the testatrix—to be ascertained from the language she has used; and the Court will incline, if possible, to support the will rather than to set it aside as void by reason of uncertainty. Now, I think, as matter of ordinary construction, the words "benevolent or charitable" should be read, not as referring to two distinct and alternative classes of "societies or institutions," but rather as expressing, in an amplified and perhaps redundant fashion, the "nature" or quality which the societies or institutions must possess in order to come within the scope of the delegated bounty of the testatrix. Of the words "benevolent" and "charitable," the former is perhaps the more comprehensive, but they are closely cognate, and obviously have much in common. I observe that Dr Johnson, in his Dictionary (1755, folio ed.), defines "benevolent" as "kind, having goodwill or kind inclinations"; and "charitable" as "(1) kind in giving alms, liberal to the poor; (2) kind in judging of others; disposed to tenderness—benevolent." In *Pemsel's* case,¹ Lord Watson (at p. 558) and Lord Herschell (at p. 572) seem to define "charitable" as being practically synonymous with "benevolent." At all events, I think the two words are not, in the will under consideration, used as alternatives, but may fairly be read exigetically, as if the testatrix had said "of a benevolent—by which I mean of a charitable—nature." I am unable to figure any kind of institution which should be of a charitable but not of a benevolent nature; nor—though the aid of the Bar was invoked at the discussion—was any satisfactory example of the converse proposition forthcoming. If the construction suggested is correct, the present case is at once differentiated from cases like *Blair*² and *Grimond*,³ where the word "charitable" was used as an alternative to "public" and to "religious" respectively; and the will was in each case held to be void from uncertainty, because the second adjective was of so vague and indeterminate a character as to be incapable of execution. With these cases one may contrast *Miller*

¹ [1891] A. C. 531.

² 7 F. (H. L.) 90.

³ 4 F. (H. L.) 1.

July 18, 1908. *v. Black's Trustees*,¹ where the words were "benevolent and charitable purposes"; and Lord Brougham, in holding the gift valid, observed—
 Hay's *Trustees v. Baillie*. "Suppose we read 'and' 'or,' the authorities in the Scottish law do not entitle us to hold that this is so uncertain as to be void"; and the opinions
 Lord Dundas. of the learned Judges—especially that of Lord Trayner—in *Cobb's Trustees*,² where a bequest "to such useful, benevolent, and charitable institutions" as the trustees in their discretion might think proper, was sustained. The present case seems to me to fall well within the lines desiderated by the Lord Chancellor in the recent case of *Murdoch's Trustees*.³ There the residue was directed to be employed in the relief of persons who, with other qualifications, had "shewn practical sympathy in the pursuits of science." The validity of the bequest was sustained. Lord Loreburn, after emphasising the rule that a benignant construction will be placed upon charitable bequests, said—"All that can be required is that the description of the class to be benefited shall be sufficiently certain to enable men of common sense to carry out the expressed wishes of the testator." I do not think men of common sense would have difficulty in apportioning Mrs Hay's residue among societies or institutions of the class described by her, if the construction of her language which I have indicated is the natural and proper one.

I should be prepared to rest my decision upon the simple grounds now stated. But the Lord Ordinary has reached an opposite conclusion. His Lordship's opinion has been largely influenced by a consideration of certain English cases to which he refers. It seems, therefore, proper to make some general observations in regard to these cases. Most, if not all of them, have been cited in argument in the recent decisions in Scotland—*e.g.*, *Cobb's Trustees*² and *Grimond*.⁴ For my part I think a real danger may arise when this branch of the law is being considered, if Judges in Scotland follow English decisions implicitly and without careful scrutiny, or Judges in England so accept Scots cases. I am not sure that there is any real difference in principle between Scots and English cases on this question, because under both systems of law the rule against giving effect to an otherwise indefinite bequest is only relaxed in favour of "charitable" bequests. But, as observed by Lord Davey in *Blair's case*,⁵ "there is no doubt that the English law has attached a wide and somewhat artificial meaning to the words 'charity' and 'charitable,' derived, it is said, from the enumeration of objects in the well-known Act of Elizabeth, but probably accepted by lawyers before that statute. In the law of Scotland there is no such technical meaning attached to the words." I gather that the English Courts are in use to construe such words as, *e.g.*, "benevolent" or "philanthropic"—occurring in a will in juxtaposition with "charitable"—in the light and by the standard of the peculiar meaning which the latter word has acquired in England. I think it is the case that the existence of the distinction pointed out by Lord Davey has resulted in decisions being pronounced by the English Courts which are not in harmony with the law of Scotland. A striking example is found by comparing the English case of *White*⁶ with the

¹ 2 S. & M'L. 866.² 21 R. 638.³ *Ante*, (H. L.) 3.⁴ 6 F. 285.⁵ 4 F. (H. L.), at p. 3.⁶ 1893, 2 Ch. 41.

Scots case of *Grimond*.¹ The two cases cannot stand together. Yet July 18, 1908. *Grimond*¹ is undoubtedly Scots law, as I presume *White*² to be good law Hay's in England. This is dealt with by Lord Moncreiff,³ whose opinion, differ- Trustees v. Baillie. ing from the other Judges of the Second Division, was expressly approved Lord Dundas. by the House of Lords. I prefer, for my own part, to determine the question raised in this case upon a construction of the language used by the testatrix, with such light as can be obtained from decisions in Scots cases, which in this branch of the law afford, to my mind, safer confirmation of one's opinion than those pronounced by English Courts, unless it is clear that the latter were not influenced by the special meaning attached in England to the word "charitable."

For the reasons stated, I am of opinion with your Lordships that the Lord Ordinary's interlocutor ought to be recalled, and the first branch of the claim for the trustees and executors of Mrs Hay sustained. It may be proper to observe that, since that interlocutor was pronounced, three important cases have been decided upon this branch of the law—two of them by the House of Lords—viz., *Murdoch's Trustees*,⁴ *Allan's Executor*,⁵ and *Dick's Trustees*.⁶

The LORD PRESIDENT and LORD PEARSON were absent.

THE COURT recalled the interlocutor of the Lord Ordinary; repelled the claims for the next of kin; sustained the claim for the trustees, and preferred them to the whole fund *in medio*.

MACPHERSON & MACKAY, S.S.C.—LAING & MOTHERWELL, W.S.—
DOVE, LOCKHART, & SMART, S.S.C.—Agents.

FREDERICK HENRY, EARL OF LAUDERDALE, Pursuer (Respondent).— No. 179.
D.-F. Campbell—Macphail.

HENRY SCRYMGEOUR WEDDERBURN, Defender (Reclaimer).— July 18, 1908.
H. Johnston, K.C.—Clyde, K.C.—Hunter, K.C.—Stevenson.

Earl of
Lauderdale v.
Wedderburn.

Jurisdiction—Heritable Office—Hereditary Standard Bearer of Scotland—Nature of Office.—Held that the Court of Session had jurisdiction to determine claims to the office of Hereditary Standard Bearer of Scotland, that office being a heritable office and not a mere title of honour, and the right to the office being a right of property which was within the cognisance of the Court.

Opinion, per curiam, that the office was transferable by disposition, and subject to diligence.

Res Judicata—Right to heritable office—Determination of Court of Claims as to right to perform services of office at Coronation.—In 1901 the King, by commission under the Great Seal, appointed a body of commissioners "to receive, hear, and determine" the claims of persons claiming the right to perform services at the time of the Coronation. Claims to the office of Hereditary Standard Bearer of Scotland were put forward by the Earl of Lauderdale, by Henry Scrymgeour Wedderburn, and by another person. The Court of Claims pronounced this deliverance:—"The Court considers that the right to the office . . . is vested in the family of Scrymgeour, and that the petitioner, Henry Scrymgeour Wedderburn, has established a

¹ 6 F. 285.

² 1893, 2 Ch. 41.

³ 6 F. at p. 293.

⁴ *Ante*, (H. L.) 3.

⁵ *Ante*, 807.

⁶ *Ante*, (H. L.) 27.

July 18, 1908. *prima facie* title to represent that family: And the Court adjudges that the claim of the said petitioner . . . be allowed him to be exercised on the day of their Majesties' Coronation." The other claims were disallowed. Subsequently an action was raised in the Court of Session at the instance of the Earl of Lauderdale for declarator that he was entitled to the office. The action was defended by Henry Scrymgeour Wedderburn, who pleaded, *inter alia*, "*res judicata*" in respect of the decision of the Court of Claims.

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Held (aff. judgment of Lord Kyllachy) that the Court of Claims did not decide the legal right to the office in perpetuity, but only determined the person who was *prima facie* entitled to officiate at the Coronation, and plea of *res judicata* repelled.

Title to Defend—Heritable Office—Title to dispute claim to office.—The Earl of Lauderdale raised an action for declarator that he was entitled to the office of Hereditary Standard Bearer of Scotland. He averred that by the Act 1600, cap. 44, the office was confirmed to "Sir James Scrymgeour and his heirs-male," and that the pursuer's predecessors had subsequently acquired right to the office. He called as defender Henry Scrymgeour Wedderburn, who denied the pursuer's right to the office, and, in support of his title to defend the action, averred that he was "heir-male of the Sir James Scrymgeour mentioned in the Act of 1600."

Held (rev. judgment of Lord Kyllachy) that the defender had averred a sufficient title to defend the action and to dispute the pursuer's claim, and that it was not necessary for him *ante omnia* to prove by service that he was the person entitled to the office in the event of the pursuer's claim proving invalid.

Process—Decree—Prescription—Negative Prescription—Decree in Absence—Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 24.—In 1671 Charles Maitland of Hatton raised an action in the Court of Session concluding for declarator, *inter alia*, that he was entitled to the office of Hereditary Standard Bearer of Scotland, and called John Scrymgeour as a defender. John Scrymgeour appeared, and, after stating certain defences, was allowed to withdraw from the action, and in his absence decree was pronounced in favour of the pursuer as concluded for.

In 1902 an action was raised in the Court of Session at the instance of the Earl of Lauderdale also concluding for declarator that he was entitled to the office of Hereditary Standard Bearer. The pursuer claimed as in right of his ancestor, Charles Maitland, and founded, *inter alia*, on the decree of 1671. The action was defended by Henry Scrymgeour Wedderburn, a descendant of John Scrymgeour.

Held that in respect of the operation of the negative prescription and of sec. 24 of the Court of Session Act, 1868, the decree of 1671 could not now be impugned, and that the pursuer, as in right of the decree, was entitled to the office.

1ST DIVISION.
Ld. Kyllachy.

(SEE 7 F. 1045.)

On 28th April 1902 an action was raised at the instance of Frederick Henry, Earl of Lauderdale, against Henry Scrymgeour Wedderburn, Esq., of Wedderburn, and the Rev. Ronald Cameron Scrymgeour. The action concluded for declarator "that the pursuer has the only good and undoubted right to All and Whole the hereditary office of our standard or banner bearer or office of carrying all our ensigns or standards, coronets, pensils, and other ensigns of war and battle, of whatever shape, fashion, or colour, as well of foot as of horse, which are or have been in use to be displayed before us or our royal predecessors, or which may be displayed in future before us or our successors, with all honours, dignities, lands, fees, duties, customs, and immunities whatsoever belonging and pertaining to the said office."

There were also conclusions for declarator that the defenders had no right to the office of Standard Bearer, and for interdict against the defender H. S. Wedderburn claiming to discharge the same.

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The defender H. S. Wedderburn entered appearance to defend the action. No appearance was made for the other defender.

The averments of parties were as follows:—

(Cond. 1) "By an Act of the Scots Parliament passed in the year 1600 (Act 1600, cap. 44) there were confirmed the infestments, rights, titles, and securities made to Sir James Scrymgeour of Dudhope, Knight, and his predecessors, by the King and his predecessors, of the heritable office of bearing the King's banner, which office it is believed had been enjoyed by him and his predecessors for some considerable time previously. The said Act, *inter alia*, declares that the said Sir James Scrymgeour and his heirs-male 'had and hes the onlie and indoubtit heretable richt of the said office and of the beiring of all his hienes banneris standertis cornettis pinsailles handschenzies vtheris signis and tokinnis of battell and weir of quhatsumeir collar schaip or fassoun baith on hors and fute that hes bene displayit or sal happin to be displayit befor his hienes and his successouris at any tyme heireftir,' and also that with the advice of Parliament the King has of new given, granted, and disposed to the said Sir James Scrymgeour, and his said heirs-male bearing the surname and arms of Scrymgeour, the foresaid office, with all honours, lands, fees, duties, privileges, and immunities belonging thereto, and expressly annuls and discharges all infestments, rights, titles, and securities of the said office or any part thereof purchased by any other person without the consent of the said Sir James and his foresaids." (Ans. 1) "The Act here partially quoted is referred to for its own terms. The said Act recognised and confirmed, but did not create the right of Scrymgeour to the office and others. It is believed and averred that the office arose through an act of bravery on the part of one of the family, Sir Alexander Carron, in the time either of Malcolm III. (1057-1093) or of Alexander I. (1106-1124), historians differing as to the exact date, in return for which the King granted him the hereditary office of Standard Bearer, gave him a portion of the Royal Arms for his bearing, with the word 'dissipate' for motto, and changed the name of the family from Carron to Scrymgeour, which means 'good fighter.' Latér, by charter, dated 29th March 1298, William Wallace, as 'custos regni Scotiae,' granted to Alexander Scrymgeour certain land in Dundee and the Constabulary of Dundee, in return for his past services as Standard Bearer, *pro fidei servitio et succursu suo praedicto regno impenso portando vexillum regium in exercitu Scotiae*. Again, in a Great Seal charter, dated 2d September 1458, to the burgh of Dundee, James Scrymgeour is named as *Vexillator domini nostri regis*. There are numerous other evidences that the office of Standard Bearer, the original gift of which was antecedent to and separate from any grant of lands, had been hereditary in the defender's family for centuries before the date of the Act 1600, cap. 44."

(Cond. 2) "In 1661 the heir-male and successor of the said Sir James Scrymgeour in his estates and in the said office was John Scrymgeour, third Viscount of Dudhope, who was in that year created Earl of Dundee. The said John, Earl of Dundee, fell into financial difficulties. He sold considerable portions of the estates and contracted debt to a large amount, with the result that apprisings which affected the said office as well as the landed estates were led by

July 18, 1908. of the said Charles Maitland in a process in which decree was pronounced by the Lords of Council and Session on 14th February 1671, it was not in the character of heir-male of the said Earl of Dundee, but on the ground that he was heir of provision under a tailzie dated in 1587, a plea which was repelled by said decree. The said decree further found that the Earl of Dundee had died without heirs-male capable of taking up his succession, and sustained the validity of the gift of *ultimus hæres* which was in dispute. The said John Scrymgeour was not, and the defender is not, the heir-male of the said John Scrymgeour, Earl of Dundee, or of the said Sir James Scrymgeour of Dudhope, to whom, and to whose heirs-male the said office was granted by the said Act of 1600, cap. 44." (Ans. 6) "The decree of 14th February 1671 and the proceedings which preceded it are referred to for their terms. Explained that the decree was pronounced in absence of Scrymgeour of Kirkton. *Quoad ultra* denied. The alleged title granted to the said Charles Maitland, by the King as *ultimus hæres* of the Earl of Dundee, was obtained upon false representations, as explained in Ans. 3. On or about 29th November 1670, Charles Maitland obtained upon similar representations a charter under the Great Seal in favour of him, his heirs and assignees, bearing to convey to him and them the Barony of Dudhope, and also, *inter alia*, the office of standard bearer, on the narrative that the subjects conveyed formerly belonged to John, Earl of Dundee, and then belonged to the King, and had come into his hands and into his gift and disposition by reason of recognition. This alleged title was absolutely inconsistent with and repugnant to the title alleged as coming from the Crown as *ultimus hæres*. Charles Maitland subsequently disclaimed the latter title. . . ."

(Cond. 7) "Relying apparently on the lapse of time and the probable loss of evidence adverse to his pretensions, the grandfather of the defender, Henry Scrymgeour Wedderburn, put forward a claim to assist at the Coronation of King George IV. as Royal Standard Bearer for Scotland, to which office he alleged he had right as heir-male of the Scrymgeours of Dudhope. In this claim he was unsuccessful, but from time to time it has been put forward in various ways by himself, by his son, the father of the present defender the said Henry Scrymgeour Wedderburn, and by the said defender himself, to the prejudice and annoyance of the pursuer's predecessors and now of the pursuer himself." (Ans. 7) "Admitted that the defender's grandfather claimed in 1820 to assist at the Coronation of King George IV. as Royal Standard Bearer for Scotland. Explained that the then Earl of Lauderdale presented at the same time a similar claim, and that both these claims were postponed. In 1876 the defender himself was summoned by Queen Victoria to attend as Royal Standard Bearer on the occasion of the unveiling of the Prince Albert Memorial in Edinburgh, and he did so attend. *Quoad ultra* denied."

(Cond. 8) "In particular the defender the said Henry Scrymgeour Wedderburn recently presented a petition to 'The Right Honourable the Lords of His Majesty's Privy Council and the Executive Committee of the Court of Claims,' alleging himself to be Hereditary Royal Standard Bearer for Scotland, and praying for permission to attend the approaching Coronation of His Majesty, and to carry the Royal Standard in that capacity. A similar petition was presented to the same body by the other defender the said Reverend Ronald Cameron Scrymgeour."

(Cond. 9) "The said Court or Committee of Claims is a body of July 18, 1868. Commissioners who were appointed by the King by commission under the Great Seal, dated 26th June 1901, to receive, hear, and determine petitions and claims concerning services to be done or performed at or in connection with His Majesty's Coronation.* And to it accordingly was referred a petition from the pursuer to the King's Most Excellent Majesty in Council craving permission to perform the duties and services of his said office of Hereditary Standard Bearer at the Coronation." (Ans. 9) "The pursuer's petition and the Commission under the Great Seal are referred to for their terms, beyond which no admission is made. Explained that the said Court of Claims was the Court specially constituted by His Majesty for the determination of, *inter alia*, the question of right to the office in question. . . ."

(Cond. 10) " . . . The said Court of Claims, on 15th January 1902, granted the petition of the defender the said Henry Scrymgeour Wedderburn, and refused the petition of the pursuer and that of the other defender the said Reverend Ronald Cameron Scrymgeour."†

The pursuer pleaded, *inter alia*;—(1) The pursuer is entitled to decree in terms of the conclusions of the summons, in respect of his title to the said office as condescended on. (2) In respect that the defender is not the heir-male of Sir James Scrymgeour mentioned in the Act 1600, cap. 44, he has no title or interest to resist the conclusions of the summons. (3) *Separatim*, in respect of the decree of 14th February 1671 condescended on, the pursuer is entitled to declarator and interdict with expenses against the defender the said Henry Scrymgeour Wedderburn.

The defender pleaded;—(1) The action is incompetent. (2) *Res judicata*. (3) No jurisdiction. The right to the office in question has been decided by the Court of Claims, which was appointed by the King for the special and exclusive determination of this among other matters. (4) No title to sue. (7) The decree of 14th February 1671 and the gift upon which it bore to proceed are inept and of no effect, and have been held to be so by the Court of Session;¹ *et separatim*, the said decree and gift did not, and could not, validly include or deal with the office in question. (8) The office in dispute having been conferred upon the defender's ancestor and his heirs-male as a personal dignity to be held by him and them *jure sanguinis*, and having been publicly confirmed by the Act 1600, cap. 44, could not be lost or affected by apprising nor by recognition, but only by failure or corruption of blood, or by an Act of Parliament repealing the said Act.

On 28th November 1902 the Lord Ordinary (Kyllachy) heard parties in the Procedure-roll. All the deeds and the decree referred to and founded on by the parties in their pleadings were before his Lordship at the discussion.

On 13th December 1902 the Lord Ordinary repelled the first three pleas for the defender.‡

* The terms of the Commission are quoted in the opinion of Lord Kyllachy (p. 1245, *infra*).

† The terms of the Court's deliverance are quoted in the opinion of Lord Kyllachy (p. 1245, *infra*).

¹ *Scrymgeour v. Lauderdale*, 1686, and *Earl of Lauderdale v. Lord Gray*, *cit. infra*, p. 1252, note 12.

‡ "OPINION.—In this case, which involves a competition for the ancient

July 18, 1908. service his averment that he is the heir-male of John, Earl of Dundee, who died in 1668: Grants leave to reclaim."*

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Majesty with respect to urgent matters, viz.—the disposal, for the purposes of a particular State function, of claims to perform services at that function.

"It is not, of course, presumable that a Court thus commissioned should profess to adjudicate—at all events, to adjudicate finally—upon legal rights. It remains to consider whether it in fact did so. I am of opinion that it is only on a strained construction of the terms of the deliverance that such a conclusion can be reached. The introductory paragraph goes, it may be suggested, somewhat beyond the operative adjudication. But nevertheless it is the operative adjudication with which we are here concerned. And what was 'adjudged' simply was that the defender, and not the pursuer, should perform at the Coronation the services claimed. And the provisional character of that adjudication is, I think, emphasised by this—that in the introductory paragraph, to which I have referred and on which the defender founds, his (the defender's) title to represent a family of Scrymgeour is 'considered' only to be established *prima facie*.

"For these reasons, I am of opinion that the deliverance or judgment of the Court of Claims does not upon its just construction determine the present question. And this makes it unnecessary to consider the larger and constitutional question as to the *power* of the Crown to supersede with respect to legal rights the jurisdiction of the ordinary tribunals. In my opinion, as I have said, no such question arises here. But I may recall, what is matter of history, that the power of the Crown to create, by virtue of its prerogative, 'cumulative jurisdictions' was the subject of much controversy in the years preceding 1688, and that if it is desired to pursue the history of that controversy reference may be made to (1) the Scots Act, 1681, cap. 18; (2) the Articles of Grievances, 13th April 1689, Scots Acts, vol. 3, p. 172; and (3) Scots Act, 1690, cap. 28.

"I propose, for these reasons, to repel the two pleas in question; to appoint the debate to be resumed on the merits; and to grant, if that is desired, leave to reclaim."

* "OPINION.—In this case I some time ago heard, by desire of parties, an argument, and pronounced judgment upon two pleas stated for the defender—(1) no jurisdiction, and (2) *res judicata*. The other day I heard a second argument which, by desire of parties, was confined to two other points, viz.—(1) the defender's title to contest the pursuer's declarator, and (2) the relevancy of the pursuer's case.

"With regard to relevancy, I should be very unwilling, in a case depending mainly upon the construction of titles and documents, to pronounce any judgment on relevancy; or to form or express any opinion touching the merits of what may turn out to be a competition of heritable titles. It would, I think, be most undesirable to do so until the case has been put in the position of a concluded cause, by an allowance of proof and a full production of documents, either admitted or proved. It is only, therefore, as affecting the question of the defender's title to contest, that I propose even to touch upon the sufficiency of the pursuer's averments—that is to say, his averments read in connection with the titles to which he refers.

"But the question of the defender's title does come up, I think, quite properly at this stage. For on the record it stands in such a position that I think the pursuer is well justified in asking that he shall not be required to enter upon a competition of titles with the defender unless it appears either (1) that the defender has a good *prima facie* title on which to compete; or (2) that the defender, having no such title, he (the pursuer) is himself in the same position.

"Now it is, I think, impossible to say that the pursuer is in the position of having no title, or no title *prima facie* good. The title which he sets forth may perhaps be liable to be reduced upon some ground. I do not

On 3d December 1903 the defender lodged a minute in which he stated that he did not desire a further opportunity of establishing by the appropriate service his averment that he was the heir-male of John, Earl of Dundee, who died in 1668. Earl of Lauderdale v. Wedderburn.

On 4th December 1903 the Lord Ordinary, in respect of this minute, sustained the second plea in law for the pursuer, and decerned against the defender in terms of the conclusions of the summons.

The defender reclaimed.

Parties were heard before the First Division on 14th November 1904 and following days.

know. Perhaps even *ex facie* it may be in some particulars open to criticism from the point of view of the feudal formalist. That may or may not be so. But substantially I do not, I confess, see that *prima facie* there is anything wrong with it. The pursuer is infeft in this heritable office. He and his authors have been so under a series of connected infeftments for more than two centuries. They have held it for that period under charters flowing from the Crown, which charters, unless the Crown was *non dominus*, cannot be impeached by third parties. And with respect to any infirmity in the Crown's title, the only suggestion, so far as I could make out, was this—that this heritable office being limited to heirs-male of the Earl of Dundee, it was, for some reason, incapable of reverting to the Crown, either by way of succession or by way of return; and was so even if, as set forth in the title, no heir-male, or other heir having right, came forward on the death of the Earl of Dundee, to claim it.

“Now I confess that taking the view of the legal character of the office, which I expressed in my former interlocutor, I am not prepared, certainly at this stage and as at present advised, to make any assumption of that kind. On the contrary, I think that, at least *prima facie*, the Crown's title is good, and that the pursuer's title, as flowing from the Crown, is in the same position.

“Now, that being so, what is the defender's title on which he claims right to impeach (either by way of reduction or *ope exceptionis*) the Crown's grant on which the pursuer founds? He alleges, in general terms, that he is the heir-male of the Earl of Dundee—that is to say, the Earl who died in 1668, and on whose death the barony of Dundee, including the office in question, was assumed to revert to the Crown. But he produces no service. He condescends on no pedigree. As I understand it, he claims, upon the bare averment that he possesses the character of heir-male, to enter upon a competition of titles with the pursuer—a competition involving a protracted and costly proof. That is really the defender's contention.

“Now, giving the fullest effect to the circumstance that the defender is called to the action and does not initiate it, I am quite unable to accept this contention. I do not consider that it would be either just or convenient that such a procedure should be allowed. But I am afraid I must also add that the defender's claim to be heir-male of the Earl of Dundee and of the family of Scrymgeour is, at least as set forth on record, in a somewhat unfavourable position. His allegation, it will be observed, is that he is heir-male of Scrymgeour of Kirkton, and as such, heir-male of the Earl of Dundee; and no doubt, if his statement had stopped there, it would have been at least possibly true; for, of course, the Scrymgeours of Kirkton might have become heirs-male of the family at a quite recent date. But the defender goes on to allege that the Scrymgeours of Kirkton became the senior line of the family *on the death of the said Earl**—that is to say, that the then Scrymgeour of Kirkton was the heir-male of the Earl at his death in

* The defender subsequently altered this averment by amendment dated 29th November 1904. *Vide supra*, p. 1240, note 2.

July 18, 1908. Argued for the defender;—(1) The Court of Session had no jurisdiction to determine claims to dignities and offices of honour.¹ The office of Standard Bearer was a dignity, and not a heritable office.² Earl of Landerdale v. Wedderburn. *Cockburn v. Langton's Creditors*³ referred to an inferior office of commercial value. (2) The question was foreclosed by the deliverance of the Court of Claims. The pursuer had already chosen his Court and presented his claim before it, and he could not now be heard to dispute the decision at which that Court had arrived. (3) The defender had averred a good *prima facie* title to defend the action, which was all that was required at this stage. Having been called to the action, he was entitled to appear.⁴ It was enough for him to allege that he was within the destination in the Act of 1600, cap. 44.⁵

Argued for the pursuer;—(1) The jurisdiction of the Court of Session originally extended over all civil matters, and had only been limited with regard to peerages, leaving its jurisdiction over other

1668. And yet, if anything is clear upon the documents already produced, Scrymgeour of Kirkton preferred no such claim in 1668, or even in 1671, when he was called and appeared in the action of declarator which was in that year brought by the pursuer's author. For it appears from the decree of 1671 (a decree which, I may say in passing, was pronounced by a Court of which Lord Stair was a member and had just been appointed President, and which, so far as I can see, is a decree worthy of all respect)—I say it appears from that decree that Scrymgeour of Kirkton, although called to and having appeared in the action, was neither called nor appeared as heir-male or even as heir-general, but was called, and at all events appeared, simply as the *nominatim* substitute in a certain tailzied destination dated in 1587, which rightly or wrongly was held by the Court to be displaced by a later title dated in 1617. It appears also from the same decree that when that fact was ascertained, the next step of the counsel who represented Scrymgeour of Kirkton and the other defenders (the sisters of the deceased and his heirs of line), was to put forward as the heir-male of the deceased a different person altogether. They put forward as heir-male a certain Alexander Scrymgeour, whose compearance was (I think not unreasonably at that stage) disallowed, because he was not, as it appeared, able even to condescend on his relationship. It is very difficult in these circumstances to see how the defender can now claim to be heir-male of the Earl of Dundee, on the ground that Scrymgeour of Kirkton was the heir-male of the Earl at his death.

"That, however, is perhaps a digression. The broad, and, I think, important fact is that the defender's title rests simply on a bare averment of his alleged propinquity; and it appears to me that that being so, the pursuer is entitled to demand that before further procedure the position of the defender should be cleared up.

"Now, there are two ways in which that might be done. There might be a proof allowed of the defender's averments, as contained in ans. 3;

¹ Earl v. Countess Cowley, [1901] A. C. 450, at p. 454; Earl of Crawford v. Duke of Montrose, 1853, 1 Macq. 401, at p. 440; Mackay's Manual, p. 118; Kames' Law Tracts, 2d ed., "Courts," p. 223; Cruise on Dignities, 2d ed. p. 249; Riddell on Peerage Law, I. 20, 24, 46, note, 128.

² Wilson v. Falconer, 1759, M. 165, Lord Kames' note, p. 167; Bower v. Earl Marischal, 1682, 2 Br. Supp. 18; Town of Edinburgh v. Earl Marischal, 1680, 3 Br. Supp. 348; Waddell v. Inglis, 1770, M. 13,134, 16,633; 2 Pat. 205; Ersk. ii., 12, 7, iii., 8, 86.

³ 1747, M. 150, 157.

⁴ Pollock v. Turnbull, Jan. 16, 1827, 5 S. 195; Stair, iv., 3, 47.

⁵ See also argument for the defender, *infra*, p. 1251.

dignities untouched.¹ Accordingly the office of Standard Bearer was July 18, 1908. within the jurisdiction of the Court of Session even if it was merely an office of honour. But it was more, it was a heritable office and possessed the incidents of heritable property.² (2) The determination of the Court of Claims was not final, and not intended to be final; it decided who was to exercise the office at the Coronation, and having done that, its effect was spent.³ It did not decide the legal right to the office in perpetuity. (3) The defender had no title to resist the conclusions of the summons. *Ante omnia* it was necessary for him to prove by service his connection with the first Earl of Dundee—the last member of the Scrymgeour family who had an undoubted right to the office.⁴

At advising on 29th November 1904,—

LORD PRESIDENT (KINROSS).—We have now to consider three interlocutors pronounced by the Lord Ordinary, the first on 13th December 1902, the second on 1st July 1903, and the third on 4th December 1903.

By the first of these interlocutors his Lordship repelled the first, second, and third pleas in law for the comparing defender, these pleas being (1) that the action is incompetent; (2) *res judicata*; (3) no jurisdiction. I think the Lord Ordinary was right in repelling all these pleas, and as his Lordship has given at length his reasons, in which I agree, for following this course, I do not think it necessary to examine these pleas in detail. The first and third of them run very much into each other, and substanti-

or I might sist process to enable the defender to obtain, if he can, in the appropriate Court a service as heir-male in general to the Earl of Dundee, who died in 1668. Of course each of these courses has its disadvantages. In a proof the function of criticism, which in a service would be performed by the proper persons (*viz.*, the competing heirs-male, if there be any), would fall to be performed by the pursuer. On the other hand, in a service the pursuer could not appear; and it might not improbably happen that—there being no appearance for any competing heir-male—the defender might prevail by simply proving to the satisfaction of the Sheriff in Chancery his descent in the male line from some common ancestor of himself and the Earl. As between these alternatives I have accordingly had some difficulty. But, in result, I have come to the conclusion that the proper course is, before further answer, to allow the defender an opportunity of obtaining a service if he can. I think that is the proper and usual course. My impression is that the production of an appropriate service would supersede any proof—I mean on the question of propinquity. But it is not necessary to decide that point now. All I propose to do at present is, before further answer, to sist process until the first sederunt day in October to give the defender an opportunity of establishing by the appropriate service that he is, as he alleges, the heir-male of John, Earl of Dundee."

¹ Ersk. i. 3, 9, 18; Schedule of Peerage Cases appended to Report of Lords' Committee on Peerages, 12th June 1882; Act of Union, 1706 (5 and 6 Anne, cap. 8), Articles 19 and 20; Riddell on Peerage Law, i. 3, 268; Mar Peerage Papers, App. 8 to Kelly's case, p. jj, *per* Lord Loughborough.

² Earl of Caithness v. Sinclair, 1749, M. 163; see also argument for pursuer, *infra*, p. 1252.

³ Sitwell v. Macleod, June 21, 1899, 1 F. 950, at p. 956.

⁴ Drummond v. Ross, Nov. 25, 1824, 3 S. 315; Alexander v. King's Advocate, March 4, 1830, 8 S. 634; Ross v. Robertson, Nov. 14, 1855, 18 D. 34; Lord Saltoun v. Park, Nov. 24, 1857, 20 D. 89; Macleod's Trustees v. Murray, May 21, 1891, 18 R. 830, at p. 832.

July 18, 1908. ally involve the proposition that the office of Standard Bearer was of such a character that it did not carry with it any rights or incidents cognisable by a civil Court. I agree with the Lord Ordinary in thinking that this is not, at all events upon the averments of the parties and the information before us, the true character of the office, and that a question relating to it, such as that which we have before us, may be competently entertained and considered by this Court.

Earl of
Lauderdale v.
Wedderburn.
Ld. President
(Kinross).

The plea dealt with by the interlocutor of 13th December 1902, upon which we heard most argument, was "*res judicata*," the adjudication pleaded in bar of the action being the determination or report of the Court of Claims appointed by His Majesty the King to receive, hear, and determine petitions and claims to perform services at or in connection with the Coronation. The duty was not confided to the Court of Claims of determining finally questions such as those which are raised in the present action, and I am of opinion that the deliverance issued by that Court cannot be successfully pleaded in bar of such an action as the present. The Court of Claims necessarily proceeded upon the information before them, while in the present action allegations are made of matters which were not proved before the Court of Claims.

By the second interlocutor, that of 1st July 1903, the Lord Ordinary, before further answer, sisted process till the 1st day of October then next to give the defender an opportunity of establishing by the appropriate service his averment that he is the heir-male of John, Earl of Dundee, who died in 1668. This interlocutor appears to have proceeded upon the view that the defender could not establish his plea that he was heir-male of John, Earl of Dundee, in any other way than by service to him in that character. It appears to me, however, that for the purposes of the present action it may possibly be competent to prove otherwise than by service some at least of the material allegations which the defender makes, and that it would be unsafe to separate this question from the others arising in the case. There are a number of other allegations made by both parties on record, which may possibly prove to be material to the determination of the case, and I understand that the counsel on both sides decline to renounce probation. Under these circumstances, I think that our proper course would be to pronounce—and I propose that we should, with a view to preparing the cause for final adjustment, now pronounce—an interlocutor in the following or in similar terms:—"The Lords having heard parties, and considered the record, proceedings, and productions, adhere to the Lord Ordinary's interlocutor of 13th December 1902: Recall his Lordship's interlocutors of 1st July 1903 and 4th December 1903, and counsel for both parties having declined to renounce probation, allow the parties a proof of their respective averments, the said proof to be taken before Lord Adam on a date to be afterwards fixed by his Lordship: Meantime reserve all questions of expenses."

LORD ADAM.—I concur.

LORD M'LAREN.—I am of the same opinion. On the question of *res judicata* it seems to me that the decision of the Court of Claims has already received full effect, because that decision was only to the effect that Mr

Scrymgeour Wedderburn was entitled to officiate as Standard Bearer at the July 18, 1908. King's Coronation. That ceremonial has passed, and the judgment has ^{Earl of} received full effect. The question here, therefore, is entirely as to which of ^{Lauderdale v.} the competing parties is entitled to the hereditary office in perpetuity. On ^{Wedderburn.} the question of further procedure, I agree with your Lordships that there ^{Lord M'Laren.} ought to be an order for proof, because the foundation of the title of each party rests on a question of fact which is not admitted by either, namely, his propinquity to the original grantee.

LORD KINNEAR.—I agree with your Lordships in thinking the question is not ripe for decision on its merits, and cannot be disposed of on its merits without prejudice to the parties until we have the facts before us on which either party relies. We can have these facts only by the parties being allowed a proof, or by one or both renouncing probation, and therefore the only course will be to allow a proof.

THE COURT pronounced this interlocutor:—"The Lords open up the record, and allow the same to be amended in terms of the minute for the defender and the answers for the pursuer respectively,* and said amendments being made, of new close the record; and having considered the reclaiming note for the defender against the interlocutor of Lord Kyllachy, dated 4th December 1903, and heard counsel for the parties, recall said interlocutor, as also the interlocutor of 1st July 1903: Adhere to the Lord Ordinary's interlocutor of 13th December 1902; and counsel for both parties having declined to renounce probation, allow the parties a proof of their respective averments, and to the pursuer a conjunct probation, said proof to proceed before Lord Adam on a date to be afterwards fixed."

Proof was led before Lord M'Laren (Lord Adam having resigned) on 14th July 1906 and 12th January 1907.

The evidence led was oral and documentary. The defender also produced a pedigree in which he traced his descent from Alexander Carron or Scrymgeour mentioned in Ans.1. The oral evidence consisted principally of the opinions of experts as to the defender's genealogy, and the documentary evidence, of a series of documents, from 1298 onwards, in which the office of Standard Bearer was dealt with or referred to. The import of the evidence, so far as bearing on the nature and quality of the office, and on the defender's pedigree, is sufficiently stated in the opinion of the Lord President. The proceedings in the action of declarator raised by Charles Maitland in 1671 are narrated in the opinion of the Lord President.

Parties were further heard before the First Division on 25th February 1908, and following days.

Argued for the defender;—The office of Standard Bearer was a high dignity, passing *jure sanguinis*,¹ and not an estate capable of being disposed or adjudged. It was confined to members of a special family, as appeared from the fact that when it was created it was associated with a new family name—Scrymgeour. In this respect it

* *Vide supra*, p. 1240, notes * and †.

¹ Ersk. iii. 8, 86.

July 18, 1908. resembled the office of Earl Marshal,¹ or Keeper of the Register of Sasines,² or High Constable,³ and not the office of Usher.⁴ In the early documents dealing with the office it was never mentioned in the dispositive or tenendas clauses, i.e., it was regarded purely as an honour.⁵ There was no indication of its passing by symbolic delivery, and it was only a burden on lands, which were held independent of it. Accordingly the office must remain in the Scrymgeour family until it was lost to them by failure or corruption of blood, or by the passing of an Act of Parliament repealing their right—none of which events had occurred. No fees or emoluments were attached to the office which could be subject to diligence.⁶ The word “infestment” in the Act of 1600 merely signified the grant of the office.⁷ The inclusion of the office in the barony titles in 1643 was a mistake, and could not alter its nature.⁸ Such being the nature of the office, the titles of the pursuer were plainly inept in so far as they purported to adjudge the office, or to convey it to persons who were not of the Scrymgeour family. Nor could they be regarded as conferring a new office, since after the Act 1455, cap. 44, it was not competent to create any new heritable office. The pursuer’s titles were further subject to the following criticisms:—(1) The *Ultimus Hæres* Charter of 1670 proceeded upon the representation, false in fact, that John, first Earl of Dundee, had no heirs-male. The Crown had thus no right to make the grant.⁹ It was true that it was ratified by Parliament,¹⁰ but *salvo jure cujuslibet*.¹¹ (2) The decree of 14th February 1671, together with the gift upon which it proceeded, was the subject of two decisions of the Court of Session, by both of which it was declared null and void.¹² The decree itself was *ex facie* untenable. (3) The Crown Charter of Recognition, 1670, contained no reference to the office, and, in any event, a title by recognition was inapplicable.¹³ (4) The Crown Charters of Adjudication, 1672 and 1676, were passed *salvo jure cujuslibet*.¹⁴ It was enough for the defender to shew that he was an heir-male of the Sir James Scrymgeour on whom the office was conferred in 1600. It was not necessary for him to shew that all other heirs-male were extinct.¹⁵ On the evidence the defender’s pedigree was sufficiently established.

Argued for the pursuer;—The pursuer tabled an *ex facie* valid title

¹ Bower v. Earl Marischal, 1682, 2 Br. Supp. 18.

² Wilson v. Falconer, 1759, M. 165, Lord Kames’ note, p. 167, and additional papers in Session Papers.

³ Duke of Hamilton, 1680, Fountainhall i. 98.

⁴ Cockburn v. Langton’s Creditors, 1747, M. 150, 157, and additional papers in Session Papers; Ersk. ii. 12, 7.

⁵ Ersk. ii. 3, 23.

⁶ Stewart v. Miller, 1802, 4 Pat. 286, *per* Lord Chancellor Eldon; Waddell v. Inglis, 1770, M. 13,134, 16,633, (H. L.) 2 Pat. 205.

⁷ Ersk. ii. 3, 18.

⁸ Lord Advocate v. Cathcart, May 19, 1871, 9 Macph. 724, at p. 749.

⁹ Stair, iii. 3, 37.

¹⁰ Act 1670, cap. 49.

¹¹ Act 1670, cap. 62.

¹² Scrymgeour of Kirkton and Others v. Lauderdale, 1686, Fountainhall, i. 395, M. 6485, 16,395; Earl of Lauderdale v. Lord Gray and the Officers of State, July 6, 1784, Campbell’s Collection of Session Papers, vol. 47, No. 92.

¹³ Ersk. ii. 2, 5, 10 to 17.

¹⁴ Act 1681, cap. 192.

¹⁵ Stair, iii. 5, 35; Sandford on Heritable Succession, i. 276.

to the office, namely, his title as the admitted heir-male of Charles Maitland of Hatton, to whom the office had passed. The defender, on the other hand, had totally failed to prove his pedigree, and could not even condescend on the date at which the Scrymgeours of Kirkton — from whom he derived his descent — became the senior branch of the family. The defender having thus no title to the office, he had no right to dispute the pursuer's claim.¹ The office of Standard Bearer was not a mere dignity, but a heritable office, such as the offices of High Admiral, Master of the Household, and Armour Bearer. It was not necessary for this that the office should carry any distinct patrimonial advantage.² At anyrate, whatever its nature was originally, it had, by the 17th century, become feudalised and capable of being attached by diligence.³ From 1643 onwards it was included in the Barony of Dundee, and a title was made up to it in the usual way. This was not a mistake, as alleged by the defender, but a customary mode of extending the barony.⁴ The Act of 1600 was a private Act, and could not affect the interests of third parties.⁵ The question between the parties thus resolved itself into a competition of heritable right, and in such a competition the pursuer had clearly established his claim. But the question was really decided in the pursuer's favour by the decree of 1671, under which the pursuer had possessed the lands and the office.⁶ All the objections now stated to the decree could have been stated in 1671, and so were excluded by the plea of "competent and omitted."⁷ By the operation of the negative prescription, the decree could not now be impugned,⁸ even though it was a decree in absence.⁹

At advising,—

LORD PRESIDENT.—The case for judgment is both important and interesting. It deals with the right to an ancient and honourable office, that of the Standard Bearer to the King of Scotland. We have before us in the papers the results of a long and most painstaking archaeological inquiry, and we have had the assistance of a careful and able argument on both sides of the Bar.

The form in which the case presents itself is an action of declarator at the instance of the Earl of Lauderdale, in which he seeks to have it found

¹ Earl of Perth v. Lady Willoughby de Eresby's Trustees, March 11, 1869, 7 Macph. 642, at p. 653; Macleod's Trustees v. Murray, 18 R. 830, at p. 832; Edmonstone v. Jeffray, June 1, 1886, 13 R. 1038; Stair, iii. 5, 35.

² Earl of Caithness v. Sinclair, 1749, M. 163.

³ Cockburn v. Langton's Creditors, M. 150, 157; Macdonell v. Duke of Gordon, Feb. 26, 1828, 6 S. 600, at p. 608; Balfour's Heraldic Tracts, pp. xxxi., xxxiv., xxxvi., xxxviii.

⁴ L. Clackmannan v. Allardes, 1630, M. 16,399; Stair, ii. 3, 45.

⁵ Ersk. i. 1, 39.

⁶ Fraser v. Lord Lovat, Feb. 18, 1898, 25 R. 603, at p. 616.

⁷ Carmichael v. Anstruther, June 19, 1866, 4 Macph. 842.

⁸ Earl of Dundonald v. Dykes, May 12, 1836, 14 S. 737; Cabbison v. Hyslop, Nov. 29, 1837, 16 S. 112, at p. 119; Paul v. Reid, Feb. 8, 1814, F. C.; Millar on Prescription, pp. 82 to 85.

⁹ Macdonald v. Kinloch Common Agent, 1790, M. 12,198; Blair v. Kinloch Common Agent, 1789, M. 12,196; Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 24.

July 18, 1908. and declared that in virtue of his titles the said office of Standard Bearer belongs to him. He called as defenders Mr Scrymgeour Wedderburn, of Earl of Lauderdale v. Birkhill, and the Rev. R. C. Scrymgeour, being the two persons who had Wedderburn. appeared as rival claimants before the Court of Claims, shortly to be mentioned. Mr Scrymgeour Wedderburn alone defends; and alleging that he is in right of said office, seeks absolvitor from the conclusions of the summons. The case is before your Lordships not for the first time, though I personally on the former occasions did not share your Lordships' deliberations; and I think it is necessary first briefly to recapitulate the former history of the case.

It is common ground between the parties that the office of Standard Bearer, which had been for long in the family of Scrymgeour, was confirmed to Sir James Scrymgeour of Dudhope and his heirs-male by an Act of the Scots Parliament in 1600. It was undisputedly possessed and enjoyed by John Scrymgeour, third Viscount Dudhope and Earl of Dundee. This nobleman fell into debt, and various apprisings were led against his estate. In 1668 he died, admittedly without male issue of his body. Shortly thereafter Charles Maitland of Hatton, Lord Hatton, and afterwards Earl of Lauderdale, acquired, as alleged by the pursuer, the right to the Standard-Bearership. This he did by obtaining a grant of the same (it will be understood that I am still setting forth the allegations of the pursuer) from the Crown, who had succeeded as *ultimus hæres* in default of male heirs to the Earl of Dundee, and he was duly infeft on the charter issued in respect of the grant.

He also bought up some of the apprisings, and upon them obtained a Crown charter of adjudication. He further obtained some supplementary titles. All these infeftments were confirmed by Act of Parliament. After him, and till 1761, the right was held on personal titles only, but in that year the seventh Earl of Lauderdale made up title as heir of the third Earl, and obtained thereafter a Crown charter of adjudication containing the said office. Since then the Earls of Lauderdale have duly made up titles to the said office, and the present pursuer has the same in his infeftments. Further, it is matter of admission that the present pursuer is the heir-male of Charles Maitland, afterwards third Earl of Lauderdale. On this statement the pursuer says his title to the office is complete.

The defender replies that the whole proceedings of Charles Maitland as regards the Standard-Bearership were inept. He says that the right was incapable of being attached by diligence, and consequently did not fall under the apprisings, and that it did not fall to the Crown as *ultimus hæres*, because although the Earl of Dundee died without heirs-male of his body, he did not die without heirs-male, and he says that he is, if not *the* heir-male, at least *an* heir-male of the said Earl, and as such entitled to resist the unfounded claim of the pursuer.

In this state of allegation each party began by an attack on the title of the other. The defender first pled no jurisdiction, by which he meant that the Court of Session had no jurisdiction to declare the right to such an office, just as it has no jurisdiction to declare the right to a Peerage. Lord Kyllachy, as Lord Ordinary, on 13th December 1902 repelled that plea; and to that judgment your Lordships, on 29th November 1904, adhered.

The defender next pled *res judicata*. This plea was founded on the July 18, 1908. fact that the Court of Claims, appointed to deal with claims of persons ^{Earl of} to render services at the Coronation of his present Majesty, had, on 15th ^{Lauderdale v.} January 1902, in a competition between these two parties and the other ^{Wedderburn.} defender as to the right to be present at the Coronation as Hereditary ^{Ld. President.} Standard Bearer for Scotland, pronounced in favour of the present defender and against the pursuer. The Lord Ordinary of the same date, 13th December 1902, repelled this plea also, and to that also your Lordships adhered.

The pursuer then attacked the defender's title to defend. The Lord Ordinary, after hearing parties, sisted the cause in order that the defender might produce, if he could, a service as heir-male of the Earl of Dundee, who died in 1688. Upon the defender's refusing to do so, he, on 4th December 1903, sustained the second plea in law for the pursuer, which was to the effect that the defender, not alleging himself to be the heir-male of the Sir John Scrymgeour mentioned in the Act of 1600 (it is admitted that the Earl of Dundee was his heir-male), had no title or interest to oppose the conclusion of the summons, and decerned and declared in favour of the pursuer. On 29th November 1904 your Lordships recalled that interlocutor, and, parties having declined to renounce probation, ordered a proof. That proof, oral and documentary, with minutes of admissions, is now before your Lordships.

I mentioned already that up to this point I was not a party to your Lordships' deliberations. I think it therefore expedient that I should first explain what I understand to be the precise effect of your Lordships' interlocutor recalling the Lord Ordinary's interlocutor of 4th December 1903. I do not hold that you thereby expressed dissent with all the views expressed by the Lord Ordinary in his note. What I do hold to have been determined was that it was not right to deny the defender a title to defend solely on the ground that he did not *ante omnia* assert and prove that he was the heir-male of the Earl of Dundee. He did assert and offer to prove that he was one of the heirs-male of Sir James Scrymgeour, i.e., within the destination of the Act of 1600; and if that was so, and if his further allegations as to the ineptitude of Charles Maitland's titles were made out, then your Lordships held that he would have shewn a sufficient title to prevent the present pursuer obtaining his decree, even though he himself might conceivably have to give way before the superior claims of another Scrymgeour who could shew that he was the heir-male of the Earl of Dundee. I accordingly approach the case from that standpoint, although as this case may go further I may perhaps be allowed to add that I respectfully agree with that judgment.

One other point ought to be mentioned in order to be put aside before I come to the merits of the case. Neither party is in a position to plead the positive prescription as determining the matter in his favour, because neither can shew undisturbed possession. The office of Standard Bearer is not such a thing as admits of a proof of possession except on stated occasions. But following the analogy of acts of presentation in the case of patronage, probably if either party had been able to shew that on successive occasions of coronations he and his ancestors had been summoned by

July 18, 1908. the Sovereign to execute his office that would have been sufficient.

Admittedly neither can do so.

Earl of Lauderdale v. Wedderburn. Coming now to the merits of the case, one might either first consider the point whether the defender had failed to connect himself with the destination of 1600 at all—in which case he would be a mere third party, and not entitled to defend—or one might consider whether Charles Maitland's titles were truly inept to transmit to him the office upon the grounds pled by the defender, a resolution of which in the negative would at least drive the defender to prove that he was the heir-male of the Earl of Dundee. On both of these questions we had careful and sustained argument. In my view of the case, however, there is another consideration which makes it unnecessary to resolve either of these questions, and that depends upon a fact which I have not so far stated.

Ld. President. In 1671 Charles Maitland, having by this time obtained the charter of *ultimus hæres* of 11th July 1670, which included *ex facie* the office of Standard Bearer, raised an action of declarator in which he called as defenders a John Scrymgeour, undesignated, but called as apparent heir (not, be it observed, heir-male) to the deceased Earl of Dundee, and also, *inter alios*, John Scrymgeour of Kirkton, who was, according to the defender's genealogy, his ancestor. In this action he obtained decree, and the extract-decree we have before us. Like all extracts of that period it narrates not only the conclusions of the action and the decree proper, but also the whole proceedings in the action. Now, the conclusions set forth that the pursuer, Charles Maitland, being the holder of the charter of 11th July 1670, which is then narrated as including various lands, &c., and, *inter alia*, "the office of Bannerbearer," it ought and should be found and declared that the whole foresaid lands and others, particularly and generally also mentioned, do properly belong and pertain to the said Charles Maitland, and then, after detailing the various steps of procedure and the defences, answers, replies, and duplies, goes on to say that the Lords repelled the defence, and therefore found, decerned, and declared in manner above written.

Now, that is a decree which in terms actually declared this office to belong to Charles Maitland in a process to which Scrymgeour of Kirkton was called, and, in my opinion, that concludes the whole matter. If your Lordships' judgment in this case is sound that this Court has jurisdiction to determine to whom this office belongs, then that was equally true of the same Court in 1671. The pursuer as heir of Charles Maitland is in right of that decree. It seems to me, therefore, that the present defender can never prevail against the pursuer without reducing that decree, and that he cannot do because of the negative prescription. For the pursuer can plead the negative prescription against the defender, even although he cannot himself assert the positive—(See *Dundonald v. Dykes*,¹ and the well-known case of *Cubbison v. Hyslop*²).

The defender attempts to criticise the result at which the Court arrived by examining the arguments of parties as set forth in the pleadings of parties detailed in the extract. But none of these criticisms are of any avail, for at best they could only shew that the Court was wrong. It is

The defender attempts to criticise the result at which the Court arrived by examining the arguments of parties as set forth in the pleadings of parties detailed in the extract. But none of these criticisms are of any avail, for at best they could only shew that the Court was wrong. It is

¹ 14 S. 737.

16 S. 112.

quite true that the contention seems to have turned on whether the ruling July 18, 1908. deed of the lands was a tailzie of 1617 or an earlier tailzie of 1587. And the reason for that was that the tailzie of 1617 was limited to the heirs-male of Sir John Scrymgeour. We have got that deed here, and it is so. It is, perhaps, well to remind your Lordships, in case of misunderstanding, that the *assignati quicunque* in a deed of that date were assignees before infestment. If this were the ruling deed no one could prevail against the donatar of the Crown unless he could allege he was heir-male of Sir John. Whereas the deed of 1587, which we have also got, tailzied the lands to a much wider destination, one branch of which was a Scrymgeour of Kirkton, and his heirs, so that the Scrymgeour, defender in the process, could prevent it being said that the lands had fallen to the Crown as *ultimus hæres*. It is also the fact that if you look at the deed of 1617 you find that it does not include the Standard-Bearership. But all this does not make an objection of the kind known as intrinsic nullity. It would only go to shew that the judgment was wrong—(See *Kinloch v. Bell*,¹ and *Speir v. Willoughby de Eresby*²). It is possible to say that there ought to have been a distinction made, i.e., that the lands ought to have been declared as belonging to Charles Maitland, but not the Standard-Bearership. But if so Scrymgeour of Kirkton was there and ought to have said so. Everything now pled as to the peculiar nature of the right to the office could have been said then. The reason very probably was that at that time the parties thought much of the lands and but little of the office. But the bare fact remains that a declarator in plain terms of the right to the office is sought by Charles Maitland, and that decree of declarator is pronounced in the terms craved.

The fact that the procurators for Scrymgeour are allowed to withdraw and the decree is pronounced as a decree in absence is also of no avail to the defender. This, of course, is an intrinsic objection. But it was long ago settled that a decree in absence proceeding on a personal citation (and *a fortiori* in a case where appearance was entered) could not be reduced merely on the ground of being in absence, after the death of the defender—*Macdonald*³—and the Court of Session Act, 1868, by section 24, protects all such decrees after twenty years after their date.

This view, if sound, makes it unnecessary to decide either of the other two questions. But in view of the importance of the case it may be as well that I should say something about them.

With regard to the question of the quality of the office, I share the views expressed by Lord Kyllachy in the first page of his first opinion. Whatever may have been the quality of the office in the dim ages in which it was first created, I think it fell under the feudalising influence which was apt to treat all such things as heritable and feudal, and accordingly, confessedly from times far earlier than the death of the Earl of Dundee it finds its place in charters and infestments along with other landed property, and the successive holders make good their right by service. If that is so, then I think it became subject to disposition and to diligence, and could then be carried by the charter of recognition or by the charter of adjudication. The case of *Cockburn v. Langton's Creditors*⁴ is another example of such a process,

¹ 5 Macph. 360.² 18 R. 407.³ M. 12,198.⁴ M. 150 and 167

July 18, 1908. and I do not think that the different class of the services makes any difference in the law. After all, the Sovereign could, if he chose, save himself Earl of Lauderdale v. Wedderburn. by not summoning his Standard Bearer to him on any occasion.

Then as regards the pedigree, my view is that although the defender Ld. President. raises a sort of moral conviction that the Scrymgeours of Kirkton were a branch of the Scrymgeours who held the office, yet I agree I cannot say that I think he has produced proof to get over the gap which occurs when you come to David of Sonahard. And unless he can get over this gap, admittedly he must fail. And here again I think Lord Kyllachy's remarks on another aspect of the decree of 1671 are very weighty. They might have been got over by other proof. But such proof has not been, in my judgment, forthcoming.

The result on the whole case is that though one cannot help feeling that Charles Maitland in 1671 got either by accident or design an office to which it is difficult to see he was entitled, yet that having got a decree in his favour, and the office having thereafter been duly transmitted, the present pursuer is entitled to prevail.

LORD M'LAREN.—I agree with your Lordship.

LORD KINNEAR.—I had intended to express my own views in this case, but every point upon which I think it turns has been expounded in the opinion which your Lordship has just delivered. I am content, therefore, to say that both upon the general law of the case, and upon the particular facts, I entirely agree with all that has been said.

LORD PEARSON was absent.

THE COURT pronounced this interlocutor:—"Find and declare in terms of the conclusions of the summons, and decern."

TODS, MURRAY, & JAMIESON, W.S.—WM. DUNCAN & Co., S.S.C.—Agents.

No. 180. MRS MARY PAYNE OR O'BRIEN AND ANOTHER, Claimants (Appellants).
—*Wilton.*

July 18, 1908.

THE STAR LINE, LIMITED, Defenders (Respondents).—*Spens.*

O'Brien v.
Star Line,
Limited.

Master and Servant—Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)—Accident arising out of and in the course of the employment—Onus.—In an application for compensation under the Workmen's Compensation Act, 1906, the *onus* is on the claimant to prove that the accident arose out of and in the course of the workman's employment.

A fireman, whose duty it was to remain on board the ship where he was employed, went ashore without permission, and returned to the ship in the evening intoxicated. In the morning he was found fatally injured at the bottom of a hold. The only access to the hold was in a part of the vessel where the fireman had no right to be, through a door which was kept locked, but which had been broken open.

In a claim for compensation brought by dependants of the fireman, the above facts were proved. There was no evidence to shew how the door of the hold had been broken open, or how the fireman had got to the hold, or how the accident had happened.

Held that the claimants had failed to prove that the accident arose out of and in the course of the fireman's employment; and accordingly that they were not entitled to compensation.

IN an application under the Workmen's Compensation Act, 1906,* July 18, 1908. in the Sheriff Court at Glasgow, at the instance of Mrs Mary Payne or O'Brien, widow of the deceased Stephen O'Brien, fireman, and Daisy Burge, her daughter, against The Star Line, Limited, for compensation in respect of the death of Stephen O'Brien, the Sheriff-substitute (Fyfe) refused the application, and at the request of the claimants stated a case.

O'Brien v. Star Line, Limited.
1st Division,
Sheriff of Lanarkshire.

The case stated that the following facts had been proved:—
“ 1. That Stephen O'Brien was a fireman on board respondents' steamship 'Star of Ireland,' which ship he joined at Barry on 16th August 1907, and it was his duty to remain on board said steamship, and subject himself at any time to the orders of the master and chief engineer of the said steamship. . . . 3. That in August 1907 said vessel was in Glasgow harbour. 4. That on Monday evening, 19th August, O'Brien went ashore without permission. 5. That he returned the worse of drink late in the evening. 6. That he went to his bunk in the fireman's fore-castle. 7. That about 5.30 on the morning of Tuesday, 20th August, he was found seriously injured lying at the bottom of No. 1 hold. 8. That the hatch of No. 1 hold was open during the night. 9. That this hatch is situated inside the fore-extension of the vessel, which is an enclosed and covered portion of the vessel on the main deck used for stowing cargo in, and the entrance to which is by a hatch on the upper deck, which was battened down on the night in question. There is an iron door communicating between the fore-extension and the fore-castle, and the hatch through which deceased fell is situated about two feet from the said door, and one foot to the left of the line of said door. 10. That this door had been locked and bolted at Barry, as is usual, by the first officer, preparatory to cargo being stowed there at Glasgow, but that it had been forced or broken open at some time and by some person or persons unknown. 11. That this door is at right angles to and distant a few feet from the door of the firemen's lavatory, and is on the same deck and directly opposite to the door of the firemen's fore-castle, which is eleven feet ten inches away. 12. That the doors of the fore-extension and of the lavatory are vastly different in construction, size, material, and position. 13. That the door of the lavatory was always open, and kept so by lashings. 14. That from the time of his return to the ship until he was found in the hold the deceased had no duties to perform in the service of the ship, and, in particular, had no duty which took him into the fore-extension, and had no right to be in that portion of the ship. 15. That the deceased Stephen O'Brien was taken to the Western Infirmary, Glasgow. 16. That on 23d August 1907, he died there in consequence of his injuries. 17. That apart from these findings there was no evidence led accounting for the deceased being found injured lying at the bottom of No. 1 hold.”

The Sheriff-substitute continued—“ On the facts proved as above, I found that there was no evidence that the death of the deceased Stephen O'Brien was the result of injury sustained by accident arising out of and in the course of his employment, and refused the application.”

* The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1), enacts:—“ If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation.”

July 18, 1908. The question of law for the opinion of the Court was:—"Whether on the facts found proved Stephen O'Brien's death was the result of injury sustained by accident; and, if so, whether such accident arose out of and in the course of his employment, within the meaning of the Workmen's Compensation Act, 1906?"

O'Brien v.
Star Line,
Limited.

The case was argued on 25th June 1908.

Argued for the appellants;—There was sufficient evidence of all the circumstances required to entitle the claimants to compensation. The injury was caused by an accident,¹ or at least, in the absence of evidence to the contrary, must be assumed to have been so caused.² This being so, the claimants were entitled to compensation, unless the respondents could shew cause—such as serious and wilful misconduct—why it should be withheld.³ Under the Act of 1906, serious and wilful misconduct had no place in the circumstances of this case.⁴ The accident arose in the course of the employment. Employment was not confined to the hours during which work was being done,⁵ and the deceased was in the course of his employment as soon as he came on board the ship on which he was employed. Lastly, the accident arose out of his employment, for it was one of the risks incidental to his employment that he might fall down the hold.⁶

Argued for the respondents;—The *onus* was on the claimants to shew that the injury arose in the circumstances described in section 1 (1) of the Act.⁷ This *onus* had not been discharged, for no explanation had been given of the way in which the accident occurred. Such evidence as there was indicated that the accident did not arise out of his employment; for it occurred at a place where the workman had no business to be.

At advising,—

LORD M'LAREN.—This is an appeal from the decision of the Sheriff-substitute of Lanarkshire, as arbitrator under the Workmen's Compensation Act, 1906, in a claim arising out of the death of Stephen O'Brien. The arbitrator has found that there is no evidence that the death of O'Brien was the result of injury sustained by accident arising out of and in the course of his employment. The material facts as stated in the case are as follows—(After summarising the facts given above his Lordship proceeded)—Now, in a certain sense this may be described as an accident arising in the course of the employment, because O'Brien was bound by the terms of his employment to be on board ship at night, and if he had not been in the employment of the Star Line the accident could not have happened. But this

¹ Fenton v. Thorley & Co., Limited, [1903] A. C. 443.

² Macdonald v. Refuge Assurance Co., Limited, June 17, 1890, 17 R. 955.

³ Johnston v. Marshall, Sons, & Co., Limited, [1906] A. C. 409.

⁴ Workmen's Compensation Act, 1906, sec. 1 (2) (c).

⁵ Mackenzie v. Coltness Iron Co., Limited, Oct. 21, 1903, 6 F. 8; Keenan v. Flemington Coal Co., Limited, Dec. 2, 1902, 5 F. 164; Blovelt v. Sawyer, [1904] 1 K. B. 271.

⁶ Robertson v. Allan Brothers & Co., April 1, 1908, Law Times Newspaper, April 11, 1908, p. 548.

⁷ Pomphrey v. Lancashire and Yorkshire Railway Co., [1903] 2 K. B. 718; Wakelin v. London and South-Western Railway Co., 1886, L. R., 12 A. C. 41; Barrie v. Police Commissioners of Kilsyth, Dec. 1, 1898, 1 F. 194.

consideration does not solve the question, because the employer is only July 18, 1908. liable to make compensation for an accident arising "out of" the employment, which I take to mean that there must be some causal relation between the employment and the accident. On the facts stated the accident is wholly unexplained. The difficulty of assigning a cause is increased by the finding of the Sheriff that O'Brien when he returned to the ship was the worse of drink. There is no question as to misconduct in the case, because that element is excluded by the statute of 1906 in the case of accidents resulting in death. But it was the misfortune of O'Brien that when he returned to the ship he was under the influence of drink, whether from his own serious fault or from some excusable cause is of no consequence in the present inquiry, and people in that condition sometimes do strange things, which in a legal sense may be regarded as their voluntary acts. It was suggested for the claimants that O'Brien having occasion to go to the lavatory missed his way and fell into the hold. If the iron door communicating with the hold had been left open this might be a probable explanation. But here it is found by the Sheriff that this door was locked and bolted by the mate or first officer of the ship, and there is no evidence that it was afterwards opened by some person other than O'Brien. The facts are then consistent with the supposition that the door in question was forced open by O'Brien himself, in which case it could not be affirmed that the accident had arisen out of the contract of employment. We do not know how the door was opened or how O'Brien fell into the hold. As to the cause of the accident the evidence is a complete blank, and therefore I am unable to say that it was in fact an accident arising out of and in the course of the employment.

The conditions of the question are nearly the same as we find in the English case of *Lancashire and Yorkshire Railway Company v. Pomfret*.¹ The workman, who was in the employment of the railway company, was travelling homewards, as he was entitled to do, in one of the company's carriages. He was found with his head crushed under a bridge and on the line, and there was no evidence as to how the man lost his life. The Court of Appeal was of opinion that, in the absence of evidence on this point, it could not be affirmed that the accident arose out of the employment, because it was possible that it might be the result of the voluntary act of the deceased in attempting to leave the carriage while the train was in motion. Lord Justice Stirling's illustration makes the ground of judgment very clear. Now, I am not overlooking the subsequent history of the case, which is, that the Court remitted to the arbitrator to take further evidence, and on a rehearing held that the party was entitled to compensation. That was only a decision on the facts of the particular case. In the present case I do not propose that we should direct a further inquiry by the Sheriff, because I am satisfied on his statement of the case that we are in possession of all the evidence of which the case admits. But then the case is just in the position in which the case of *Pomfret*¹ stood at the first hearing, and the opinions delivered at that hearing support the conclusion to which I have come, that it is not proved that this accident arose from a cause for which the respon-

¹ [1903] 2 K. B. 718.

July 18, 1908. dents are responsible. I am therefore of opinion that the appeal should be dismissed.

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LORD KINNEAR.—The question as stated by the learned Sheriff is really a question of fact. I have no doubt that if the Sheriff arrives at a conclusion such as he states in the last sentence of his statement when he says, "I found there was no evidence that the death of the deceased Stephen O'Brien was the result of injuries sustained by accident in the course of his employment," and if he arrives at that conclusion upon the ground that there is no legal evidence which he is entitled to consider, the Court may review a decision of that kind. We may instruct him, as we might instruct a jury, that there is evidence from which they might draw an inference of fact. We cannot tell the Judge or the jury that there is evidence from which they ought to draw an inference of fact, but if it appeared to me on reading this case that the Sheriff had gone wrong by misdirecting himself as to the kind of evidence which he ought to consider, I should have thought that a proper question was raised for the decision of the Court. But it seems to me quite clear that the Sheriff's decision is really a decision on fact upon evidence which he has fully considered, and I am not prepared to interfere with his judgment on a mere question of fact.

Since we have heard the whole question argued, I quite agree with the conclusion at which the learned Sheriff arrived. It must be taken, I think, as settled, that in order to recover compensation under the Workmen's Compensation Act the claimant must establish two things—first, that the accident arose in the course of the workman's employment; and secondly, that it arose out of the workman's employment—and that the *onus* of proving these facts lies upon the claimant. Now, all we know is that this man was sleeping on board the steamship on which he was fireman. In the course of his employment it was his duty to be on board at night in order to submit himself to the orders of the master and chief engineer, and so far, therefore, he was in the performance of his duty in being on board. But then it was found that "from the time of his return to the ship the deceased had no duties to perform in the service of the ship, and in particular he had no duty which took him into the fore-extension, and had no right to be in that portion of the ship." It rather seems to me that that finding, taken by itself, negatives the proposition which the appellant seeks to make out, namely, that the accident arose out of his employment. He had no duty to perform at all, but was entitled to be on board and bound to be on board in order that he might be available for any duty that he might be called upon to perform. Now, it may be that if it had been shewn that in these circumstances an accident had befallen him from merely blundering through one door instead of going through another in going to a part of the ship where he was entitled to be, a question might have arisen, but that is not the fact. The fact is that he was found lying in the hold, that he could not have got there without in the first place going into a part of the ship where he had no right to be, and in the second place he could not go into that part of the ship without opening a locked door. The door was forced or broken open at some time, by some person; the Sheriff says it is not ascertained how or by whom. But then all the facts are that this man was

found to have been injured by going into a part of the ship where he had no right to be, and which could only have been reached by forcing a locked door. I am unable to see how that can be said to be an accident arising out of his employment. I am not disposed to speculate as to how the accident might have happened, or how the door might have come to be open, because it is for the claimant to prove how that happened, if he can shew that it happened in such a way as to bring the case within the scope of the Act, and he has failed to prove it. It is possible to imagine a variety of ways by which such a thing might occur, but there is no reason to suppose that it occurred in the performance of duty. I agree with what was said by your Lordship in the chair that we must take into account that the Sheriff finds that this man came aboard in a state of intoxication. How did an intoxicated man open or break through a locked door and tumble into a hold where he ought not to be? I agree with the Sheriff that upon the evidence we cannot say we know anything about that. It is not proved that he did these things in the course of the employment in which he was engaged.

LORD MACKENZIE concurred.

The LORD PRESIDENT and LORD PEARSON were absent.

THE COURT answered the question of law in the negative, and dismissed the appeal.

ALEXANDER BOWIE, S.S.C.—CAMPBELL FAILL, S.S.C.—Agents.

THOMAS M'EWAN, Pursuer (Respondent).—*Cooper, K.C.—Macphail.* No. 181.
MRS JESSIE PRENTICE JONES OR M'EWAN, Defender (Reclaimer).—*Dickson, K.C.—Umpherston—R. S. Horne.* July 18, 1908.

Husband and Wife—Divorce—Desertion—"Reasonable Cause"—Act 1573, cap. 55.—Circumstances in which held that a wife who had deserted her husband had no reasonable cause for non-adherence.

Question whether in an action of adherence a wife can successfully defend herself upon any other grounds than would be required in order to sustain an action at her instance for separation and aliment.

Mackenzie v. Muckenzie, May 16, 1895, 22 R. (H. L.) 32, commented on.

Husband and Wife—Divorce—Desertion—Interruption—Action of separation at defender's instance—Act 1573, cap. 55.—A wife deserted her husband, and after having been in desertion for about a year raised an action of separation against him, in which she was unsuccessful. Thereafter she continued to refuse to live with him. In an action of divorce on the ground of desertion at the instance of the husband, raised four years after the date of desertion, the wife pleaded that the period during which the action of separation was being carried on should be deducted from the four years, as during that period she was not in "malicious and obstinate defection."

Held (aff. judgment of Lord Dundas) that in the circumstances of the case she was not entitled to the deduction claimed.

Husband and Wife—Divorce—Desertion—Privy Admonition—Act 1573, cap. 55.—A husband whose wife had deserted him, and who had frequently expressed his desire that she should return, signed an agreement with her about a year and a half after the date of desertion with reference to the custody of the child of the marriage, in which he stated that "he adheres

July 18, 1908. to his former requests to her to return to live with him, and desires that she should do so." He had no further communication with her, and about two years and a half later raised an action of divorce for desertion.

M'Ewan v.
M'Ewan.

Held, in view of the circumstances of the case, that this declaration was a standing offer to his wife to return and needed no repetition, and that the husband had not failed in his duty to give "privy admonitions for due adherence" in terms of the Act 1573, cap. 55.

1ST DIVISION.
Lord Dundas.

ON 18th July 1906 Thomas M'Ewan, electrical engineer, Edinburgh, raised an action against his wife, Mrs Jessie Prentice Jones or M'Ewan, concluding for declarator that the defender had been "guilty of wilful and malicious non-adherence to, and desertion of, the pursuer for the space of four years," and for decree of divorce.

The parties were married at Edinburgh on 19th December 1900, and thereafter took up house together.

The pursuer averred that on 28th September 1901 it was arranged between the parties that, for domestic reasons, the defender should go to her father's house at Dalmeny for a short time, where she accordingly went.

On 4th November 1901 the pursuer received a letter from the defender's agents charging him with cruelty and asking him to consent to a voluntary separation. On 27th February 1902 a child was born to the defender at Dalmeny. On 4th March 1902 the pursuer's agent, after an investigation into the circumstances, wrote to the defender's agents denying the charge of cruelty, and intimating that the pursuer desired the defender to return to his house. On 7th March the defender's agents wrote stating that she would not agree to return to live with the pursuer.

(Cond. 4) " . . . Since the said 7th March 1902 the defender has adhered to the position taken up in the said letter of her agents, and has without any justification persistently refused to return to the pursuer's house and to resume cohabitation with the pursuer, and she has remained in desertion since said date."

(Cond. 7) " . . . The pursuer has repeatedly, through his agent, and also personally, intimated to the defender that he desired her to return to him and resume cohabitation. . . . During October and November 1902 the pursuer and defender had frequent meetings, and the defender expressed her willingness to return soon to live with her husband, and with her knowledge and approval a house was accordingly taken by the pursuer. Early in December, however, the defender refused to see the pursuer when he called for her, and when he wrote to her as to her returning to the house he had taken she did not reply."

(Cond. 8) "On 13th December 1902 an action of separation and aliment was raised by the defender in the present action against the present pursuer, and on 8th December 1903, after a long proof, the Lord Ordinary (Lord Low) assolized the present pursuer. Mrs M'Ewan thereafter reclaimed against Lord Low's interlocutor."

The pursuer further averred that on 9th and 11th January 1904 an agreement was signed between the parties and the defender's father, by which it was arranged that for a time the defender should have the custody of the child, and that she should withdraw her reclaiming note, which was done.

The agreement contained the following article:—"First. It is declared and agreed that Mr M'Ewan's handing over the child to Mrs M'Ewan, who at present is living apart from him, is not to be held as to any extent implying acquiescence on his part in her con-

tinuing to live apart from him; on the contrary, he adheres to his July 18, 1908. former requests to her to return to live with him, and desires that she should do so." The other articles were concerned with the arrangements for the custody of the child and for the withdrawal of the action. M'Ewan v.
M'Ewan.

In answer to the pursuer's statements the defender made specific averments of cruelty and ill-treatment on the part of the pursuer prior to 28th September 1901, which were not pressed in argument on the reclaiming note, and into the details of which it is unnecessary to enter.

In answer to cond. 7 the defender stated:—"The defender in October 1902 offered to resume cohabitation with the pursuer, but his conduct demonstrated, and was intended to demonstrate, to the defender that it was impossible for her to return to live with him. . . . He made it a condition of the defender returning to live with him that a nurse employed by him at his own hand should have sole charge and control of the child, and should not be interfered with by the defender. This nurse had been grossly insolent to the defender, as the pursuer was well aware. The defender told the pursuer that it would be impossible for her to return to him if this nurse was not dismissed. The pursuer, however, declined to dismiss the nurse. The pursuer also made it a condition of the defender returning to live with him that no member of the family should visit or come to the house, and that she should have no communication with them. The conditions so imposed by the pursuer, which were quite unjustifiable, and which the defender was entitled to decline to accept, satisfied the defender that the pursuer had no real desire to resume cohabitation with her, that he had lost all real affection for the defender, and that she had no security whatever in the event of her returning to live with the pursuer against a continuance on the pursuer's part of his former conduct, subjection to which in the defender's state of health would have been attended with grave risk to her life. In these circumstances the negotiations for renewed cohabitation proved abortive."

She further averred that since the action of separation the pursuer had never made any overtures whatever, either personally or by letter, to the defender. This was not disputed.

The pursuer pleaded;—(1) The defender having wilfully and maliciously deserted the pursuer for upwards of four years, he is entitled to decree of divorce as craved.

The defender pleaded;—(2) The defender not having been guilty of wilful and malicious non-adherence to and desertion of the pursuer should be assoilzied. (3) The pursuer not having been ready and willing during the period of the defender's alleged desertion to adhere to the defender as a husband, the defender should be assoilzied. (4) The defender having been, and being, justified in refusing to adhere to the pursuer, owing to his conduct as condescended on, the defender should be assoilzied.

Proof was led before the Lord Ordinary (Dundas) on 16th July 1907, and following days.

The evidence established the truth of the account given in the pursuer's averments of the negotiations between the parties subsequent to 28th September 1901. The negotiations between the parties in October and November 1902, as bearing on the question whether the defender was justified in refusing to live with the pursuer, are fully detailed in the opinion of the Lord Ordinary.

July 18, 1908. On 19th October 1907 the Lord Ordinary pronounced decree as craved.*

M'Ewan v.
M'Ewan.

* "OPINION.—This is an action by a husband against his wife for divorce upon the ground of desertion. The parties were married on 19th December 1900; the defender left her husband's house on 28th September 1901; and they have never since lived together. The action was raised on 18th July 1906. It is thus an admitted fact that the parties have lived apart for more than four years prior to the action. The main question is whether or not the defender had reasonable cause for remaining away from her husband during that period. The case is one of the utmost importance to the parties; I have heard a long and exhaustive proof, and able arguments by counsel; some—though not, I think, all—of the points of fact and law involved present considerable difficulty. I have therefore studied the case with great care and anxiety. I have come to the conclusion that the pursuer is entitled to the decree which he seeks.

"When the case was in the Procedure-roll a question of law was raised as to which, on 20th March 1907, I reserved my opinion for reasons then expressed. On 13th December 1902 Mrs M'Ewan brought an action of separation and aliment against her husband, in which the Lord Ordinary (Low), on 8th December 1903, assoilzied the latter. A reclaiming note was presented, but the case went no further, in consequence of an agreement between the parties to which I shall have to refer later. The question as to which I reserved my opinion was whether or not a valid defence to this statutory action for divorce for desertion may be based upon grounds insufficient to afford the defender success in her action for separation and aliment. In the view which I hold of the present case, it is not necessary for me to decide that question, because I am of opinion, for reasons which I shall explain, that even if it be answered in the affirmative, the defender has not made out any sufficient case of 'reasonable cause' for absenting herself from her husband. But, as the question is interesting and important, and as this case may go further, it is right that I should state my opinion upon the legal point. No defence, in my judgment, will be good as an answer to a statutory action for divorce, like the present, or to an action of adherence at common law, which falls short of what would be sufficient to support an action of judicial separation by the absenting spouse against the other. This question was fully canvassed, though not decided, in the well-known case of *Mackenzie*, 1893, 20 R. 636, aff. 1895, 22 R. (H. L.) 32. In the Court of Session, a majority of the Judges seem to have thought that what is 'reasonable cause' within the meaning of the Act 1573, c. 55, is a jury question for the Judge or Judges in each case as it arises; and that such 'reasonable cause' may consist in something less than would be sufficient as a defence to an action of adherence. The latter view was, as I gather, distinctly negatived in the House of Lords, at all events by Lord Watson (22 R., at pp. 40, 41). But his Lordship seems (at p. 42) to have treated as an open question for future decision whether or not, in an action of adherence, a wife can successfully defend herself upon any other grounds than would be required in order to sustain an action at her instance for separation and aliment. I am content to express my entire concurrence in the opinion of Lord Rutherford Clark in *Mackenzie's* case, the reasoning of which appears to me to be irresistibly sound. That, like the present case, was an action by a husband against his wife for divorce for desertion under the Act 1573, c. 55. Lord Rutherford Clark said, *inter alia*,—'The defender has, I think, only one possible justification. She must shew that she was not bound to adhere, or in other words, that she had a good defence to an action of adherence. The Court must give decree of adherence unless a good defence is stated, and when a wife disobeys the decree she must be in wilful and malicious desertion, for she is refusing to perform what the Court has determined to be her obligation as a wife. A decree of adherence

The defender reclaimed.

July 18, 1908.

The case was argued on June 9, 10, 11, and 12, 1908.

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Argued for the defender;—(1) Looking to the conduct of the pursuer in October and November 1902, the conditions which he imposed on the defender's return, and in particular, his refusal to dismiss the nurse, the defender had reasonable cause within the meaning of the Act 1573, cap. 55, for refusing to adhere. Less would suffice as an excuse for non-adherence than was required to support an action of separation on the ground of cruelty at the instance of the wife.¹ (2) In any event, the pursuer required to prove not only that the desertion was unjustifiable, but also that it was obstinately persisted in for four years prior to the raising of the action, *i.e.*, from July 1902 to July 1906.² This could not be proved, for from that period there fell to be deducted the time—December 1902 to December 1903—when the defender was carrying on an action of separation

is no longer necessary as a formality in order to a divorce. But there is no change in the law. . . . I know of no defence to an action of adherence save adultery and cruelty, though I think that the latter may be moral as well as physical.' There is not much authority upon the point. Lord Rutherford Clark refers to the weighty *dictum* of Lord President Inglis in *Chalmers*, 1868, 6 Macph. 547, and to the direct decision in *A B v. C D* 1853, 16 D. 111,—(the word 'resist' in Lord Rutherford Clark's quotation from the interlocutor in *A B v. C D* is a misprint for 'insist on'). To these one might add Fraser on the Personal and Domestic Relations (1846), p. 448 and p. 684. On the other hand, it must be noted that Lord Fraser in his later book (*Husband and Wife*, vol. 2, p. 873) seems to have altered his opinion; and that Lord Watson (22 R. (H. L.) p. 42), was 'unable . . . to regard the case of *A B v. C D* as an authority of weight.'"

(His Lordship then examined the evidence with regard to the averments of cruelty and ill-treatment on the part of the pursuer prior to 28th September 1901)—"If my views upon the evidence are, up to this point, correct, it follows, in my judgment, that the defender had not, when she left her husband's house, reasonable cause for permanently absenting herself from him contrary to his desire. The evidence, in my opinion, falls far short of anything which has been hitherto held in our law to amount to legal cruelty or *sevitia*. . . . If again (contrary to my opinion) something short of *sevitia* may do as a defence to an action like the present, it appears to me that what is here proved ought not to be held sufficient. In considering such questions it is right and proper to have regard to the condition and the health of the wife; but I think it would be a new and dangerous doctrine to affirm that a wife has reasonable cause for remaining apart from her husband against his expressed desire because of conduct on his part which at times annoys or pains her, or may even have a prejudicial effect on her health, where there is no violence, and where the conduct is neither habitual nor deliberate, and is not the sole or even the main cause of her ill-health or weakness.

"I now come to consider the events which have happened since 28th September 1901, and I do so in the light of what, according to my view, had occurred previously. On 4th November 1901 Messrs Drummond & Reid wrote to the pursuer the letter to which I have already referred,

¹ Mackenzie v. Mackenzie, Dec. 21, 1892, 20 R. 636 (at pp. 651, 663, 670, 673), aff. May 16, 1895, 22 R. (H. L.) 32 (at pp. 34, 40); Russell v. Russell, [1895] P. 315, aff. [1897] A. C. 395 (at pp. 409, 410, 455); Fraser on Husband and Wife, 2d ed. p. 873; Bishop on Marriage (ed. 1891), secs. 1741, 1746, 1757-59.

² Barrie v. Barrie, Nov. 23, 1882, 10 R. 208.

July 18, 1908. against her husband. There was no suggestion that this action was raised otherwise than in good faith, and during its currency it was obviously impossible for the defender to be living with her husband. Accordingly, while the separation action was pending, the defender could not be said to be in malicious and obstinate desertion.¹ (3) After the date of the action of separation (December 1903), the pursuer had held no communication with the defender, and had taken no steps to shew that he desired her to return to him. The article in the agreement of January 1904, founded on by the pursuer, was not a sufficient discharge of the pursuer's duty to give "privy admonitions for due adherence," in terms of the Act 1573, cap. 55.² By that agreement he virtually consented that his wife should live apart from him.

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Argued for the pursuer;—(1) The evidence as to the pursuer's behaviour to his wife admittedly fell short of the degree of cruelty

alleging 'a long and systematic course of cruelty carried on' by him towards his wife, and asking him to agree to a voluntary separation. The pursuer handed this letter to his agent, who replied to it on the 8th, stating that he was making inquiries into the matter. Mr Robson's inquiry was careful and methodical, and occupied a considerable time. On 4th March 1902 he replied to Drummond & Reid, denying absolutely the charges of cruelty, or that any ground for separation existed, and stating that the pursuer desired that, as soon as the defender was sufficiently recovered from her recent confinement, she should return to her home, along with the child. On 7th March Messrs Drummond & Reid wrote that 'Mrs M'Ewan remains of the same mind as when she instructed us to write the letter of 4th November last to Mr M'Ewan, and . . . cannot agree to the proposal you make that she should return to live with Mr M'Ewan.' This is a very clear declinature to adhere, and the pursuer dates the commencement of his wife's desertion of him from this time, though he pleads alternatively a day in July 1902. I do not think that the effect of the letter in this aspect is materially diminished by the fact that Mrs M'Ewan was admittedly too weak and ill on 7th March to have been able to rejoin her husband. That was not the 'proposal' which had been made—in which her return was made expressly conditional upon her being sufficiently recovered to allow of her being removed with safety; and Messrs Drummond & Reid's rejection of the 'proposal' is absolute, and not based upon the state of her health at the time. The child, it appears, was born at Dalmeny on 27th February 1902. The first intimation of this event was made to the pursuer verbally through the law-agents upon the day after its occurrence—coupled with the strange request (repeated in writing, by Mr Robson's desire, on 3d March) that he should make immediate arrangements for taking over its custody. This, we now know, was entirely Mr Jones' doing. He is explicit about this. '(Q.) Did you want to prevent any reconciliation between the husband and wife, and in order to prevent that reconciliation did you send away the child? (A.) That is the idea we had at the time. The sending away of the child was entirely my act.' It is curious, however, to note that this is not consistent with the averments made in a petition presented to the Court in Mrs M'Ewan's name on 7th May for access to her child, the instructions for which Mr Jones says that he gave. On 21st June an important letter was written by the pursuer's agent to Messrs Drummond & Reid, in which

¹ Young v. Young, Nov. 16, 1882, 10 R. 184; Craxton v. Craxton, May 8, 1907, 23 T. L. R. 527.

² Gibson v. Gibson, Feb. 1, 1894, 21 R. 470.

which would entitle her to a decree of separation. It was accordingly insufficient to justify her non-adherence.¹ This point had never been directly decided one way or another, but on principle it would be anomalous to hold that a wife was not entitled to live separate, and yet was not bound to adhere. Even if a less degree of cruelty were sufficient, the evidence did not establish that it had occurred. (2) The period of the separation action should not be deducted. The running of a prescriptive period was only interrupted by actual legal incapacity to act, and the maxim *non valens agere* did not apply to such a case as the present.² It was not suggested that the defender was bound to live with the pursuer while she was carrying on an action of separation, but if that action were decided against her, and if she still refused to adhere, it was quite reasonable that the period of the currency of the action should be counted into the period of desertion.³ (3) Whether the deserted spouse had sufficiently dis-

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he expressed the pursuer's continued desire that his wife should return and live with him, and his willingness, immediately on learning that Mrs M'Ewan agreed to come back, to make a home for her as soon as possible, and meanwhile to arrange for their living together in suitable apartments. Prior to this, on 11th June, the pursuer had written to his wife in affectionate terms, the sincerity of which I do not in the least doubt. The reply he got was from Mr Jones on 16th June, written in the third person, and briefly informing him that his wife had gone to Glasgow to consult a specialist, and would probably be there for some time. This announcement produced a letter from Mr Robson to Mr Jones, of 21st June, which speaks for itself. On 8th July Messrs Drummond & Reid wrote to Mr Robson asking for 'a definite reply to the matters referred to in our letters — (1) a voluntary separation; (2) custody of the child; and (3) aliment for Mrs M'Ewan and her child.' This letter was crossed in the post by a letter from Mr Robson to the defender's agents repeating his client's desire that his wife should return, and adding, 'as he had not only offered, but has urged this, and is willing thus to maintain and provide for her, he declines to furnish her with separate aliment.' The pursuer, as I understand, takes 8th July 1902 as the date at which, at the latest, the defender's desertion must be held to have commenced. On 12th August the pursuer and his wife had a personal meeting, and on the 16th he wrote her an affectionate letter. Again, on 7th October, a meeting took place at the defender's request, at which, as appears from a letter by the pursuer's agents, dated on the 8th, 'Mrs M'Ewan stated that she was prepared, as soon as she was stronger and sufficiently recovered, to return to live with her husband and try to be happy together.' On 3d November the defender called upon Mr Robson, who gives a distinct account of the interview. On the 6th Mr Robson wrote to the defender informing her that the pursuer had taken a house in Warrender Park Crescent, which she had recently seen with him, and would have it put in order and furnished without delay, so that she might return to and resume living with him;

¹ Russell v. Russell, [1895] P., at pp. 329-31, [1897] A. C. at pp. 399, 419; Mackenzie v. Mackenzie, 20 R., at p. 670; A B v. C D, Dec. 3, 1853, 16 D. 111; Chalmers v. Chalmers, March 4, 1868, 6 Macph. 547; Jolly v. McGregor, 1828, 3 W. & S. 85, at p. 189; Forster v. Forster, 1 Hag. C. R. 153; Astley v. Astley, 1 Hag. Ec. R. 721; Paterson v. Paterson, Dec. 14, 1861, 24 D. 215; Crombie v. Crombie, May 16, 1868, 6 Macph. 776, per Lord Neaves; More's Lectures, vol. i., p. 76.

² Graham v. Watt, July 15, 1843, 5 D. 1368.

³ Bishop on Marriage (1891 ed.), sec. 1758, and cases cited.

July 18, 1908. charged his duty of remonstrance, was in each case a question of circumstances.¹ In the present case the evidence shewed that the pursuer had amply evinced his desire that the defender should return.

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At advising on 18th July 1908,—

LORD PRESIDENT.—In this case I am of opinion that we should adhere to the judgment of the Lord Ordinary. His Lordship has examined the case with extreme care and minuteness, and I think your Lordships would, in any view, have been slow indeed to disturb that judgment so far as it is based upon facts. Probably I need in one sense say no more, but I should like to say this, that although in a case of this sort I always have bowed my own judgment on any dubious point to the judgment of the Judge who saw the witnesses, I have no hesitation in saying that reading the evidence, as I have, very carefully as a Judge of appeal, I should be inclined to take

and asking her to meet the pursuer on an early day in order to select papers and colours for the rooms. The letter concludes, 'I am also instructed to say that, as you have already been informed, he wishes that neither your sister nor any members of your family should visit at or come to the house.' It was the fact that the pursuer had expressed this wish, which I do not think was in the circumstances unwise or unreasonable, at all events, as regarded the immediate future. The defender's reply, written on 7th November, is a very important letter, as bearing upon a legal point argued by her counsel, to be afterwards referred to. She says,—'I agree to the taking of the flat in Warrender Park Crescent. With regard to painting, furnishing, &c., will Mr M'Ewan be good enough to please himself as, in the circumstances, it is a matter in which I have no interest. I have made up my mind that, however Mr M'Ewan acts or whatever he says, I will try living with him for the sake of my helpless little boy. I wish another meeting, which Messrs Drummond & Reid will arrange for me.' The meeting desired by the defender was arranged for, and took place on the 19th. But before it took place, a most regrettable change of circumstances had arisen. A sharp disagreement had occurred between the defender and her sister, on the one part, and the nurse whose duty it was to bring the baby daily to their lodgings, on the other part. The ladies allege that Nurse Archibald had been intolerably rude to them, and had even slapped Miss Jones' face. The meeting on 19th November, from which the pursuer, under his agent's advice, absented himself, and at which Mr and Miss Jones was present, was wholly taken up with this dispute. Mr Robson's letter of 21st November describes the situation, and announces that the pursuer declined, 'in the interests of the child,' to comply with the defender's request that Nurse Archibald should be dismissed; and on 24th November Messrs Drummond & Reid wrote that the defender 'cannot go to the house in Warrender Park Crescent if the present nurse is to be retained. She is quite decided as to this.' On the 27th Mr Robson wrote, adhering to the position which the pursuer, under his advice, had taken up. Upon this matter of the nurse, the negotiations between the parties for a permanent reconciliation broke down; and in December the wife's action for separation was raised. It cannot, I think, be doubted that this rupture was a most unfortunate occurrence. The circumstances attending it have given me much anxiety, I confess that, in my judgment, the pursuer would have acted with more propriety if he had yielded to his wife's wishes, and got a new nurse for the child. It is not,

¹ Watson v. Watson, March 20, 1890, 17 R. 736.

even a stronger view than the Lord Ordinary has taken of the conduct of July 18, 1908. the parties. I think that I might say that the whole of the trouble in this *M'Ewan v. case* was from the very bad advice and evil influence that this lady got from *M'Ewan*. her own relations, and I think in particular that the conduct of the brother *Ld. President* and sister was such that Mr M'Ewan was well entitled, if he wished, to refuse that they should ever be in his house again.

Now, if it only rested upon fact I would say no more, but there are in the case one or two nice and delicate points of law on which I think it necessary to say a very few words. In the first place, I agree with the Lord Ordinary in the view which he takes in the first part of his note as to the true import of the case of *Mackenzie*¹ in the House of Lords. That is to say that I agree with him that in the House of Lords the view of the majority of the Judges in the Court of Session as to what was the true meaning of "reasonable cause" in the Act of 1573, cap. 55, was overturned, and the House of Lords held

to my mind, clear upon which side lay the justice of the dispute as to the conduct of Nurse Archibald. The evidence is conflicting. But in any case I think it is matter for regret that the pursuer did not yield upon the point. It is, however, a very different affair to conclude that, in not so yielding, he was guilty either of cruelty in the legal sense, or of such conduct as could justify his wife in refusing to come back to him. I cannot adopt that conclusion. A number of reliable witnesses speak to the nurse's excellent treatment of the child; it is, to my mind, doubtful whether she had been guilty of insolence towards the defender and her sister; the matter was *prima facie* one upon which the pursuer was entitled to judge; and I am convinced that his resolution, mistaken as I conceive it to have been, was arrived at conscientiously upon the advice of his agent, who was also his uncle, upon whom he relied implicitly, and not from any intention of wounding his wife or being cruel to her. The judgment of Lord Low was pronounced on 8th December 1903. The agreement, which has been referred to, was signed on 9th and 11th January 1904. Since that time the parties have neither written nor spoken to one another. This action was raised on 18th July 1906.

"The defender's counsel argued that, even if his client must be held to have been in 'malicious and obstinate defection,' in April or in July 1902, the pursuer's action fails (a) because the defender had not been in such 'defection' for a full space of four years prior to 18th July 1906; and (b) because the pursuer had not, during that period, sufficiently complied with the duty incumbent upon him of endeavouring to persuade her to return. The former of these arguments included two quite separate branches. It was argued in the first place that the defender cannot be held to have been in desertion during the dependence of her action for separation, which, although not successful, was raised and fought out *bona fide*; and that the period, about a year, over which the litigation extended, must be cut out and disregarded, the result being that the necessary space of four years has not elapsed. I know of no authority for this contention, and I think it is unsound. It seems to me to derive no support from the case of *Young*, 1882, 10 R. 184, which was cited, where a wife's action was thrown out as irrelevant, because it appeared that, during the last two years of the period of alleged desertion, her husband had been, and still was, in prison. As Lord Adam justly observed, 'If during a part of that period the absence has been compulsory, it cannot, in my opinion, be affirmed to have been wilful.' Nor does the recent English decision in *Craxton*, May 8, 1907, 23

¹ 22 R. (H. L.) 32.

July 18, 1908. that nothing less will afford reasonable cause than that which would be sufficient as a defence to an action of adherence. I agree with him also
M'Ewan v. that their Lordships in the House of Lords in that case treated it as
M'Ewan. a question not decided, as far as they were concerned, whether, in an
Id. President. action of adherence, a wife can successfully defend herself upon any other grounds than would be required in order to sustain an action at her instance for separation and aliment. The Lord Ordinary goes on to express his opinion upon that question by intimating that he concurs with what Lord Rutherford Clark said in *Mackenzie's* case.¹ I do not hold that the House of Lords overturned that, but, on the other hand, I do think that they certainly spoke in such a way as to shew that they did not consider that matter binding on them, but that it was not necessary to decide it in that case. I do not think it is necessary to decide it in this case either, and for this very good reason, that even supposing the criterion was not

T. L. R. 527, appear to me to aid the defender's argument at all. I remain of the opinion upon the point which I expressed on 20th March last. It was urged by the defender's counsel that, if this view is sound, in a case where a separation action had been so prolonged as to extend over four years, a wife might, at the end of it, be then and there divorced for desertion. I do not think this result could follow. She would always have a *locus poenitentiae* to declare her willingness to adhere. On the other hand, if the defender's contention is sound, the result might, in the case figured, be that the husband would have to wait not four but eight years for his decree. The second branch of the defender's argument as regards the period of four years deserves, I think, more consideration, and raises what appears to me to be a delicate point, and one not covered by authority. Her counsel urged that the running of the statutory period was effectually interrupted, because during October and the beginning of November 1902 the parties were on friendly terms with one another, and on 7th November the defender wrote the letter to Mr Robson, which I quoted some time ago at length. It was urged that the parties had thus 'practically come together,' and that at all events on 7th November, it could not be said that the wife was 'remaining in malicious obstinacy.' This point has caused me more anxiety than any other in the case; but upon the whole, I think that it is not sound. It has, I am aware, been often laid down that the remedy of divorce for desertion is a very peculiar and a purely statutory one; and that care must be taken not to unduly extend its application. But I think one must regard the general mental attitude of the defender during the period as a whole, and not pay undue heed to temporary signs of softening, unfortunately abandoned, and never ripening into actual adherence. I think the defender's expression of willingness to adhere, for the sake of her child, was always under some reservation as to an improvement in her own health and strength; and even the letter of 7th November expressly conditions that a further meeting should be arranged. Most regrettably, as I have explained, the scene had materially altered before that meeting took place, and the overtures of 7th November came to nothing. If I am right in holding that the defender was in wilful non-adherence otherwise during the period in question, I cannot hold that anything that took place during this temporary brightening of the horizon was sufficient to bar the currency of the statutory period.

"The defender's remaining argument was based upon the pursuer's alleged failure to fulfil his duty in the way of persuading his wife to return to him.

¹ 20 R. 636, at p. 668.

what I may call the stricter criterion which Lord Rutherford Clark said it July 18, 1908. was—supposing it was the looser criterion—I think the ground here in fact which is set forth for the wife not adhering is utterly and absolutely inadequate. The ground which is put forth as having justified the wife in her eventual refusal to go home is that the husband declined, *ante omnia*, to dismiss the nurse, and the reasons for dismissing the nurse were said to be that the nurse had behaved very rudely to the wife and her sister, and there was a story of an assault upon the sister by the nurse. As far as that story is concerned I think it bears, if not absolute falsity, exaggeration, on the face of it. In fact I consider Miss Jones' testimony in these matters as entirely untrustworthy, and it seems to me out of the question to say that a wife is entitled to say she will no longer live with her husband because, forsooth, she having been absent for a long time, and a child of very tender years having been entirely looked after by a nurse almost from the moment it was born, the husband does not choose to dismiss the nurse before the wife comes home. All that sort of thing, if the wife had been allowed to come home, would have settled itself. All would have been well in that household, I am sure, if it had been given a chance; but to say that an incident of such a sort is to be a ground on which the wife is to resist one of the first duties of matrimony seems to me nothing less than absurd. Accordingly, I do not think we need solve that somewhat

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Ed. President.

During the earlier part of the time in question no such charge could, I think, possibly be maintained against Mr M'Ewan. I have alluded to his letters and his conduct. I think he was sincerely anxious to get his wife back, and made it abundantly clear to her that he was so. But after the separation case was over, an agreement, as I have already explained, was entered into, to which Mr and Mrs M'Ewan and Mr Jones were parties. The first article of this document recorded, as matter of declaration and agreement by all parties, Mr M'Ewan's adherence to his former position as regarded his wife, and a repetition of his request and desire that she should return to him. It is true that after the agreement was signed he never again wrote to his wife. It may perhaps be regretted that he did not, and if he had been left to his own impulse, I think he probably would have done so. But he was advised by Mr Robson, and the advice was, in my judgment, legally correct, that the clause to which I have referred was a standing offer to his wife to return, and needed no further repetition. In my opinion, the pursuer was not, in the circumstances which I have detailed, bound to continue requests and entreaties which, it seems clear enough, must, if answered at all, have been answered in the negative. The limits of a deserted husband's duty in this regard were fully canvassed in the Whole Court case of *Watson*, 1890, 17 R. 736, where some difference of opinion arose. I think the question must be held to be largely one of circumstances. I assent to the view of Lord Kinnear in *Willey's case*, 11 R. 815, which was quoted with approval by the Lord President in the case of *Watson*, to the effect that in order to his success it is necessary that 'the deserted spouse is desirous to adhere, and takes some intelligible method of expressing that desire to the offender.' I cannot doubt that the pursuer here was throughout sincerely desirous to adhere, and that the defender thoroughly understood that he was so. There is some evidence as to occasions when the parties are said to have met and passed each other on the streets, but it is very vague and inconclusive, and I attach little importance to it.

"For the reasons which I have now stated, I am of opinion that the pursuer is entitled to decree. . . ."

July 18, 1908. difficult question of law which is left open by the judgment of the House of Lords in *Mackenzie*.¹

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Id. President.

Now, the only other question from which I think comes any real trouble is the question whether, in calculating the four years, the wife was entitled to a deduction for the period during which an action of separation was running. Under the circumstances here I am of opinion that she was not. There is little or no authority on the matter in the books in this country, but the question does seem to have arisen in America; and although it is no authority that binds one, I think that one is fortified in one's view by the view which seems to have been taken there, and which I find in section 1758 of the last edition of Mr Bishop's book. After dealing with proceedings which are really a fraud on the Court, he goes on: "Or if after a desertion has commenced, there comes a real divorce suit, rendering a renewal of the cohabitation temporarily improper, still it does not interrupt the desertion; because, as an intent to continue the cohabitation will in the absence of explanation extend through the temporary separation of the last section,² so the intent will reach forward and govern the period of the divorce suit here stated." Now, taking the facts of this case, I think it is perfectly clear that although one would hesitate to say that when the lady originally went away from her husband's house, she did it with a mind then actually made up to desert, I think that that state of mind very rapidly supervened under the influence of her own relations. I think it was brought to an absolute point in the beginning of the next year, when, after a demand had been made by her for a separation, the whole matter had been carefully looked into by the husband's lawyer, and a perfectly clear and proper letter had been written by that gentleman, saying that he, having gone into the whole facts, had found nothing which would justify such a demand, and that it must be distinctly understood that the husband wished his wife to come back again. Well, after that period it seems to me the intention to desert is clear, and I think that if there was to be any action raised, it ought to have been raised then and there, at once. A long period after this is allowed to elapse, and after a time, when the wife seems almost to have been in a state of mind in which she was inclined to come back, she breaks off on this absurd pretext about the nurse, and raises then an action of separation in which she is entirely unsuccessful; it seems to me impossible in these circumstances that she should claim to have the period deducted. All these remarks seem to be enormously strengthened when I remember the fact that up to this hour there has never been an offer by this lady to come back. It would be a perfectly different question if what your Lordships were deciding was a case in which the wife was at your Lordships' bar, saying, "I am willing to live with my husband to-morrow; don't settle it that the axe has fallen, that the last hour of the four years is run out, and that I am divorced"; whereas here you have persistent desertion maintained to this very hour. I am entirely of the opinion of the Lord Ordinary, and think his judgment should be adhered to.

¹ 22 R. (H. L.) 32.

² Section 1757 lays down that while carrying on a suit for any form of divorce a withdrawal from cohabitation is necessary, and is not desertion.

LORD M'LAREN.—I concur with your Lordship in the chair, both as to July 18, 1908. the facts and as to the legal principles raised in the case.

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LORD KINNAR.—I concur.

LORD PEARSON was absent.

THE COURT adhered.

ROBSON, & M'LEAN, W.S.—DRUMMOND & REID, W.S.—Agents.

THE RIGHT HONOURABLE LORD POLWARTH, Pursuer (Respondent).— No. 182.

D.-F. Campbell—Mackintosh.

NORTH BRITISH RAILWAY COMPANY AND NORTH-EASTERN RAILWAY Nov. 15, 1907.

COMPANY, Defenders (Reclaimers).—*Sol.-Gen. Ure—Cooper, K.C.—Grierson.*

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Railway—Owner of cattle undertaking risk of carriage if sent by route specified—Damage sustained on different route—Contract—Railway and Canal Traffic Act, 1854 (17 and 18 Vict. cap. 31), sec. 7.—A Railway Company agreed with the owner of three head of cattle consigned by rail from Maxton Station to Alnwick, *via* Kelso, for exhibition at a cattle show at Alnwick, that if they were not sold they should be taken back to Maxton at half fare, provided the owner consigned them by the same route as that by which they had been sent, and undertook the risk of their conveyance. Between Kelso and Alnwick there were two railway routes equally convenient, one by Wooler, the other by Tweedmouth. The Railway Company sent the cattle to Alnwick by the Wooler route. The cattle were not sold at the show, and the owner's agent in sending them back from Alnwick Station signed a consignment note bearing that they were sent for carriage back to Maxton "by the same route as on the journey here, at the reduced rate," "and in consideration of your charging such reduced rate" "the undersigned agrees to free and relieve you of all liability" for loss or damage, unless caused by wilful misconduct on the part of their servants. The Railway Company chose to send the cattle back by the Tweedmouth route and they were destroyed by fire at Tweedmouth Junction.

In an action brought by the owner of the cattle against the Railway Company for £800 as the value of the cattle the defenders maintained (1) that they were not liable, as they had sent them back by the route contracted for, *viz.*, by Kelso; (2) that the stipulation that they should be returned by the same route was a stipulation solely for their own benefit, and conferred no right on the sender of the cattle; (3) that in any view their liability was restricted to £15 for each animal, in respect that no declaration of an excess value was made on behalf of the owner in terms of the Railway and Canal Traffic Act, 1854, sec. 7.

Held (1) that the Railway Company had broken the contract, and could not found on the indemnity clause therein, but (2) that their liability for the loss of the cattle was limited to £15 per animal.

THIS action was raised on 1st February 1905 by Lord Polwarth, 2nd Division. Mertoun House, St Boswells, against the North British Railway Com-
pany and the North-Eastern Railway Company, jointly and severally, for payment of £800. Ld. Johnston.

The following narrative is taken from the opinion of the Lord Ordinary (Johnston):—"This action is raised by Lord Polwarth to establish liability against the North British Railway Company and the North-Eastern Railway Company jointly, or jointly and severally,

Nov. 15, 1907. for the loss of three head of cattle destroyed at Tweedmouth Junction on their way back to Maxton, the station for Lord Polwarth's estate of Mertoun, from the Northumberland Agricultural Society's show at Alnwick on 13th July 1904.

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"The cattle were despatched from Maxton on the morning of 12th July, *via* Kelso, and travelled by the short route by Coldstream and Wooler to Alnwick. They were returned on the afternoon of the 13th from Alnwick, *via* Alnmouth Junction, to Berwick, and thence back to Tweedmouth, with the intention of sending them from Tweedmouth, *via* Coldstream and Kelso, to Maxton. While standing at Tweedmouth Junction the truck in which the cattle were caught fire and they were destroyed.

"The cattle being prize animals, the sum of £800 is claimed as their value.

"The question raised or intended to be raised depends first upon the special contract made by Lord Polwarth, through his factor, Mr Campbell, with the Company or Companies for the transit of the cattle, and second upon the fact that the North-Eastern Company returned the cattle, *via* Berwick and not *via* Wooler, and the effect thereof.

"The admitted situation is that Maxton Station is on the North British Railway between St Boswell's Junction and Kelso; that from Kelso to Sprouston is part of the North British line, but is worked by the North-Eastern, and the traffic between the two Companies is exchanged at Kelso, so that practically the North-Eastern line may be said to begin at Kelso; that from Kelso Alnwick can be reached by two routes of the North-Eastern—one, the shorter, *via* Coldstream and Wooler, the other, the longer, *via* Coldstream, Tweedmouth, and Alnmouth; that the route *via* Tweedmouth frequently involves the traffic being taken to Berwick and back to Tweedmouth; that besides the routes above mentioned, traffic between Maxton and Alnwick could be taken by a third but a very roundabout route, *via* Duns and Reston, to Berwick, on the North British, and thence *via* Tweedmouth and Alnmouth, on the North-Eastern, to Alnwick.

"An arrangement exists, as was not denied, though the details of the arrangement and the precise relations of the Companies were not before me, between the North-Eastern and the North British Railway Companies (and I gather that the agreement is a general one among all railway companies in the kingdom) for the transit of cattle for *bona fide* show purposes to and from agricultural meetings at freight and a-half, *i.e.*, freight for going and half freight for returning. But in order to obtain the benefit of such reduction of freight a somewhat elaborate system of documents requires to pass, the precise terms of which are essential to the contract between Lord Polwarth and the Railway Companies.

"In the first place, before the cattle start on the outward and return journeys respectively declarations are required, Nos. 13 and 16 of process, to be handed to the station-agents at the point of shipment for the outward and homeward journeys. These declarations are each of them headed North-Eastern Railway. What the precise relation between the North British and the North-Eastern Railway Companies in the matter is, as I have already said, not disclosed, but the terms preclude the North-Eastern from denying that the North British was at least their agent, except on the footing of denying authority and disclaiming the transaction altogether. But without detailed informa-

tion there is practically no doubt, having regard to the known relations of the two lines, that as between themselves there exist arrangements for through traffic which cover the occasion in question. Nov. 15, 1907.

“No. 13 of process [headed ‘*Agricultural Show Traffic*’—‘*To the Show*’], commences with a certificate by the Secretary to the Agricultural Society that the stock had been entered by Lord Polwarth for exhibition. The rest of the document is titled a certificate, but is in reality one side of an agreement, which, if stock are tendered and accepted for transit on the faith of it, becomes mutual. In consideration of the North British receiving and forwarding the stock under the conditions applicable to agricultural show traffic, Lord Polwarth, through his factor, undertook to relieve the North British Company, and all other companies over whose lines the animals might pass, from all liability for loss, &c., except upon proof that such loss, &c., arose from wilful misconduct on the part of the servants of such companies. Lord
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“Indorsed upon this document are ‘General Conditions of Conveyance,’ which I understand to be the conditions applicable to agricultural show traffic, as none others are referred to. Of these the important articles are that the stock is conveyed—(8) to the show at ordinary rates. (9) From the show, if sold, at ordinary rates. (10) From the show, if unsold, at half rates back to the station whence sent. (1) The live stock can only be conveyed at the owner’s risk. (6) On returning, if the animals remain unsold, the exhibitors must produce a certificate of the fact, issued by the secretary of the society and signed by the exhibitor, in order to be entitled to the privilege of having the stock charged at half rates. (7) In order to secure the return of the live stock at half rates if unsold, the exhibitors must in every case take care to consign them on the return journey by the same route as they were sent to the meeting, otherwise full rates will be charged.

“On delivery of this document to the station-agent at Maxton on 12th July 1904, the usual owner’s risk consignment note (No. 12 of pro.) was prepared by the agent and signed by W. Henderson, the man in charge of the cattle, whose authority from Lord Polwarth was not disputed. It bore simply that the cattle were consigned from Maxton to Alnwick *via* Kelso, although it must be conceded that it was the understanding of both parties that they would travel *via* Wooler.

“What Henderson signed was a request that the cattle ‘be carried at the special or reduced rate, in consideration whereof he agreed to relieve the North British Company, and all other companies over whose lines the stock might pass, from all liability for loss, &c., except upon proof that such loss, &c., arose from wilful misconduct on the part of the Company’s servants.’ . . .

“On the return journey the document No. 16 of process, also signed by Mr Campbell, Lord Polwarth’s factor, was handed to the station-agent at Alnwick, similar in terms with the document No. 13 of process, and having the same general conditions of conveyance indorsed, except that it bore the word ‘returned’ as part of the heading ‘*Agricultural Show Traffic*,’ and ‘from the show’ instead of ‘to the show,’ and also bore a certificate by the Agricultural Society’s secretary that the stock had been exhibited, instead of had been entered for exhibition, and was addressed, not to the North British, but to the North-Eastern and North British Companies. But then the document No. 16 of process was supplemented by the document No. 15,

Nov. 15, 1907. signed by Henderson, the man in charge, and admittedly representing Lord Polwarth. This bore a declaration, first of all, that the stock had been exhibited and had not been sold, and was still the *bona fide* property of the exhibitor; and in the second place, a request . . . in terms very similar to that which is embodied in the North British consignment note No. 12. In fact No. 15, with the North-Eastern consignment note No. 14, are the North-Eastern's counterpart of the North British consignment note No. 12.

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"But though the terms are very similar generally, and have the same object, viz., to relieve the Railway Companies from loss, except for wilful misconduct on the part of their servants, and the contract is to be deemed to be made separately with all companies parties to any through rates under which the stock is carried, there is this important difference, that the consignment is expressly 'for carriage back to the station named' in the schedule indorsed, which station is Maxton, North British ' (from which station such *animals or goods were consigned here for the above-mentioned show*) *by the same route as on the journey here* at the reduced rate below your ordinary rate, and in consideration of your charging such reduced rate,' &c. The italics are the Company's. Neither in this nor in the consignment note No. 14 is any route otherwise mentioned, but merely the station of destination, viz., Maxton.

"It is maintained, in the first place, for the defenders that their liability is, in any event, limited to £15 per animal, in respect that no declaration of an excess value was made on behalf of Lord Polwarth in terms of the Railway and Canal Traffic Act, 1854, section 7; and, in the second place, that the stock was, at the time of the fire, being carried under an owner's risk special contract, which exempted them from liability, in respect that no wilful misconduct on the part of their servants was alleged.

"Lord Polwarth's answer is, that assuming that both or either of these defences might, under other circumstances, have been available to the defenders, they cannot in the actual circumstances be pleaded, in respect that the companies had broken their contract with him by diverting the traffic round by Berwick and Tweedmouth, instead of sending it back by the route by which it came."

The pursuer pleaded;—(1) The pursuer having contracted with the defenders the North British Railway Company for the carriage, by themselves or their agents, of the said animals to and from the said show, and the said company having failed to carry them safely, they are liable in damages as concluded for, both at common law and under the Mercantile Law Amendment Act, 1856, section 17. (2) Assuming that the defenders the North British Railway Company contracted with the defenders the North-Eastern Railway Company, as agents for the pursuer, or that the North British Company acted throughout as agents for the North-Eastern Company, or that otherwise the pursuer's claim is against the North-Eastern Company, the said latter Company is similarly liable to the pursuer in damages as concluded for. (3) Assuming any limitation of the liability of either Company under said schedule or otherwise, such limitation is excluded (1st) by reason of the said unauthorised deviation in the return journey; (2d) by reason of the said loss and damage having been caused by fire.

The defenders, *inter alia*, pleaded;—(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the

summons. (3) The defenders should be assoilzied from the conclusions of the action in respect that the animals were at the time of the fire being carried under an owner's risk special contract. (4) The pursuer's loss not having been caused by the negligence or default of the defenders or their servants, the defenders are entitled to decree of absolvitor. (6) No declaration having been made by or on behalf of the pursuer in terms of the Railway and Canal Traffic Act, 1854, section 7, the defenders are not in any event liable in excess of £15 for each animal.*

On 20th July 1905 the Lord Ordinary continued the cause till the first sederunt-day in October to give the pursuer an opportunity of lodging a minute of amendment.†

* The Railway and Canal Traffic Act, 1854 (17 and 18 Vict. cap. 31), enacts:—

Sec. 2. "Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic" (which term by section 1 includes animals) "upon and from the several railways and canals belonging to or worked by such companies respectively. . . ."

Sec. 7. "Every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void:"

Provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals beyond the sums hereinafter mentioned; (that is to say) . . . for any neat cattle, per head fifteen pounds, . . . unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned. . . ."

† "OPINION.—(After the narrative above quoted),—

"Lord Polwarth's answer requires, first, a consideration of the contract, and, second, of certain English authorities bearing upon the point.

"I am of opinion, in the first place, that it is not open to the Railway Company to plead that the condition indorsed on the documents Nos. 13 and 16, to the effect that the traffic must be consigned on the return journey by the same route as that by which they were sent, is one entirely in their favour, and which may be waived by them if they find it convenient—*Bidoulac*, 17 R. 144. I do not need to determine absolutely whether this might or might not have been so on the documents Nos. 13 and 16 of process, for the matter does not rest on these documents alone; it rests also on the document No. 15 of process, which having been accepted and the cattle delivered for carriage on the faith of it, becomes a mutual contract for the return journey 'by the same route as on the journey here.'

"But the Railway Companies maintain further that the word 'route' is elastic, and that they were not confined to transmitting the stock by the same line of rails by which it had come, but were entitled to return it by any combination of their lines, for though they did not put their argument precisely in these words, I cannot find any other which accurately defines it. I think they limit their contention to this, that so long as they send back by Kelso, it is open to them to send either by Wooler or Tweedmouth. But it appears to me that if their contention is good at all, it would warrant their returning the traffic by Reston and St Boswells, or by any other possible route on their combined systems—say Edinburgh and St Boswells. I cannot hold that the word 'route' has this extended meaning, even with

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The pursuer having lodged a minute making the amendments desiderated by the Lord Ordinary, and the defenders having stated that they did not propose to raise further the question of relevancy,

the limitation which the Company indicates. I think that 'route,' particularly in the phrase 'the same route,' as 'on the journey here,' imports a definite line within the system of a company, or within the combined system of two companies, and not merely the system or systems of one or both as a whole. I do not suggest that this view could be pressed to the extreme point, as, for instance, to involve a breach of contract if traffic which was taken through Carstairs station were returned by the Carstairs loop line without entering the station; but without pressing the argument to such an extreme, I cannot hold that the route from Alnwick, by Alnmouth and Tweedmouth or Berwick, was not an entirely different route from that by Wooler, and one to which pursuer might reasonably have objected had it been proposed to him as sufficient implement of the Company's contract.

"I think it is not unfair to test this point by putting the converse proposition. Suppose at Alnwick the pursuer for his own advantage or convenience had booked his cattle back to Maxton *via* Tweedmouth or Berwick, could he have had any answer to the Company's demand for full freight on the return journey? In my opinion he would not.

"But I am bound, in the second place, to consider the English authorities founded upon, as they appear to bear very closely on the question.

"I do not think that the case of *Great Western Railway Company v. McCarthy*, 1887, L. R., 12 App. C. 218, goes further than to determine that the clause in the owner's risk contract note of both the companies concerned imported quite a legal condition exempting from liability under the Railway and Canal Traffic Act, 1854, section 7, provided a proper alternative was given, and in the present case no question is apparently raised on this score, but the three cases—*Morritt v. North-Eastern Railway Company* (1876), L. R., 1 Q. B. D. 302; *Mallet v. Great Eastern Railway Company*, L. R., [1899] 1 Q. B. 309; and *Foster v. Great Western Railway Company*, L. R., [1904] 2 K. B. 306—are more apposite, and the latter was founded upon as the ruling case, and as deciding the present question in favour of the Railway Companies.

"I pass over *Morritt's* case, as it may be referred to the same principle as *Foster's* case.

"The real question is between *Mallet's* case and *Foster's* case, and whether *Mallet's* case is a sound judgment and applicable to the present, or is substantially overruled by *Foster's*. In *Mallet's* case the contract was to carry from Lowestoft to Jersey *via* London, the Great Western Railway, and Plymouth, whereas the receiving company transmitted goods from London *via* the London and South-Western Railway and Southampton. This was done by mistake of their servants, who misread the direction, which was not very distinctly written. There was delay in the transmission and consequent loss. It was held that the delay was delay in the performance of the contract, and arose in consequence of the defendants' doing something which was wholly at variance with the contract.

"But in *Foster's* case the circumstances were different. The goods were being carried also to Jersey, and they ought to have been transmitted from Exeter *via* London and South-Western to Southampton. But they were accidentally carried past Exeter, and when the mistake was discovered it was too late to send them back to Exeter to catch the Southampton boat, and the Railway Company did what was best in the circumstances by sending them *via* Weymouth, which was a totally different route from that by which they had undertaken to carry them. The decision was that the breach of their contract was at Exeter, but that it was occasioned by their servants' negligence but not wilful misconduct, and that they were there-

the Lord Ordinary, on 25th November 1905, repelled the first, third, Nov. 15, 1907.
and sixth pleas in law for the defenders, and allowed the parties a
proof of their averments as to, *inter alia*, the value of the cattle in
question." *

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fore protected by the relieving clause in their contract, that after Exeter they were no longer obliged to have recourse to that clause, because they were no longer carrying under the contract, but as bailees of the goods were doing their best in the circumstances. And the case was carefully distinguished from that of *Mallet*. It is quite true that in the opinions of the Judges who gave judgment in the case, and particularly of Lord Alverstone, there is an undercurrent of dissatisfaction with the case of *Mallet*, but it goes no further. It may be that it is justified, if it be held that in *Mallet's* case at London a similar mistake was made to that made in *Foster's* case at Exeter, but even if this be so, neither *Foster's* case nor *Mallet's* case; assuming it to be corrected by the judgment in *Foster's*, is like the present. Here there was no mistake in transit. There was a deliberate diversion of the route from the beginning, and I do not think that the doubts indicated in *Foster's* case strike at the grounds of judgment in *Mallet's* case, but merely their application in the circumstances. But whether these grounds of judgment properly applied in *Mallet's* case or not, they apply, in my opinion, here, and I cannot hold them displaced by *Foster's* case.

"I speak of the above cases with the respect due to them as decisions pronounced by the English Courts *in pari materia* though not binding on me, but I should myself have adopted the ground of judgment in *Mallet's* case in the circumstances of the present.

"On the documents therefore upon which the case must ultimately depend, and on which it was argued by the pursuer, I should be prepared to hold that he might have a good case to recover untrammelled by the owner's risk contract embodied in the special agreement for carriage to and from the show. But then the documents are not his record, but are only embodied in it, and that insufficiently, by reference, and while Mr Mackintosh presented a very able argument upon the documents and authorities, he failed, to my mind, to connect them with his record. . . . I shall therefore continue the case to give him an opportunity of considering his position."

* "OPINION.— . . . The defenders having asked to be reheard on their sixth plea in law, I have now heard a full argument, and have reconsidered the question, with the result that I shall now repel the plea.

"Prior to the passing of the Carriers Act, 1830 (11 Geo. IV. and 1 Will. IV. cap. 68), common carriers were practically in the position of guaranteeing the safe delivery of goods which they accepted for carriage. And all goods which they accepted for carriage for one person, they were bound to carry for all the lieges. The law, however, allowed them to relieve themselves, by notice published with the intent to limit such heavy responsibility. But in respect of the practice of persons tendering for carriage, parcels, the value of which was grossly disproportionate to the bulk, without notifying to the carrier the value and nature of the contents, and of the difficulty of fixing parties with knowledge of such limiting notices, the Legislature thought fit, by section 1 of the above Act of 1830, to enact that no common carrier by land for hire should 'be liable for the loss of or injury to any article or articles of property of the descriptions following'—[and then followed an enumeration of bullion, gold, and silver-plate, jewellery, bank-notes, paintings, china, silks, furs, lace, and other articles of similar nature of value disproportionate to bulk]—contained in any parcel or package delivered for carriage 'when the value of such article or articles or property aforesaid, contained in such parcel or package, shall exceed the sum of £10, unless at the time of the delivery thereof . . . the value and nature of such article or articles or property shall have been declared by

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A joint minute of admissions for the parties was then lodged, in which they agreed in stating—(1) That the value of the animals in question should be held to be £550. (2) That the animals died in consequence of the injuries caused by fire while in the waggon. And (3) that certain general notices (in which defenders declared they were not common carriers of cattle) had been publicly exhibited by the defenders; and *quoad ultra* renounced further probation.

On 22d February 1907 the Lord Ordinary pronounced this inter-

the person sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.' By this provision, therefore, the carrier was entirely relieved for the loss of or injury to any such article, unless it was declared, and what was practically a premium of insurance paid.

"But when railways and canals came practically to supersede the common carriers of 1830, while the Act of 1830 still continued to regulate the carriers' liability where it applied, a further limitation was found necessary, and was introduced by the Railway and Canal Traffic Act, 1854, section 7, but the relief given was not absolute, but qualified and limited." (His Lordship here quoted the section.)

"It was maintained that this provision limited the defenders' liability for the loss of the pursuer's cattle to the sum of £15 per head, in respect that he had not declared them to be of higher value and paid the consequent increased freight. But I think that the grounds on which I have already disposed of the defenders' third plea in law apply to the plea founded upon this provision, and warrants my rejecting it. I think that it is an implied condition of the Railway Company taking benefit by the limitation of liability provided, that they shall carry on the contract on which the cattle were delivered.

"I have again considered the English authorities to which I was referred at the first debate and certain further authorities which were quoted, but I have not changed my view of their bearing.

"The former authorities quoted were *Morritt v. North-Eastern Railway*, 1 Q. B. D. 302; *Mallet v. Great Eastern Railway* [1899], 1 Q. B. 309; and *Foster v. Great Western Railway Company* [1904], 2 K. B. 306. I am prepared on further perusal to admit that *Mallet's* case was wrongly decided, and that it was in reality not distinguished, but disapproved, by the Court of King's Bench in *Foster's* case. But that does not alter my view of the bearing of the two other cases. They determine that a mistake even negligently made by a railway company in the course of executing the contract of carriage, which resulted in goods being diverted from the route by which they were contracted to be carried, did not deprive the companies in the one case of the benefit of the provision of section 1 of the Carriers Act, 1830, and in the other case of the benefit of a special condition just and reasonable, and therefore permissible to be made, under section 7 of the Railway and Canal Traffic Act, 1854. But they leave open the question what is to happen when the mistake or the neglect or the default occurs, not in course of executing the contract, but where the contract is never even commenced to be executed.

"The distinction between these cases and certain others to which I will immediately refer, was, I think, correctly noted by Lord Blackburn, then Mr Justice Blackburn, when he says in *Morritt's* case, at 1 Q. B. D. 304,— 'in each of these' (that is, the latter cases) 'there was an intentional act on the part of the defendants in sending on or misdelivering the goods; here there was only negligence.'

"The new cases to which I have been referred are *Sleat v. Fagg*, 5 Barn. & Ald. 342, and 24 R. R. 407, and *Garnet v. Willan*, 5 Barn. & Ald. 53,

locutor :—" Having considered the cause along with the joint minute of admissions, *inter alia*, assessing the value of the cattle in question at £550 sterling, and renouncing further probation, decerns against the defenders, conjunctly and severally, for the agreed-on sum of £550 sterling, with interest thereon, as concluded for in the summons."* Nov. 15, 1907.
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The defenders reclaimed, and argued ;—(1) The cattle were con-

and 24 R. R. 276, in both of which carriers were held responsible for loss notwithstanding notice equivalent to the provisions of the Carriers Act, 1830, brought home to the knowledge of their customer, because they were not carrying under their contract, but outwith their contract, and these decisions seem to me to support the view which I have already expressed. I was also referred to *Hearn v. London and South-Western Railway*, 24 L. J. Kx. 180; *Millen v. Brasch*, 10 Q. B. D. 142; and *Hendon v. Caledonian Railway Company*, 7 R. 966. The first two are illustrative of the general question; the latter, like the cases of *Sleat* and *Garnet*, is more directly in line with the present.

"In fact I remain of the opinion which I formerly held, that the question at issue in the case depends upon whether Lord Polwarth's cattle were returned 'by the same route as on the journey' out. I have already expressed my reason for the opinion that they were not so returned. If so, they were not carried on the contract, but contrary to the contract of carriage. . . ."

* "OPINION.—(After stating that negligence had not been proved, his Lordship continued)—But the case has been taken throughout on the footing that the pursuer founded entirely on breach of contract, and though I think that their record might have deduced this more pointedly, I think that it is their real case on record. If so, then the contract was broken; the cattle were not carried on it, but in contravention of it. It was no mere negligence or fault of the defenders' employees diverting the cattle in transit. They never were carried on the contract at all, and this was done intentionally. Whether for the defenders' convenience, or whether it was assumed that the pursuer would thereby get better expedition, does not appear to me to affect the question. Under their contract the defenders, whether they were common carriers or carrying on a special contract, were bound to deliver the cattle at Maxton, and they could not do so. They cannot, therefore, plead any of the conditions of the contract to excuse their breach. Nor can they so plead the statutory limitation of liability, for the statute subsumes a contract of carriage, and that the carriage proceeds under that contract. I cannot distinguish from *Hendon v. Caledonian Railway*, 1880, 7 R. 966, in Scotland; and from *Sleat v. Fagg*, 1822, 24 R. R. 407; *Lilley v. Doubleday*, 1881, L. R., 7 Q. B. D. 510, and *Royal Exchange Shipping Company v. Dixon*, 1886, L. R., 12 A. C. 11, in England. The damage then is the value of the cattle. 'The question is whether the defendant was responsible for the goods, and if so the damage must be their value' (*per* Lindley, J., in *Lilley v. Doubleday*, *supra*, and *cf. Ellis v. Turner*, 1800, 5 R. R. 441), unless indeed the damage was too remote. But this I cannot hold in face of the English cases of *Davis v. Garrett*, 1830, 31 R. R. 524; *Scaramanga v. Stamp*, 1880, L. R., 5 C. P. D. 295, to which I have referred. I do not think that even a *damnum fatale* would have excused the defenders, but the defenders do not attempt to shew that the accident was occasioned by the agency of nature, and could not reasonably have been avoided—*Nugent v. Smith*, 1876, L. R., 1 C. P. D. 423.

"I shall therefore decern against the defenders for the agreed-on sum of £550, with expenses. I do not think that there should be any modification in respect of the amendment of record, for if the defenders did not add to their statement in defence they brought forward for the first time the important plea last disposed of, and occasioned the third hearing."

Nov. 15, 1907. signed from Maxton by Kelso, which left it open to the Railway Company to send them either by Wooler or by Tweedmouth, and to return them by either route without regard to the route by which they had been sent. The request by the owner to send the cattle back by the same route was to be construed in the same way as leaving the option with the Railway Company, provided they were sent by Kelso. (2) The stipulation by the Railway Company that they should be returned by the same route was inserted solely for their own benefit, and they could waive it.¹ (3) There was no wilful misconduct on the part of the defenders in sending the cattle by Tweedmouth to avoid delay.² (4) The Railway and Canal Traffic Act, 1854, sec. 7, applied, and limited the defenders' liability to £15.³

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Argued for the pursuer;—By returning the cattle by a route not that specified, the defenders had put themselves outside the contract, and had lost the benefit of the limitation of liability under it, and also of the limitation under sec. 7 of the Railway and Canal Traffic Act. The pursuer's case rested on the general law of contract.⁴ The intentional breach of contract by the defenders distinguished this case from *Morritt v. North-Eastern Railway Company*, and other cases cited.

At advising on 15th November 1907,—

LORD LOW.—The instructions which the pursuer gave to the defenders to convey his cattle from Maxton to the Agricultural Show at Alnwick were to convey them *via* Kelso. Those instructions were indefinite to this extent, that beyond Kelso there were two routes—one by Wooler and the other by Tweedmouth—both upon the defenders' system, by either of which the cattle might have been sent to Alnwick, and between which there was little difference either as regarded distances or convenience. It was stated by the pursuer's counsel that the intention was that the cattle should be sent by the Wooler route, because it was arranged that the cattle truck should be taken from Maxton by a train which ran in connection with a Wooler train. If that had been admitted or proved it might have been sufficient to shew that "*via* Kelso" meant in this particular case *via* Kelso and Wooler, but there is neither admission nor evidence on the point. All that we know is that the cattle were consigned to Alnwick *via* Kelso, and if that was all that the defenders were requested and agreed

¹ *Bidoulac v. Sinclair's Trustee*, Nov. 29, 1889, 17 R. 144.

² *Morritt v. North-Eastern Railway Co.*, 1876, L. R., 1 Q. B. D. 302; *Foster v. Great Western Railway Co.*, [1904] 2 K. B. 306; *Scaramanga v. Stamp*, 1880, L. R., 5 C. P. D. 295.

³ *Hill v. London and North-Western Railway Co.*, 42 L. T. 513; *Great Western Railway Co. v. McCarthy*, 1887, L. R., 12 App. Ca. 218; *Hodgman v. West Midland Railway Co.*, 1865, 35 L. J., Q. B. 85; *Hinton v. Dibbin*, 1842, 2 Q. B. (A. & E.) 646; *Baxindale v. Hart*, 1852, 21 L. J., Ex. 123; *London and South-Western Railway Co. v. James*, 1872, L. R., 8 Ch. Ap. 241; *Wahlberg v. Young*, 1876, 4 Asp. Mar. Cas. 27, note; *Hearn v. London and South-Western Railway Co.*, 1855, 24 L. J., Ex. 180, 10 Exch. 793; *Miller v. Brasch*, 1882, L. R., 10 Q. B. D. 142.

⁴ *Just. Inst.* iii. 14, 2; *Ersk. Inst.* iii. 1, 22; *Jones on Bailments*, pp. 68 and 69; *Davis v. Garrett*, 1830, 6 Bing. 716; *Royal Exchange Shipping Co. v. Dixon*, 1886, L. R., 12 App. Cas. 11; *Lilley v. Doubleday*, 1881, L. R., 7 Q. B. D. 510; *Scaramanga v. Stamp*, L. R., 5 C. P. D. 295; *Ellis v. Turner*, 1800, 8 Term Reports, 531; *Garnet v. Willan*, 5 Barn. & Ald. 35.

to do, I am inclined to think (although in the view which I take of the Nov. 15, 1907.
 case it is unnecessary to decide the point) that it was open to take the
 cattle *via* Tweedmouth.

The cattle were in fact conveyed by the Wooler route. They were
 safely delivered at Alnwick, and no question arises in regard to the journey
 thither.

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At the close of the show the cattle not having been sold required to be
 returned to Maxton. The defenders give special terms to persons sending
 live stock to agricultural shows upon certain conditions. They, *inter alia*,
 charge only half rates for the return journey of stock which is not sold,
 but only upon the condition that "the exhibitor must in every case take
 care to consign them on the return journey by the same route as they were
 sent to the meeting, otherwise full rates will be charged."

The pursuer was naturally desirous to have his cattle returned at half
 rates, and accordingly his servant, who had charge of the cattle, filled up
 and signed the form supplied by the defenders of a special contract for the
 return of unsold cattle from a show at half rates. The document runs
 thus:—"You are requested by the undersigned to receive the cattle in
 question for carriage back" to Maxton "by the same route as on the
 journey here, at the reduced rate below your ordinary rate, and in con-
 sideration of your charging such reduced rate for the carriage thereof the
 undersigned hereby undertakes to free and relieve you" of all liability for
 loss or damage, unless caused by wilful misconduct on the part of the com-
 pany's servants.

Although these were the terms of the contract for the return journey, the
 defenders did not send the cattle *via* Wooler, but *via* Tweedmouth. During
 the journey the truck in which the cattle were being conveyed took fire, to
 the effects of which they all ultimately succumbed. The question to be
 determined in this case is, Whether the defenders are liable in damages to
 the pursuer for the loss which he has sustained, and if so, what is the
 measure of their liability?

The defenders maintain (1) that they are not liable to any extent, in
 respect that by the contract the pursuer relieved them of all liability for
 loss, unless the loss was occasioned by the wilful misconduct of their ser-
 vants, which is not alleged; and (2) that in any view they were not liable
 in a larger sum than £15 for each animal in terms of the 7th section of the
 Railway and Canal Traffic Act, 1854.

In support of their contention that they are liable to no extent, the
 defenders argued, in the first place, that the words in the contract, "by
 the same route as on the journey here," meant the route by which the
 cattle were consigned when sent to the show, namely, *via* Kelso, and that
 as they (the defenders) had the option of taking the cattle either by Wooler
 or Tweedmouth on the outward journey, they had the same option on the
 return journey. I am of opinion that that argument is not well founded.
 The words in the contract for the return journey which I have quoted seem
 to me, according to their natural and ordinary signification, to mean the
 route by which the journey to Alnwick was as matter of fact made, and I
 do not think that it is competent to read them as meaning something else,
 by reference to a prior and entirely separate contract.

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The defenders further argued that the stipulation in regard to the route was inserted solely for their benefit, because they only agreed to carry the cattle at half rates on the return journey upon the condition that the pursuer should consent to the cattle being sent back by the same route as that by which they had come. The stipulation therefore (the defenders argued) although binding upon the pursuer was not binding on them, and that so long as they only charged half rates as for the Wooler route they could send the cattle by another route if they found it more convenient to do so.

Here again I am unable to accept the defenders' argument. If the argument be sound, the defenders were entitled to convey the cattle by any route they chose, and would not be bound to consider whether it was equally convenient and safe for the pursuer as the specified route. To say that the defenders had such power seems to me to be out of the question, seeing that the pursuer had agreed that the cattle should be conveyed at his risk. No doubt he took the risk in consideration of the reduced rate which was charged for the carriage, but he also took the risk for the route which was specified, and for no other.

I am therefore of opinion that the defenders were in breach of their contract in taking the cattle by Tweedmouth, and that they cannot found upon the indemnity clause in the contract.

The question remains whether the defenders' liability is limited in amount by the Railway and Canal Traffic Act, 1854? The Lord Ordinary has answered that question in the negative, holding that the Act applies only where a railway company is carrying cattle under a contract, and that in this case the route adopted by the defenders having from its commencement been a different route from that specified, they were altogether outside of their contract. Whether that view be sound or not appears to me to depend upon the construction of the statute.

By the second section it is enacted that every railway company shall "afford all reasonable facilities for the receiving and forwarding and delivering of traffic," and traffic is defined as including animals. A railway company therefore is bound to carry cattle.

By the seventh section it is enacted that every railway company "shall be liable for the loss of or for any injury done to any horses, cattle, or other animals . . . in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants . . . provided always that no greater damages shall be recovered for the loss of or for any injury done to any of such animals beyond the sums hereinafter mentioned (that is to say) . . . for any neat cattle per head fifteen pounds," unless the person sending the animals shall have declared them to be of a higher value, in which case the company is authorised to demand a reasonable percentage upon the excess of value so declared.

In this case the pursuer made no declaration of value, and accordingly, if the statute applies, he cannot recover from the defenders more than £15 for each of the cattle.

What, therefore, the Railway Company is by the statute made liable for is the loss of or injury to cattle "in the receiving, forwarding, or delivering thereof." Now, unquestionably, the defenders received the cattle from the pursuer's servant for the purpose of forwarding them to Maxton, and they

were in fact forwarding them to Maxton when the fire occurred. *Prima facie*, therefore, the Act applies. But it was said that the defenders cannot be regarded as having been acting as carriers for the pursuer at all, because they intentionally and deliberately adopted a route which was wholly different from that by which alone the pursuer had agreed that the cattle should be conveyed. Nov. 15, 1907.
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The force of that argument lies in the fact that the defenders intentionally adopted a different route from that stipulated, and that fact differentiates this case from those in which the contract has been departed from by mere mistake or carelessness, as, for example, when goods have been despatched upon the contract route but have afterwards been negligently shunted on to the wrong line or put into the wrong train at a junction, or where goods have been carried on beyond the station at which they ought to have been delivered. It seems to me, however, that the fact that there has been intentional departure from the contract route does not of itself solve the question. Suppose that cattle were being sent to an agricultural show, or to be sold at a market to be held on a particular day, and that after they had been carried a certain distance along the contract route it was found that the line ahead was blocked,—I cannot doubt that railway officials could send the cattle on by another route by which they could arrive at their destination in time for the show or market, without losing the benefit of the statute in the event of the cattle being killed or injured after they had been diverted from the contract route.

In this case we do not know the reasons which led the defenders to send the cattle *via* Tweedmouth, because there is neither admission nor evidence upon the point, and probation has been renounced. It is not averred, however, that there was anything of the nature of wilful misconduct, in the ordinary sense of these words, on the defenders' part, or that they took the cattle *via* Tweedmouth for any other purpose than to deliver them to the pursuer at Maxton. The Dean of Faculty gave an illustration intended to enforce his argument that the defenders having intentionally departed from the contract could not found upon the statute. The case which he supposed was that the pursuer had been in debt to the defenders, and that they had resolved to hold the cattle against the debt, and for that purpose had carried them off to York. I agree that in that case the statute would not have applied, because the defenders would not have been engaged as carriers in receiving, forwarding, or delivering the cattle. In the case which happened, however, they were acting as carriers and in no other capacity. When the accident occurred they were carrying the pursuer's cattle to the appointed destination, and there was nothing in the nature of appropriation of the cattle to their own use, or of handing them over to another carrier, or of sending them to the wrong destination or the wrong person. It therefore appears to me that the defenders did not by their breach of contract put themselves outside of the statute, and I am confirmed in that view by the highly authoritative judgment which was given in regard to a similar question under the Carriers Act in *Morrill v. North-Eastern Railway Company*.¹

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Nov. 15, 1907. I am accordingly of opinion that the pursuer is not entitled to recover more than £45, being the statutory maximum amount allowed when no declaration of value is made.

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The LORD JUSTICE-CLERK and LORD STORMONTH-DARLING concurred.

LORD ARDWALL was sitting in the Extra Division.

THE COURT recalled the Lord Ordinary's interlocutor of 22d February 1907, and decerned for payment by the defenders, conjunctly and severally, to the pursuer of the sum of £45, with interest.

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ACCOUNTING. *Appropriation of Payments.*

Where a debtor has paid money on account to his creditor, if the debtor has not appropriated particular payments to particular debts, the appropriation is governed by the intention of the creditor, express, implied, or presumed. *Hay & Co. v. Torbet*, Dec. 17, 1907, p. 781.

A firm of cattle auctioneers rendered an account to a customer setting forth, in a column in order of date, cattle, &c., sold to the customer, and cash advances made to him, and in another column, below the first, in order of date, the payments made by the customer to the auctioneers. The columns were each added up, and the balance was struck by deducting the amount of the second column from the amount of the first. *Held* that the account was not an account-current to which the rule as to the appropriation of payments applied. *Hay & Co. v. Torbet*, Dec. 17, 1907, p. 781.

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ADMINISTRATION OF JUSTICE. *Law-agent—Disclosure of former client's address.*

Where an agent has ceased to act for a party to a cause, it is his duty to furnish the opposite party's agent with his former client's address, if it is known to him, so as to enable that party to move the Court to proceed if further attendance is not made. *Sime, Sullivan, and Dickson's Trustee v. Adam*, Oct. 25, 1907, p. 32.

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AGENT AND CLIENT. *Agent's Rights—Hypothec—Company—Winding-up—Production of Documents—Reservation of Lien—Companies Act, 1862, sec. 115.*

1. On the motion of the official liquidator of a company which was being wound up by the Court, the law-agents of the company were *ordained* to produce all books, title-deeds, papers, and other deeds or documents in their custody relating to the company "without prejudice to the lien claimed by them." Liquidator of *Donaldson & Co., Limited*, v. *White & Park*, Dec. 4, 1907, p. 309.
2. Where a law-agent, who has acted for a company, and is its creditor for professional services, in obedience to an order under sec. 115 of the Companies Act, 1862, pronounced in the liquidation of the company, has produced the title-deeds of heritage belonging to the company, without prejudice to any lien which he may have over them, the mere reservation of his lien does not give him a preference over the general assets of the company, unless it can be shewn that, had the titles not been ordered to be delivered up, he would have had an

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effectual lien over them for his account. *Rorie v. Stevenson*, Feb. 8, 1908, p. 559.

3. Circumstances in which *held* that a law-agent was not entitled to a preferential ranking in the winding-up of a company. *Rorie v. Stevenson*, Feb. 8, 1908, p. 559.

See *Agent and Principal—Expenses*, 11, 12.

AGENT AND PRINCIPAL. *Liability of Principal to third parties—Special Agency—Company Promotion—Agent employed for amalgamation of companies—Power to involve principal's credit for law-agent's account.*

A company employed a chartered accountant to carry through an amalgamation of their company with another, and subsequently paid him £200 to cover his charges, expenses, and outlays. Without special instructions from the principals, and without their knowledge, he employed a firm of law-agents to prepare a certain deed, and informed them that it was on his principals' behalf. On his failing to pay the law-agents' account, they brought an action against the principals for the amount of that account. The defenders denied having employed the pursuers. *Held* that the agent had no authority from the defenders to employ the pursuers, and defenders *assolined*. *J. M. & J. H. Robertson v. Beatson, M'Leod, & Co., Limited*, June 6, 1908, p. 921.

AGENTS PROVOCATEURS. See *Trade-Mark*, 3.

ALIMENT. *Liability to diligence—Alimentary Fund—Settlement of disentailed money.*

1. Alimentary liferent out of money disentailed and settled on the disentailer as a condition of the consent of the next heir *held* to be settled by the next heir, and therefore not liable to arrestment by the disentailer's creditors. *Lord Ruthven v. Drummond*, July 14, 1908, p. 1154.

Liability to diligence—Alimentary Provision.

2. *Question*, whether an alimentary provision is adjudgeable. *Cuthbert v. Cuthbert's Trustees*, June 12, 1908, p. 967.

See *Donation*, 1.

ALIMENTARY PROVISION. *Creation—Directions to purchase annuities—Right of beneficiary to payment of the capital—Government Annuities.*

1. A testator directed his executor or his trustees to invest certain sums in the purchase of annuities in the name and for the benefit of certain persons. He further provided: "And I declare that all annuities . . . shall be purchased by him or them from the British Government or from the Scottish Widows' Insurance Company, Limited, of Edinburgh, in Scotland, and any other first-class company or annuity office as my said executor or . . . trustees shall in this behalf think fit." There was no declaration that the annuities were to be alimentary, but Government annuities, purchased under the Government Annuities Act, 1853, are not assignable except on the insolvency or bankruptcy of the annuitant. The beneficiaries having called on the trustees to pay over the principal sums instead of investing them in the purchase of annuities, *held* that the beneficiaries were entitled to payment of the principal sums. *Turner's Trustees v. Fernie*, May 30, 1908, p. 883.

Power to Assign.

2. *Question* as to the assignability of an alimentary provision *quoad excessum*. *Cuthbert v. Cuthbert's Trustees*, June 12, 1908, p. 967.

See *Aliment*.

APPROPRIATION OF PAYMENTS. See *Accounting*.

ARBITRATION. *Submission—Construction.*

1. A landlord and tenant entered into a submission, which, on the narrative that the tenant had in the lease become "bound to accept the buildings and others . . . as in good tenantable condition and repair when the same had been put into good order," referred to arbitration, *inter alia*, the sum payable by the landlord to the tenant in respect of any of the drains, ditches, dykes, and fences not being "in tenantable condition and repair" as at the entry of the tenant. The arbiters awarded a sum which they reached on the principle of giving the amount which an outgoing tenant would have had to expend in putting the subjects into tenantable condition and repair. In an action of reduction at the instance of the tenant against the landlord, *held* (1) that the question referred to arbitration was the amount of the defender's obligation *qua* landlord, and not the amount for which an outgoing tenant would have been liable, and therefore (2) that the arbiters not having determined the question submitted to them, their award fell to be reduced. *Davidson v. Logan*, Nov. 29, 1907, p. 350.

Powers and Duties of Arbitrator—Agricultural Holdings (Scotland) Act, 1883, sec. 5—Agricultural Holdings Act, 1900, secs. 1 and 2 (1).

2. In an arbitration between a landlord and an outgoing tenant as to the amount of compensation for improvements to which the tenant was entitled, the tenant objected to the scale of compensation fixed by the lease at the commencement of his tenancy on the ground that it was not fair and reasonable, and claimed compensation on the scale fixed by the Act of 1883. *Held* that the arbitrator, in order to explicate his jurisdiction, was bound to decide whether the scale of compensation fixed by the lease was, at its date, fair and reasonable, and so fell to be applied. *Observed* that the decision of the arbitrator on this question would not be final, and might be challenged in a process of interdict or of reduction. *Bell v. Graham*, June 16, 1908, p. 1060.

Decree-Arbitral—Award by arbiters and oversman conjointly.

3. The landlord of a farm and the incoming tenant entered into a submission by which they referred certain questions "to A and B, arbiters mutually chosen, and in the case of their differing in opinion, to an oversman to be named by the said arbiters before entering on the business of the submission." An award was issued which bore to be the award of, and was signed by, the two arbiters and the oversman. In an action of reduction by the tenant against the landlord, *held* (1) that *ex facie* the award was invalid in respect that it bore to be the award of a tribunal to which the parties had not agreed to submit their disputes; and (2) that it was incompetent by parole evidence to prove that the oversman had never acted, and that the award was the award of the arbiters only. *Davidson v. Logan*, Nov. 29, 1907, p. 350.

See *Master and Servant*, 10, 17, 24.

ARRESTMENT. *Arrestment on the dependence—Competency.*

1. *Arrestments on the dependence of an action against the purchasers of a ship completed but not finally handed over to the purchasers, recalled, in respect that the property had not passed.* *Sir James Laing & Sons, Limited, v. Barclay, Curle, & Co., Limited*, Nov. 25, 1907 (H. L.), p. 1.

Subjects arrestable—Alimentary Fund—Settlement of disentailed money.

1. In a petition for disentail of an entailed sum of money presented by the heir in possession, the next heir consented to the disentail on condition that the balance of the disentailed sum, after satisfying certain debts of the disentailer, should be put in trust to provide an

ARRESTMENT—Continued.

alimentary liferent to the disentailer. The value of the next heir's expectancy and certain debts due to him by the disentailer exceeded in amount the balance of the disentailed sum put in trust. Arrestments having been used by creditors of the disentailer in the hands of the trustees, *held* that in the circumstances the trust money had really been settled by the next heir, and not by the disentailer, and that consequently the alimentary restriction was valid; and arrestments *recalled*. Lord Ruthven v. Drummond, July 14, 1908, p. 1154.

Recall—Recall on ground that subjects not arrestable—Procedure—Competency—Competency of considering question of right in petition for recall.

3. *Held* that, where no action of furthcoming had been raised, the question whether a fund arrested was subject to the diligence of creditors could be determined in a petition for recall of the arrestments. Lord Ruthven v. Drummond, July 14, 1908, p. 1154.

Recall—Recall at instance of arrestee.

4. A petition for recall of arrestments at the instance of the arrestee is not competent (1) where the subject arrested is a debt or a sum due, or (2) where the subject arrested is a corporeal moveable which the arrestee admits is the property of the common debtor, but over which he alleges that he himself has claims; but such a petition is competent at the instance of the arrestee (3) where the subject arrested is a corporeal moveable which the arrestee does not admit is the property of the common debtor; and the arrestee will be entitled to have the arrestments recalled unless the arrester can establish a *prima facie* case that the subject arrested is the property of the common debtor. Barclay, Curle, & Co., Limited, v. Sir James Laing & Sons, Limited, Nov. 7, 1907, p. 82.

Recall—Procedure—Personal Diligence Act, 1838, sec. 20.

5. *Held* that the expenses of an unsuccessful motion for recall of arrestments on the dependence could be dealt with as expenses in the action, such a motion not being a separate process. Muir & Co., Limited, v. United Collieries, Limited, March 17, 1908, p. 768.

Arrestment ad fundandam jurisdictionem—Validity—Arrestment of debt paid by cheque received before but cashed after arrestment.

6. A Glasgow firm brought an action in Scotland against Gray, an Englishman, after having used arrestments to found jurisdiction in the hands of a Scotch company, Moss, who were alleged to be due a sum of money to Gray. Gray had already received from Moss a cheque on a Glasgow bank for the amount due, which he indorsed for value prior to the arrestment. The cheque was not presented for payment by the indorsee till the day after the arrestment. It was then duly paid. *Held* that delivery of the cheque by Moss to Gray operated as instant payment of the sum due to him by Moss, that consequently, at the time when the arrestments were used, there was no fund in the hands of Moss which could be attached, and that jurisdiction had not been effectually constituted. Leggat Brothers v. Gray, Nov. 5, 1907, p. 67.
7. *Observed* that although an arrestment *ad fundandam jurisdictionem*, after creating jurisdiction, leaves no *nexus* over the property arrested, yet such an arrestment to be effectual must be laid on property which would be arrestable in execution. Leggat Brothers v. Gray, Nov. 5, 1907, p. 67.

Arrestment ad fundandam jurisdictionem—Validity—Arrestment of Shares in Limited Company.

8. The shares of a limited company registered in Scotland are subject to

ARRESTMENT—Continued.

arrestment, and the arrestment of such shares in the hands of the company *ad fundandam jurisdictionem* renders the shareholder liable to the jurisdiction of the Court of Session. *American Mortgage Company of Scotland, Limited, v. Sidway*, Jan. 31, 1908, p. 500.

ASSIGNATION. Alimentary Provision.

Question as to the assignability of an alimentary provision quoad excessum. *Cuthbert v. Cuthbert's Trustees*, June 12, 1908, p. 967.

See *Bank*, 1.

BANK. Cheque—Death of Drawer before presentment—Assignment of Funds in hands of Bank—Credit balance on current account—Debit balances on other accounts—Bills of Exchange Act, 1882, secs. 53 (2), 73, 75.

1. A bank having refused payment of a cheque on the ground that it had received notice of the death of the drawer, the holder of the cheque in an action against the bank claimed payment of the amount on the ground that to that extent the cheque operated as an assignation of a sum standing at the drawer's credit on his account current in the hands of the bank. In a proof the bank books shewed a balance due to the drawer on his account current more than sufficient to pay the cheque, but they also shewed that on his other accounts the drawer was due to the bank for advances a larger sum than that standing at his credit on the current account. For these advances the bank held securities. *Held* (1) that the cheque, as a cheque, having lapsed at the death of the drawer, the pursuer could not avail himself of the rule by which a bank, which is in the habit of honouring a customer's cheques on a current account, is not entitled without notice to refuse payment because on a balance of all accounts the customer is a debtor to the bank; and (2) that the cheque did not operate as an assignation, in respect that at the time when it was presented to the defenders there were not in their hands any "funds available for the payment thereof" within the meaning of section 53 (2) of the Bills of Exchange Act, 1882. *Kirkwood & Sons v. Clydesdale Bank*, Oct. 15, 1907, p. 20.

Cheque—Payment—Arrestment of debt paid by cheque received before but cashed after arrestment.

2. Delivery of a cheque which was ultimately duly paid *held* to operate instant payment of a debt so as to leave no funds in the hands of the drawer due to the payee which could be arrested, although the arrestments were laid on before the cheque was presented for payment. *Leggat Brothers v. Gray*, Nov. 5, 1907, p. 67.

BANKRUPTCY. Constitution—Notour Bankruptcy—Debtors (Scotland) Act, 1880 (43 and 44 Vict. cap. 34), sec. 6.

1. *Held* that sec. 6 of the Debtors Act, 1880, applies to all cases where imprisonment is under that Act incompetent, even though it was already incompetent under a previous Act. *Harvie v. Smith*, Jan. 18, 1908, p. 474.

Trust for behoof of creditors—Trustee—Right of surviving trustee to act—Trusts (Scotland) Act, 1861, sec. 1—Trusts (Scotland) Act, 1867, sec. 1—Trusts (Scotland) Amendment Act, 1884, secs. 1 and 2.

2. *Held* that the powers conferred on gratuitous trustees by the Trusts (Scotland) Act, 1861, are extended to non-gratuitous trustees by the Trusts (Scotland) Amendment Act, 1884; and that, consequently, the survivor of two trustees, nominated in a trust-deed for behoof of creditors which contained no clause of survivorship, had a good title to pursue an action on behalf of the trust. *Clark's Trustee v. McRostie*, Nov. 22, 1907, p. 196.

BANKRUPTCY—Continued.

Trustees—Liabilities—Liability to account to bankrupt—Trustee discharged—Bankruptcy (Scotland) Act, 1856, secs. 141 and 142.

3. A bankruptcy had been terminated on payment of a composition, and the trustee, after the statutory audit of his accounts by the commissioners, had been discharged. Thereafter the bankrupt brought an action of accounting under sec. 142 of the Bankruptcy Act, 1856, against the trustee, calling on him to account for his whole intromissions with the estate. *Held* that it was not competent to call on the trustee to account twice over for the same intromissions; and as there were no averments that the intromissions called in question had not already been adjudicated on by the commissioners, action dismissed as irrelevant. *Opinion (per Lord Kinnear)* that if a bankrupt desires to call on the trustee for an accounting under sec. 142 of the Bankruptcy Act, 1856, he must do so before the trustee has been discharged. *Hemming v. Galbraith*, June 6, 1908, p. 897.

Sequestration—Discharge of bankrupt—Failure to pay five shillings in the pound—Bankruptcy and Cessio (Scotland) Act, 1881, sec. 6 (1) and (3).

4. Where a bankrupt has not paid 5s. in the £1, the question whether his failure to do so has arisen from circumstances for which he cannot justly be held responsible is a question in the discretion of the Judge of first instance, and although his judgment is subject to review the Court will not interfere unless there are no reasonable grounds on which the judgment can be supported. *Bell v. Bell's Trustee*, May 29, 1908, p. 853.
5. A bankrupt trader, more than two years after the date of his sequestration, applied for his discharge. Objections were lodged by the trustee in the sequestration and by the principal creditors of the bankrupt. The trustee reported that the bankruptcy was caused by the culpable conduct of the bankrupt. It appeared that the bankrupt was a cattle-dealer; that his business had been throughout a period of twelve years a series of speculations in the market price of live stock; that his bank-book shewed a turnover of £4000 a year; that at the end his liabilities were £1003 and his assets £156; that he had not kept proper business-books; and that he refused to assign to the trustee a *spes successionis*. No dividend was paid to the creditors, the assets recovered by the trustee, amounting to £156, having been lost by him in litigation. The objecting creditors were a limited company, carrying on business as auctioneers and live-stock salesmen, the trustee was their secretary, and the bankrupt's operations had been carried on mainly at their auction mart. The Sheriff-substitute found the bankrupt entitled to his discharge, but suspended the granting of the discharge for three months. On appeal the Court affirmed the judgment of the Sheriff-substitute. *Bell v. Bell's Trustee*, May 29, 1908, p. 853.

Sequestration—Procedure—Appeal—Competency—Election of Trustees—Finality of Sheriff's deliverance—Bankruptcy (Scotland) Act, 1856, secs. 68, 69, 71.

6. At a meeting of creditors convened for the purpose of electing a trustee on a bankrupt estate, and presided over by the Sheriff, an objection was stated to W., a candidate, in respect that he was a creditor, that his claim was founded on documents as to which questions must arise, and as to which he would have to adjudicate as trustee, and that accordingly he had an interest opposed to the general interest of the creditors. The objection was considered and repelled by the Sheriff, who, after a vote was taken, declared W. elected. In an appeal against the deliverance of the Sheriff on the ground that sec. 68 of the Bankruptcy Act, 1856, enacted that "it

UPTON—Continued.

all not be lawful to elect as trustee the bankrupt or any person conjunct or confident with the bankrupt, or who holds an interest opposed to the general interest of the creditors," that W. had such an interest, and that therefore the Sheriff's deliverance was *ultra vires*, *Id* that the objection in question was one for the consideration of the Sheriff, and that after he had considered and repelled it, his deliverance, under sec. 71 of the Bankruptcy Act, 1856, was final and not subject to review. *Grierson v. Ogilvy's Trustee*, June 11, 1908, p. 959.

Husband and Wife, 6.

OF EXCHANGE. *Liability of Parties—Proof—Parole—Competency—Bills of Exchange Act, 1882, sec. 100.*

A written agreement two parties stipulated that payment of certain goods, sold but not delivered, should be made by bills, which were to be guaranteed. Certain of the bills not having been met, the holders issued an action against the guarantors for payment of the balance. In defence a verbal agreement between the parties was alleged to the effect that the bills were to be renewed at maturity if the goods had not been delivered, and it was averred that delivery of all the goods had not been accepted. *Held* that the defence was irrelevant, in respect that the bills were granted in implement of the written agreement, and that, notwithstanding the provisions of sec. 100 of the Bills of Exchange Act, 1882, the terms of this agreement could not be modified by parole evidence. *Stagg & Robson, Limited, v. Stirling*, Feb. 28, 1908, p. 675.

Bank.

E. See *Railway*, 1, 2.

I. Magistrates and Town-Council—Citation—Citation of Corporation by citing its members—Disclaimer of defence by certain members.

A corporation was cited by calling its members by name, as representing the corporation but not as individuals. The majority of the corporation resolved to defend the action. *Held* that they were entitled to lodge defences in name of the whole members as representing the corporation, and that dissenting members were not entitled to disclaim the defences. *Eadie v. Glasgow Corporation*, Nov. 21, 1907, p. 207.

in of Guild—Jurisdiction—Declinature of Jurisdiction—Disputed question of fact—Sist of cause to enable Court of Session action to be brought—Discretion of Dean of Guild.

A petition having been presented to the Dean of Guild for warrant to erect certain buildings, answers were lodged thereto objecting that the proposed buildings were in contravention of certain building restrictions. No proper competition of heritable right was involved, but the matter depended on the construction of certain documents and on evidence as to the precise position of a plot "A" marked on a certain plan which had been lost. The Dean of Guild assisted the petition to enable the petitioner to establish his alleged rights in the Court of Session. Against this interlocutor the petitioner appealed, maintaining that the Dean of Guild should not have declined jurisdiction, but ought to consider and determine the matter himself. The Court *held* that, in the circumstances, it was not expedient to disturb the discretion of the Dean of Guild, and *affirmed* his interlocutor. *Macandrew v. Dods*, Oct. 31, 1907, p. 51.

in of Guild—Procedure—Appeal to Dean of Guild against decision of Corporation—Questions to be considered by Dean of Guild—Glasgow Building Regulations Act, 1900, sec. 60.

Held that in disposing of an appeal under sec. 60 (3) of the Glasgow

BURGH—Continued.

Building Regulations Act, 1900, the Dean of Guild is not limited to the consideration of whether the Corporation in giving their consent were acting capriciously or *ultra vires*, but must also take into consideration whether the individual owner appealing is, as a result of his proximity, unduly prejudiced by the increased height; and that the Dean of Guild should not take into consideration the invasion of any legal rights of the individual owner, such legal rights falling to be vindicated in the petition for lining. *Observed* that in disposing of such an appeal the Dean of Guild ought to apply his expert knowledge, and, where possible, dispose of the matter summarily without a proof. *Summerlee Iron Co., Limited, v. Lindsay*, March 13, 1908, p. 754.

Common Good—Accounts—Objection to accounts—Time for lodging objections—Royal Burghs (Scotland) Act, 1822, secs. 1, 3, and 10—Royal Burghs (Scotland) Act, 1833, sec. 32—Glasgow Municipal Act, 1879, sec. 10.

4. The Glasgow Municipal Act, 1879, altered the date for making up the accounts for Glasgow from 15th October, as provided by sec. 32 of the Royal Burghs Act, 1833, to 31st May.

On 7th May 1907, within the time allowed for objections by the Royal Burghs Act of 1822, certain burgesses of Glasgow, by a letter addressed to the Town-clerk, objected to an item charged in the Common Good account for the year ending 31st May 1906, and on 7th June 1907 presented a petition and complaint praying the Court to disallow the charge. The Corporation of Glasgow, besides answers on the merits, maintained that the objections were too late, contending that the alterations made on the date for lodging the annual account involved a corresponding change in the date for objecting to the account. *Held* that the statutory provisions in the Act of 1822 as to lodging objections to the annual account were not affected by the alteration of the date for making up and lodging the account. *Eadie v. Glasgow Corporation*, Nov. 21, 1907, p. 207.

See *Police—Property—Reparation*, 6, 16.

BURIAL GROUND. See *Expenses*, 3—*Sheriff*, 1, 2.

CAUTIONER. *Relief—Cautioner personally completing executory contract—Obligation of co-cautioner for share of loss.*

1. Under a contract for the construction of water-works for a town-council undertaken by M'Donald, Marshall and Pennycook were taken bound, jointly and severally, as cautioners for the due performance of the contract. On 24th May 1904 the town-council intimated to the cautioners that if the work was not carried on satisfactorily within eight days the contract would be taken off M'Donald's hands, and the cautioners would be held liable for any loss. The work was thereafter carried on satisfactorily till 13th July when M'Donald became incapacitated by ill-health from continuing the contract, whereupon Marshall, who was himself a builder and contractor, after asking and being refused the co-operation of Pennycook, with consent of the town-council, but without any further formal demand by them upon him, took up the contract as cautioner and completed it. The result was that there was never any failure to carry it on regularly. In completing the contract Marshall sustained loss. It was proved that if he had not acted as he did the loss would have been greater. *Held* that in these circumstances Marshall was entitled to intervene personally at the time when he did so, and that Pennycook was bound to pay to him one-half of the loss sustained by him, including half of a fee to him for superintending the work. *Marshall & Co. v. Pennycook*, Nov. 29, 1907, p. 276.

CAUTIONER—*Continued.**Extinction of Obligation—Release of Security—Water-works Contract—Retention Money.*

2. By a contract for the construction of water-works for a town-council it was stipulated that payments should be made to the contractor monthly on certificates of the engineer at the rate of 80 per cent of the value of the work executed, the remaining 20 per cent being payable half on completion of the work, and the balance at a later period, the town-council "always having power to withhold payment on any certificate should the works not be carried on regularly or to their satisfaction." The contractor became incapacitated by ill-health from completing the contract. A sum of £400 was then certified as payable to the contractor by the town-council. One of two cautioners for the contractor intervened and completed the contract, with the effect that there was never any failure to carry it on regularly. The town-council, after the cautioner had intervened, with his consent but not with consent of the other cautioner, paid away the £400 to assignees of the contractor. *Held* that as the works had been carried on regularly the council would not have been entitled under the contract to withhold payment of the £400, and that by paying it over they did not free the non-consenting cautioner from his obligation. *Observed* that the cautioners would have been freed if the town-council had paid over the 20 per cent before the time stipulated. *Marshall & Co. v. Pennycook*, Nov. 29, 1907, p. 276.

CHARITABLE AND EDUCATIONAL BEQUESTS AND TRUSTS. *Constitution—Construction—Uncertainty.*

1. A testator by his trust-disposition and settlement directed his trustees to employ the residue of his estate "in instituting and carrying on a scheme for the relief of indigent bachelors and widowers, of whatever religious denomination or belief they may be, who have shown practical sympathy, either as amateurs or professionals, in the pursuits of science in any of its branches, whose lives have been characterised by sobriety, morality, and industry, and who are not less than fifty-five years of age, or of aiding any scheme which now exists or may be instituted by others for that purpose." *Held* (1) that the bequest was "charitable," and therefore entitled to a benignant construction; and (2) that so construed it was not void from uncertainty. *Weir v. Crum Brown*, Feb. 6, 1908, (H. L.) p. 3.
2. A testator disposed his whole estate to certain trustees, and directed them to realise the whole residue of his estate at such time as they might think proper, and "at any time or times, or from time to time, as and when the said residue or any part thereof becomes available, as they may deem proper, to pay over or divide the said residue, or any part or parts thereof, to or amongst such local or Scottish charitable institutions and schemes already constituted, or which may hereafter be constituted . . . as they may select, or any one or more of such institutions and schemes, and that at such time, in such manner, or in such proportions, all as they in their absolute discretion may deem proper." The testator further provided that his trustees should have "the fullest powers of and in regard to realisation, investment, administration, management, and division, as if they were beneficial owners"; that "the time, manner, and propriety of selling and disposing" of his estate, heritable and moveable, should be entirely at the discretion of his trustees; and that his trustees might, should they in their discretion see fit, retain the investments of which the estate consisted at the time of his death, "and that for such time or times as they might think fit or indefinitely." The next of kin of the testator maintained that the directions of the trust-disposition with regard to the disposition of the residue were void from uncertainty,

CHARITABLE AND EDUCATIONAL BEQUESTS AND TRUSTS—*Continued.*

in respect that (1) the class of objects of the testator's bounty was not sufficiently definite; and (2) power was given to the trustees to postpone realisation indefinitely. Held that the bequest of residue was not void from uncertainty. Dick v. Audsley, May 26, 1908, (H. L.) p. 27.

3. A Scottish testator, by his holograph general settlement, provided,—
“The residue of my property I give and bequeath for the benefit of foreign missions in India, China, Africa, and South America, or any other in the foreign field suitable. I appoint the Rev. W. Watson, Kiltearn, as my executor, at a remuneration of £20 sterling.” *Held* that the bequest was a bequest for charitable purposes, and was not void from uncertainty, the bequest being to a definite class, coupled with the appointment of a person (the executor) having power to select the objects falling within the class on whom the benefit of the bequest was to be conferred. *Allan's Executor v. Allan, March 17, 1908, p. 807.*
4. A testatrix directed her trustee or trustees to apportion and pay over the proceeds of the residue of her estate “amongst such societies or institutions of a benevolent or charitable nature in such proportions as he or they shall in their own discretion think proper.” *Held* that the bequest was to be construed as a bequest in favour of charitable societies and institutions, and was not void from uncertainty. *Hay's Trustees v. Baillie, July 18, 1908, p. 1224.*

Administration—Bequest for “the poor of the parish.”

5. *Held* that a bequest to the Parish Council of K. “for the benefit of the poor of the parish of K.” was not limited in its application to the “legal poor,” but might be applied for the benefit of poor persons who were not in receipt of parochial relief. *Parish Council of Kinloes v. Morgan, Nov. 22, 1907, p. 192.*

Alteration of Scheme—Bursary for natives of a town—Extension to those born elsewhere.

6. A testator bequeathed a sum of money to trustees for the purpose of founding a bursary to be granted by them “to any deserving young man, being a native of Dunbar, attending college in the prospect of becoming a minister of the Established Church of Scotland, or as a missionary.” The trustees received payment of the bequest in 1888. In 1907 they presented a petition in which they stated that, although full publicity had been given to the bursary by advertisement and by intimation in the local schools, no application for it had ever been made, and craved the Court to empower them, failing application from natives of Dunbar, to grant the bursary to otherwise qualified applicants born in the Presbytery of Dunbar, or failing such applicants to otherwise qualified applicants without conditions as to nativity. The Court *granted* the petition. *Kirk-Session of Dunbar, May 29, 1908, p. 852.*

Cy-près—Failure of purpose—Grant of additional powers—No formal scheme.

7. The administrator of a charitable trust, founded in 1786 for the purpose of supplying to poor householders in Edinburgh oatmeal, or oats to be made into meal, at 10d. per peck (which was approximately half the market price in 1908), presented a petition to the Court in which, on the narrative that for many years it had been impossible to expend the whole income of the trust on the trust purposes, he craved for a grant of additional powers. *Circumstances* in which the Court, without formally approving of a scheme, granted additional powers to enable the administrator to supply coal, milk, oatcakes, bread, or flour, at half the market price. *Guardian of Thomson's Mortification, July 4, 1908, p. 1078.*

CHEQUE. See *Bank*.

CHURCH. See *Teinds*.

COLLECTING SOCIETY. See *Insurance*, 3.

COMPANY. *Summary Complaint at instance of Company*.

1. A summary complaint may be presented at the instance of an incorporated company without the conjunction of an officer of the company. *Fairbairn v. Lochryan Oyster Fishery Co., Limited*, May 31, 1907, (J.) p. 1.

Liability ex delicto—Slander uttered by servant.

2. *Held* that a company was liable for a verbal slander uttered by its servant in the course of the servant's employment and for the benefit of the company. *Finburgh v. Moss' Empires, Limited*, June 9, 1908, p. 928.

Incorporation—Validity—Trade Union—Trade Union Act, 1871, sec. 5—Trade Union Amendment Act, 1876, sec. 16.

3. The Aberdeen Master Masons' Incorporation, Limited, was incorporated under the Companies Acts, and the memorandum of association provided that the objects of the Incorporation, *inter alia*, were "(1) to take over the whole or any of the assets and liabilities of the unincorporated association known as 'The Aberdeen Master Masons' Association'"; (13) to assist any institution with objects similar to those of the trade, "and not being a trade union"; (22) to do all lawful things conducive to the attainment of the above objects, "provided that the Incorporation shall not impose on its members or support with its funds any regulation which, if an object of the Incorporation, would make it a trade union." An action having been raised by the Incorporation against a member for payment of dues, the defender averred that the association, whose assets and liabilities were taken over by the pursuers, was a trade union, and that the pursuers were *de facto* acting as a trade union, and pleaded that the pursuers, being a trade union, were not validly registered as a company, and had no title to sue. *Held* that as any act which would make the Incorporation a trade union would be null and void under the above quoted clauses of the memorandum of association, the Incorporation could not be a trade union, and plea of "no title to sue" repelled. *Aberdeen Master Masons' Incorporation, Limited, v. Smith*, Feb. 27, 1908, p. 669.

Memorandum—Inconsistency between Memorandum and Articles of Association—Provisions in the Articles for preferential treatment of one class of shareholders.

4. The memorandum of association of a limited company provided:—"The capital of the company is £250,000, divided into 139,092 ordinary shares of £1 each, and 110,908 deferred shares of £1 each." The articles of association provided that the ordinary shares should have a preferential ranking as to dividend; and that, in the event of a winding-up, the shares of the company should be repaid "in the order in which the shares or stocks are entitled to rank for payment of dividend." In the winding-up of the company the deferred shareholders maintained that the provision in the articles for the preferential ranking of the ordinary shareholders in a winding-up was inconsistent with the memorandum of association, and was therefore invalid; and that the surplus assets fell to be distributed equally among all the shareholders. *Held* that there was no inconsistency between the articles and the memorandum of association, and that in the winding-up the ordinary shareholders were entitled to payment of their capital in full before the deferred shareholders received anything on account of their capital. *Liquidator of the Humboldt Redwood Co., Limited, v. Coats*, March 13, 1908, p. 751.

COMPANY—Continued.

Members and their liability—Membership—Qualifications—Objections to admission pleadable by company and not by member—Liability for dues.

5. At a meeting, on 8th July 1904, of the directors of the Aberdeen Master Masons' Incorporation, Limited, incorporated under the Companies Act, S. was admitted as a member of the Incorporation. On account of his age, and for other reasons, S. was, in accordance with the articles of association, ineligible for membership, but he accepted membership, and acted as a member till 20th March 1906, when he sent in a letter of resignation. On 4th June 1906 the Incorporation raised an action against S. for payment of dues incurred by him prior to the date of his resignation. S. pleaded that he never was a member of the Incorporation, and had consequently never incurred the dues. *Held* that the defender was liable for the sum sued for on the ground that he was a member of the Incorporation, the objections to his admission being pleadable by the Company and by no one else; Lord Kinnear also holding that whether he was technically a member or not, he was bound by his agreement with the Incorporation. *Aberdeen Master Masons' Incorporation, Limited, v. Smith*, Feb. 27, 1908, p. 669.

Members and their Liability—Agreement to take Shares—Illegal issue of Shares—Condition of setting off calls against fees to be earned.

6. A applied for shares in a company, and paid the amount due on application, on the express condition that the firm of which he was a member should be appointed to a certain office, and that he should be at liberty to pay up the balance due upon his shares by fees to be earned by the firm. Before the balance had been paid the company went into liquidation. The company and its liquidator sued A for the amount unpaid upon his shares. *Held* that it was *ultra vires* of the directors to agree to the stipulation as to payment for the shares, and therefore that the defender was not a shareholder and was entitled to absolver. *National House Property Investment Co., Limited, v. Watson*, June 5, 1908, p. 888.

Members and their Liability—Agreement to take Shares—Conditional Application.

7. A applied for shares in a company, his letter of application containing the following condition:—"This application is made on the distinct understanding . . . that my firm is appointed surveyors to this company over an average radius of thirty miles from Edinburgh . . . and that my firm is also appointed advisory surveyors to the Advisory Board for Scotland at fees to be adjusted." He paid the amount due on application. His firm obtained the appointment as surveyors for the Edinburgh district, but were never made advisory surveyors to the Board for Scotland, the company having gone into liquidation before that Board was constituted. *Opinions* that the application was one for an immediate allotment of shares provided the company agreed to the conditions specified, and that the condition as to the advisory surveyorship was not a condition precedent but subsequent and collateral to the contract, and meant that A's firm should obtain the appointment when the Board was constituted. *National House Property Investment Co., Limited, v. Watson*, June 5, 1908, p. 888.

Capital—Reduction of Capital—Conversion without Reduction of Capital—Companies Act, 1867, secs. 9-19—Companies Act, 1877, secs. 3 and 4.

8. A limited liability company under its memorandum of association had a capital of £50,000, divided into 50,000 shares of £1 each, with power to reduce its capital. All its shares had been issued, 12s. 6d. being paid up on each share. The shareholders unanimously passed and confirmed a special resolution that the capital of the company should

COMPANY—*Continued.*

be converted from 50,000 shares of £1 each, with 12s. 6d. paid up, into 50,000 shares of £1 each, with the full amount paid up on 31,250, leaving 18,750 to be issued at the discretion of the directors; and that such conversion should be effected by re-allocating the share capital among the shareholders, crediting to each of them one £1 share for each pound sterling at his credit in the share capital account. The company presented a petition for confirmation of the "reduction of capital resolved on by" the special resolution above mentioned. All the creditors of the company consented. The Court *refused* to confirm the resolution in respect that it effected a "conversion" and "re-allocation," and not a reduction of capital. Walker Steam Trawl Fishing Co., Limited, Nov. 16, 1907, p. 123.

Directors—Directors' Remuneration—Directors' Expenses—Expenses of travelling to and from Board Meetings.

9. The articles of association of a limited company, after providing for the remuneration of the directors, further provided that the directors "shall be indemnified out of the funds of the company against all costs, charges, losses, damages, and expenses which they shall respectively incur and be put to in the execution of their respective offices." In an action at the instance of the company against a director for repayment of sums paid to him as his expenses in travelling from his home in Scotland to attend the meetings of the board in London, *held* that these expenses were not incurred by the director in the execution of his office, and that consequently the payments made to him were illegal and fell to be refunded. Marmor, Limited, v. Alexander, Nov. 7, 1907, p. 78.

Winding-up—By the Court—Petition by creditors—Withdrawal of petitioning creditors—Sist of other creditors in their place—Competency.

10. Creditors, who had presented a petition for the compulsory winding-up of a limited company, after intimation and service had been effected, but before the prayer of the petition had been granted, compromised their claim against the company, and did not insist in the petition. Certain other creditors of the company thereupon presented a note stating that they desired to insist in the petition, and craving the Court to sist them as petitioners in place of the original petitioners. The company lodged answers, in which they challenged the competency of the application. The Court *sisted* the applicants as craved. The Tudor Accumulator Co., Limited, v. Scott Stirling & Co., Limited, Dec. 18, 1907, p. 331.

Winding-up—Liquidator—Joint Liquidators—Small Company.

11. In the voluntary winding-up of a company with a nominal capital of £5000, and a paid-up capital of £42, 4s., A was appointed liquidator. In a petition by a creditor for a supervision order, the company and the creditors concurred in asking the Court to grant the order, and to appoint B joint liquidator. The Court *granted* the order, but in respect of the smallness of the sum involved *refused* to appoint a joint liquidator, superseded A as liquidator, and appointed C sole liquidator. Wishart, March 4, 1908, p. 690.

Winding-up—Liquidator—Director resident in London.

12. Circumstances in which the Court *appointed* as joint liquidator in the winding-up of a company a person who was a director of the company, and who was resident in London. Liquidators of Bruce Peebles & Co., Limited, v. Shiells, March 5, 1908, p. 692.

Winding-up—Conduct of Liquidation—Production of Documents—Lien—Companies Act, 1862, sec. 115.

13. On the motion of the official liquidator of a company which was being wound up by the Court, the law-agents of the company were *ordained* to produce all books, title-deeds, papers, and other deeds or docum^t

COMPANY—Continued.

in their custody relating to the company "without prejudice to the lien claimed by them." Liquidator of Donaldson & Co., Limited, v. White & Park, Dec. 4, 1907, p. 309.

14. Where a law-agent, who has acted for a company, and is its creditor for professional services, in obedience to an order under sec. 115 of the Companies Act, 1862, pronounced in the liquidation of the company, has produced the title-deeds of heritage belonging to the company, without prejudice to any lien which he may have over them, the mere reservation of his lien does not give him a preference over the general assets of the company, unless it can be shewn that, had the titles not been ordered to be delivered up, he would have had an effectual lien over them for his account. *Rorie v. Stevenson*, Feb. 8, 1908, p. 559.
15. Circumstances in which *held* that a law-agent was not entitled to a preferential ranking in the winding-up of a company. *Rorie v. Stevenson*, Feb. 8, 1908, p. 559.

Winding-up—Expenses—Petitioning Creditor's Expenses—Party and Party or Agent and Client—"Expenses as taxed."

16. In a petition at the instance of a creditor for the compulsory winding-up of a limited company, answers were lodged by the company, together with a note stating that the shareholders had resolved upon a voluntary winding-up, and had appointed a liquidator, and asking that the liquidation be continued under the supervision of the Court. The Court refused the petition for compulsory winding-up, pronounced a supervision order, and found the petitioner and the respondents entitled "to their expenses as these may be taxed by the Auditor." *Held*, on the motion for approval of the Auditor's report, that under the above finding the petitioning creditor was entitled to have his expenses taxed as between agent and client. *M'Gregor v. Ballachulish Slate Quarries Co., Limited*, Oct. 16, 1907, p. 1.

Winding-up—Expenses—Petitioning creditor's expenses—Creditor's petition for judicial winding-up—Supervision order pronounced on company's petition—Creditor's expenses.

17. One of the creditors of a company presented a petition for the judicial winding-up of the company. Thereafter the company, having passed an extraordinary resolution for voluntary winding-up and having appointed D. as liquidator, petitioned for a supervision order, and lodged answers to the creditor's petition. The creditor also lodged answers to the company's petition. At the hearing the parties agreed that a supervision order should be pronounced, but the creditor moved that D. should be superseded as liquidator. The Court pronounced a supervision order in the company's petition and continued D. as liquidator. The creditor moved that his expenses in his petition for judicial winding-up should be expenses in the liquidation. The company opposed. The Court *held* that the creditor's expenses prior to the date of the petition for a supervision order were expenses in the liquidation, and *quoad ultra* refused the motion. *Pattullo v. Caithness Flagstone Co., Limited (in Liquidation)*, Oct. 22, 1907, p. 25.

Winding-up—Expenses—Petition for leave to proceed with an action against Company—Unsuccessful opposition by Liquidator and Company—Decree for "expenses"—Companies Act, 1862, sec. 87.

18. A note was presented in the compulsory winding-up of a company, praying for leave, under sec. 87 of the Companies Act, 1862, to proceed with an action against the Company, and to find the Company and liquidator, if they or either should appear to oppose the prayer, liable in expenses. The note was opposed by the Company and its liquidator. The Court authorised the petitioners to proceed

COMPANY—Continued.

with their action, and found them entitled to "expenses." The Auditor having disallowed the expenses incurred by the petitioners prior to the date of lodging answers by the Company and its liquidator, the petitioners lodged a note of objections to the Auditor's report. The Court *sustained* the objection, holding that as the petitioners had been found entitled to "expenses" without limitation, it was too late for the Company and its liquidator to raise the question of liability for expenses incurred by the petitioners prior to the date of lodging answers. *Observed* that the Company and liquidator by appearing incurred the risk of being held liable for the prior expenses. *Anderson's Trustees v. Donaldson & Co., Limited (in Liquidation)*, Jan. 8, 1908, p. 385.

Winding-up—Expenses—Petitioning Creditor's Expenses.

19. The Court intimated that they would not in future grant expenses to petitioners as a matter of course, but would leave it for the decision of the Lord Ordinary to whom the liquidation was remitted. *Observations* on the expenses in liquidation proceedings. *Wishart*, March 4, 1908, p. 690.

Restraint of actions and diligence—Action by superior for sequestration for feu-duty after Liquidation—Companies Act, 1862, sec. 163.

20. *Held* that an action by a superior against his vassal, a limited company in liquidation, for sequestration of the moveables on the feu for arrears of feu-duty, was not an "attachment, sequestration, distress, or execution" within the meaning of sec. 163 of the Companies Act, 1862, in respect that it was not a proceeding for the purpose of creating a security, but was a proceeding for the purpose of making effectual a real security already existing in virtue of the superior's infestment. *Anderson's Trustees v. Donaldson & Co., Limited (in Liquidation)*, Oct. 26, 1907, p. 38.

See *Agent and Principal—Arrestment*, 8.

COMPENSATION. See *Expenses*, 11.

COMPULSORY POWERS. See *Stamp*, 2-4.

CONFUSIO. See *Ground-annual—Right in Security*, 2, 3.

CONTRABAND OF WAR. See *Ship*, 4.

CONTRACT. Constitution—Consensus in idem—Identity of Purchaser—Essential Error—Question with innocent third party.

1. Telford falsely represented to Morrison that he was the son of Wilson, Bonnyrigg, and had authority from him to purchase two cows. Morrison was deceived by this representation, agreed to sell the cows on the usual credit, and delivered them to Telford, who never paid the price. Thereafter Robertson purchased the cows from Telford in good faith and without knowing that they had been improperly obtained, and paid the price demanded by Telford. In an action by Morrison against Robertson for delivery of the cows, *held* (1) that the cows were never sold to Telford, and (2) that the purchaser from him had no title to retain them. *Morrison v. Robertson*, Dec. 19, 1907, p. 332.

Pactum illicitum—Restraint of Trade—Agreement not to trade—Severability of agreement.

2. By agreement between Mulvein, "boot and shoe factor, Maybole," and Murray, Mulvein engaged Murray "as a retail traveller, salesman, and collector in his said business of boot and shoe factor," and Murray bound himself "not to sell to or to canvass any of the said Mulvein's customers, or to sell or travel in any of the towns or districts traded in by the said Mulvein for a period of twelve months from the date of the termination of this engagement." *Murr*

CONTRACT—Continued.

having left Mulvein's employment, Mulvein, founding on the agreement, brought an action to have Murray interdicted from selling boots and shoes to or canvassing any persons who were customers of the pursuer prior to the date when the defender left the pursuer's employment, and from selling, travelling for, or trading in, boots and shoes in certain districts specified. The defender pleaded that the agreement founded on was illegal, in respect that it was in restraint of trade, and was more comprehensive than was reasonably necessary for the protection of the pursuer's interests. From a proof it appeared that the districts specified in the prayer of the petition were the districts in which the defender had travelled when in the pursuer's employment, and further that the pursuer did business in several other parts of Scotland. *Held* that the obligation not to sell to or canvass the pursuer's customers for a period of twelve months from the termination of the agreement was reasonable and valid. *Held* further, that *quoad ultra* the obligation was unreasonable and invalid, both because the area within which it took the defender bound not to travel was unnecessarily wide, and also because it took him bound not to travel in any trade whatsoever. *Mulvein v. Murray*, Jan. 31, 1908, p. 528.

Condition—Suspensive Condition.

3. The minute of sale of an hotel to Steven bore that "it shall be a condition of this agreement being binding on both parties that Mr Steven applies for and obtains a transfer of the licence certificate of the said hotel." *Held* that this was a suspensive condition. *M'Arthur's Executors v. Guild*, March 11, 1908, p. 743.

Condition—Suspensive or resolute—Appointment to office.

4. A applied for shares in a company, his letter of application containing the following condition:—"This application is made on the distinct understanding . . . that my firm is appointed surveyors to this company over an average radius of thirty miles from Edinburgh . . . and that my firm is also appointed advisory surveyors to the Advisory Board for Scotland at fees to be adjusted." *Opinions* that the condition as to the advisory surveyorship was not a condition precedent, but subsequent and collateral to the contract. *National House Property Investment Co., Limited, v. Watson*, June 5, 1908, p. 888.
5. *Termination—Confusio—Disposition ex facie absolute to bondholder—Unrecorded back-letter.—Right of bondholder held not extinguished confusions.* *King v. Johnston*, Feb. 28, 1908, p. 684.
6. *Termination—Confusio—Bond over entailed lands—Acquisition of bond by heir of entail in possession—Defective Entail—Bond held not extinguished confusions.* *Colville's Trustees v. Marindin*, June 6, 1908, p. 911.

Termination—Confusio—Ground-annual.

7. *Opinion* that a ground-annual may be extinguished *confusions.* *King v. Johnston*, Feb. 28, 1908, p. 684.

See *Company*, 1, 5, 6—*Lease*, 4—*Master and Servant*, 1, 17—*Railway*, 8.

COURT OF CLAIMS. See *Res Judicata*, 1.

DEAN OF GUILD. See *Burgh*, 2, 3.

DEPOSIT. See *Innkeeper*.

DILIGENCE. *Imprisonment—Decree ad factum præstandum—Decree for delivery—Small-Debt Amendment (Scotland) Act, 1889, secs. 1 and 2, Sched. B.*

1. *Held* that a pursuer in a small-debt action, who held an order for delivery of a moveable in the form of Schedule B attached to the

DILIGENCE—Continued.

Small-Debt Amendment (Scotland) Act, 1889, was entitled to proceed, on the expiry of the days of charge, to enforce the order by imprisonment without further application to the Sheriff. *Stewart v. M'Dougall*, Dec. 13, 1907, p. 315.

Imprisonment.

2. *Observed* that sec. 1 of the Small-Debt Act, 1835, which enacted that it should not be lawful to imprison any person on account of any civil debt which shall not exceed the sum of £8, 6s. 8d., "exclusive of interest and expenses thereon," had not the effect of rendering imprisonment incompetent in the case of a debt of £40, although that debt consisted of expenses only, where the expenses had been awarded in an action in which the principal sum decerned for exceeded £8, 6s. 8d. *Harvie v. Smith*, Jan. 18, 1908, p. 474.

See *Arrestment—Reparation*, 12.

DONATION. *Donation or debt.*

1. In 1906 a labourer raised an action against his wife's brother for decree for payment of £26, as being the amount expended by the pursuer on the defender's aliment. The pursuer averred that in 1897 he took the defender, then a destitute orphan eleven years old, into his own house, and alimented him for two years, after which the defender was able to earn enough for his own support. *Held* that the action was irrelevant, the pursuer's averments shewing that the aliment had been given as a donation, and without any intention that it should form a debt against the defender. *Turnbull v. Brien*, Dec. 5, 1907, p. 313.

Delivery—Proof—Animus Donandi.

2. On 24th December 1903 the books of Robert Brownlee junior contained an account-current between him and his father, Robert Brownlee senior, which shewed a balance of £1653, 8s. 6d. at the credit of the father. At the same date the account was squared by an entry of "To cash, £1653, 8s. 6d.," and a docquet was appended, which was signed by Robert Brownlee senior, in these terms—"Settled this date." Of the same date a receipt was granted by the father to the son for £1653, 8s. 6d. "as per account rendered." No cash passed between the parties. At the same date the son gave a receipt to his sister, Miss Brownlee, for £1653, 8s. 6d., and she was credited in his books with that amount. On 22d February 1904 Robert Brownlee junior gave his father a written guarantee that Miss Brownlee would pay him £2000. On 16th March 1904 Robert Brownlee junior, by Miss Brownlee's instructions, paid the £1653 and interest to the father's agents. In an action brought by the father's executrix in 1905 against Robert Brownlee junior for payment of the £2000, the question arose whether in March 1904 the sum of £1653, 8s. 6d. belonged to the father or to the daughter. The defender alleged that it had been gifted by the father to the daughter on 24th December 1903, and contended that the documents above mentioned instructed an absolute title in the daughter, and, therefore, that the £1653 had been paid by the daughter, and the defender's liability under the guarantee reduced by that amount. *Held* that as the defender admitted that the sum due by him to his father had not been paid by him to his father on 24th December 1903, the *onus* lay upon him to prove (1) that the father had transferred the title to Miss Brownlee, and (2) that he had done so *animus donandi*; and that the writings did not, by themselves or along with the parole evidence, instruct either the transfer to her or the *animus donandi*. *Brownlee's Executrix v. Brownlee*, Nov. 29, 1907, p. 232.

See *Husband and Wife*.

EDUCATION. See *Charitable and Educational Bequests and Trusts—School.*

ELECTION. See *Marriage-Contract.*

ELECTION LAW. *Burgh Occupation Franchise—Tenant and Occupant—Joint Tenants—Valuation-Roll—Occupancy—Representation of the People (Scotland) Act, 1832, secs. 11 and 12.*

1. A and B and three other persons were, at a rent of £45, joint tenants under a lease of premises in a burgh which were used as billiard and reading rooms by an organisation (consisting of about 100 persons) of which they were members. During the currency of the year ending 31st July 1907 B ceased to be a member of the organisation and his name was deleted from the Valuation-roll. A having been put on the roll of burgh voters as joint tenant and joint occupant of the premises, on the ground that the rent of the premises was sufficient to afford a £10 qualification to him and to each of the other three remaining occupants, the Court in an appeal *held* that A's name fell to be deleted from the roll, on the ground that as B still remained a joint tenant under the lease A's interest was under £10. *Question, per Lord Johnston*, whether the four persons occupied the premises as joint tenants or merely as members of the organisation, sharing the occupancy with the other hundred members. *Niven v. Stewart*, Nov. 29, 1907, p. 290.

University Franchise—Right of women graduates to vote—Representation of the People (Scotland) Act, 1868, secs. 27 and 28—Universities Elections Amendment (Scotland) Act, 1881, sec. 2 (3), (10), and (16)—Universities (Scotland) Act, 1889, sec. 14 (6).

2. Women graduates of a Scottish university are not entitled to vote in the election of a Member of Parliament for the university. *Nairn v. University Courts of St Andrews and Edinburgh*, Nov. 16, 1907, p. 113.
3. The registrar of a Scottish University is not bound to issue voting papers to women graduates although their names appear on the register of the general council of the university. *Nairn v. University Courts of St Andrews and Edinburgh*, Nov. 16, 1907, p. 113.

ENTAIL.

1. *Effect—Acquisition of Bond over Entailed Lands by Heir of Entail in Possession—Confusio—Defective Entail—Bond held not extinguished confusione.* *Colville's Trustees v. Marindin*, June 6, 1908, p. 911.

Heir in possession—Lease—Obligation to take over sheep stock—Transmission of obligation against succeeding heir of entail.

2. In an action brought by the tenant of a sheep farm on an entailed estate in Argyllshire, on the death of his landlord, against the next heir of entail, for declarator that the landlord's obligation in the lease to purchase the tenant's stock of sheep at its termination was binding on the defender, the pursuer averred that from time immemorial such obligations had been a universal condition of sheep farm leases in the north and west of Scotland, founded on the considerations (1) that sheep stock in that part of the country requires to be acclimatised to a particular farm or district, and (2) that stock habituated to a certain holding do not wander beyond the boundaries, and thus enable march fences to be dispensed with. *Held* that although the lease was an alienation struck at by the fetters, it was valid as a necessary act of administration, binding on the estate, but that the obligation to purchase the sheep was a personal obligation, which did not burden the estate, and was not binding on the next heir of entail. *Gillespie v. Riddell*, Feb. 20, 1908, p. 628.

ENTAIL—Continued.

Heir in possession—Lease—Obligation to take over sheep stock—Transmission of obligation against representatives of lessor.

3. An heir of entail in possession of an entailed estate granted a lease of a sheep farm which contained this clause:—"The proprietor binds and obliges himself that he or the then incoming tenant shall purchase the waygoing blackfaced hill sheep stock . . . at the expiration of this tenancy . . . at the valuation of two arbiters mutually chosen." The grantor of the lease died and was succeeded in the entailed estate by the next heir of entail, who disentailed and died before the termination of the lease. The lease being about to terminate, his representatives and the incoming tenant both intimated to the outgoing tenant that they declined to purchase the sheep stock. The tenant then sought to enforce the obligation against the trustees and executors of the grantor of the lease by presenting a petition against them for the appointment of an arbiter to value the sheep stock. *Held* that the obligation had transmitted against the trustees and executors of the grantor, and that they were bound to appoint an arbiter. *Gardiners v. Stewart's Trustees*, June, 16, 1908, p. 985.

Disentail—Consents—Date of Entail—Trust to entail lands—Failure of trustees to carry out trust—Lands in Scotland subsequently entailed in terms of the trust—Option to settle lands either in England or Scotland—Entail Amendment Act, 1848, secs. 2, 27, 28.

4. By his testamentary writings a testator bequeathed £150,000 to certain trustees for the purpose of purchasing lands in England or Scotland, and settling them on a certain series of heirs in such terms as would have imported, with regard to lands in Scotland, a strict entail. The testator died in 1840, and the trustees never accepted office or took any steps to carry out the purposes of the trust. In 1866 the general representative of the testator executed a disposition and deed of entail of a Scotch estate that he had purchased at a price exceeding £150,000. The disposition and deed of entail proceeded on the narrative of the trust created by the testator, was in favour of the series of heirs specified therein, and declared that the present deed was executed in fulfilment of that trust. In 1907 the heir of entail in possession of the estate, who was born in 1864, presented a petition to disentail, in which he claimed the right to do so without the consent of the next heir, on the ground that the date of the entail must be taken to be the date of the coming into operation of the trust, viz., the testator's death in 1840. *Held* (1) that the entail was an entail in execution of the trust; (2) that although there was an option to settle lands either in England or Scotland, the lands actually settled being lands in Scotland, the provisions of the Entail Amendment Act, 1848, were applicable; (3) that in virtue of sec. 28 of that Act the date of the entail must be taken to be the date of the testator's death, and therefore, in virtue of sec. 2 of the Act, the petitioner was entitled to disentail without consents; and (4) that no distinction could be drawn with regard to the portion of the estate that was said to exceed £150,000 in value. *Earl of Mansfield v. Lord Scone's Tutor*, Jan. 18, 1908, p. 459.
5. *Disentail—Consent—Condition of consent—Settlement of disentailed money to provide alimentary liferent for disentailer—Money held to be settled by next heir, and alimentary restriction consequently valid.* *Lord Ruthven v. Drummond*, July 14, 1908, p. 1154.

ERROR. *Essential Error—Error as to stipulations in deed signed—Error as to contents not induced by one of the parties—Signature of contract in ignorance of alteration on draft.*

F. signed a contract with S. without reading it over, in the belief that

ERROR—Continued.

no material alteration had been made on a draft revised by him. F. subsequently refused to implement the contract on the ground that a material alteration had been made in one of the clauses, of which he had not been made aware. S. brought an action of damages against F. for breach of contract. After a proof, *held* (1) that when F. signed the deed he was under no error as to its nature, (2) that his error as to one of the clauses was not induced by S., and (3) that accordingly F. was bound by his signature. *Selkirk v. Ferguson*, Oct. 24, 1907, p. 26.

See *Contract*, 1.

EXECUTOR. Powers—Power to sell heritage.

1. Terms of will which *held* to convey heritage to executor, and to give him power to sell the same. *Jack's Executor v. Downie*, March 7, 1908, p. 718.

Liabilities—Obligation under lease to take over sheep stock.

2. Executor of a deceased heir of entail *held* bound to implement an obligation, in a lease granted by him, to take over sheep stock at the termination of the lease. *Gardiners v. Stewart's Trustees*, June 16, 1908, p. 985.

See *Charitable and Educational Bequests and Trusts*, 3—*Husband and Wife*, 6—*Master and Servant*, 32.

EXPENSES. Awarding—Jury Trial—Verdict under £50—Limitation of Expenses recoverable by pursuer.

1. *Held* that in a case originating in the Sheriff Court the limitation, enacted by sec. 8 of the Act of Sederunt 20th March 1907, as to the amount of expenses recoverable by the pursuer, applies only to expenses in the Court of Session, and not to expenses in the Sheriff Court. *Geddes v. A. & J. M'Lellan*, June 10, 1908, p. 941.

Awarding—Jury Trial—Verdict under £50—Certificate by Judge—Time to apply for certificate.

2. *Observed, per curiam*, that the certificate entitling a pursuer to recover a proportion of his expenses larger than one-half ought to be applied for either at the trial or within eight days thereafter. *Geddes v. A. & J. M'Lellan*, June 10, 1908, p. 941.

Awarding—Administrative Proceeding—Petition to designate land for burial ground—Power to award expenses against unsuccessful objector—Burial Grounds (Scotland) Act, 1855.

3. A parish council presented a petition to the Sheriff, under the Burial Grounds (Scotland) Act, 1855, praying him to designate certain lands as a burial ground. Objections were lodged by a conterminous proprietor, whose lands were separated from the proposed burial ground by a burn, on the ground that the burn would be polluted by the drainage from the burial ground. The Sheriff repelled the objections, designated the ground, and awarded expenses against the objector. The objector, being charged for the expenses, brought a suspension of the charge, on the ground that the award of expenses was *ultra vires* of the Sheriff. *Held* that the proceedings were administrative and not judicial, and that, the objections not being vexatious, the Sheriff was not entitled to award expenses against the objector; and charge *suspended*. *Liddall v. Ballingry Parish Council*, July 4, 1908, p. 1082.

4. *Question*, whether in a case of vexatious opposition expenses may be awarded by a Sheriff in an administrative proceeding. *Liddall v. Ballingry Parish Council*, July 4, 1908, p. 1082.

Awarding—Particular Processes—Arrestments on Dependence—Recall—Motion—Separate Process—Personal Diligence Act, 1838, sec. 20.

5. Pursuers, who had been found entitled to the expenses of an action,

EXPENSES—Continued.

held entitled, as part of such expenses, to £3, 3s., as the cost of opposing successfully an incidental motion made in the cause for recall of arrestments on the dependence. *Muir & Co., Limited, v. United Collieries, Limited*, March 17, 1908, p. 768.

Awarding—Particular Processes—Petition for limitation of liability of ship—Expenses of competition—Merchant Shipping Act, 1894, secs. 503 and 504.

6. In a petition at the instance of shipowners for limitation of liability under secs. 503 and 504 of the Merchant Shipping Act, 1894, *observed* (*per* the Lord President),—"Where no question is raised as to the right of petitioners to have their liability limited, and where the ship, as it were, tables its stake, then such expenses as are given against the petitioners over and above the limited fund must be restricted to the expenses of lodging the claims and taking decree, and not extended to any expenses incurred in the competition between the claimants." *Kennedys v. Clyde Shipping Co., Limited*, June 5, 1908, p. 895.

Awarding—Particular Processes—Stated Case—Workmen's Compensation Act, 1897—Expenses of adjusting stated case.

7. Where the appellant in a stated case under the Workmen's Compensation Act, 1897, had been allowed the expenses of the stated case, the Court, *following* the practice adopted in the case of *London and Edinburgh Shipping Co. v. Brown*, 1905, 7 F. 488, *modified* the expenses to be allowed for adjusting the stated case at the sum of £3, 3s., including the fee of £1 paid to the Sheriff-clerk. *Dempster v. Baird & Co., Limited*, March 7, 1908, p. 722.

Interlocutors dealing with expenses—Expenses of first trial—Motion for new trial.

8. The pursuer of an action of damages obtained a verdict, which was set aside as being contrary to the evidence, and a new trial was ordered. At the second trial the pursuer again obtained a verdict. The defenders moved for a new trial. The Court refused to allow a new trial, and found the pursuer entitled to expenses "except the expenses of the first trial." *Held* that the expenses incurred by the pursuer in resisting the motion to set aside the verdict obtained at the first trial were expenses of the first trial, and consequently that the pursuer was not entitled to these expenses. *Conolly v. North British Railway Co.*, Jan. 15, 1908, p. 422.

Parties liable and entitled—Trustees unsuccessfully defending action to reduce trust-deed—Party and Party or Agent and Client.

9. Circumstances in which a body of testamentary trustees—who had unsuccessfully defended an action for reduction of the trust-deed, and had, along with the trust-estate, been found liable in expenses—were *allowed* expenses out of the trust-estate, to be taxed as between agent and client; but not the expenses of an unsuccessful motion for a new trial. *Merrilees v. Leckie's Trustees*, Feb. 19, 1908, p. 576.

Taxation—Party and Party or Agent and Client—Public Authorities Protection Act, 1893, sec. 3—Public Health (Scotland) Act, 1897, sec. 166.

10. *Held* that, in virtue of sec. 3 of the Public Authorities Protection Act, 1893, that Act does not apply to an action against a Local Authority for an act done in pursuance of the Public Health Act, 1897. *Montgomerie & Co., Limited, v. Haddington Corporation*, Nov. 12, 1907, p. 127.

Decree in agent's name—Compensation.

11. In an action for payment of a sum claimed as due under a contract the defenders pleaded no title to sue, and also that the matters in dispute fell to be determined by arbitration. After a proof the Lord Ordinary repelled the plea of no title to sue, found the pursuers entit'

EXPENSES—Continued.

to expenses, and remitted the account to the Auditor. Thereafter the Lord Ordinary sustained the plea that the matters in dispute fell to be determined by arbitration, and sisted the process, reserving the question of expenses. The pursuers thereafter moved for approval of the Auditor's report on their account of expenses, and for decree in name of the agents-disbursers. The defenders maintained that to grant decree as craved would prevent them setting off a claim for expenses if they should be found entitled to expenses when the merits of the action were decided. The Lord Ordinary (Mackenzie) superseded consideration of the pursuers' motion, and granted leave to reclaim. The pursuers having reclaimed, the Court *granted* decree in name of the agents-disbursers. *Opinions* that the course taken by the Lord Ordinary was competent. *Hugh Nelson & Co. v. Glasgow Corporation*, May 30, 1908, p. 879.

Decree in agent's name—Objections not stated timeously.

12. A party to an action in the Sheriff Court who had allowed the agent of his opponent to obtain decree for expenses in his own name held to be barred by the exception of competent and omitted from suspending a charge on the allegations (1) that the agent had not, at the time when the motion for expenses was made, paid his dues as a law-agent, and (2) that *de facto* he was not the agent-disburser. *Rennie v. James*, Feb. 28, 1908, p. 681.

See *Company*, 16-19—*Husband and Wife*, 2, 3—*Warrandice*.

FEE AND LIFERENT. See *Succession*, 12, 13, 16.

FISHING. *Salmon-Fishing—Exercise of right—Fishing by rod and line—Extent of right—Medium filum—Fishing in æmulationem vicini.*

1. M., the proprietor of salmon-fishings *ex adverso* of one bank of a river 60 feet wide, anchored a boat about mid-stream and fished therefrom with rod and line, casting his line not only on his own side of the *medium filum*, but also on the other side, in such a way as to interfere with an angler fishing for salmon from the opposite bank. In a petition for interdict at the instance of the owner of the salmon-fishings on the opposite bank, *held* that, even if M. had a right to cast his fly beyond the *medium filum*, he was not entitled to exercise that right *in æmulationem vicini*; that here he had acted *in æmulationem vicini*; and that the petitioner would have been entitled to interdict if she had insisted on it. *Campbell v. Muir*, Jan. 10, 1908, p. 387.
2. Lord Cowan's statement in *Earl of Zetland v. Tennent's Trustees*, Feb. 26, 1873, 11 Macph. 469, of the principles applicable to the regulation of salmon-fishing rights between opposite proprietors, as regards the *medium filum* of the river, *approved*; and *opinion* that these principles apply to fishing by rod and line as well as to fishing by net and coble. *Campbell v. Muir*, Jan. 10, 1908, p. 387.

Sea Fishing—Trawling within Prohibited Area—Offence committed by member of crew acting under orders—Duty of Prosecutor to prove guilty knowledge—Herring Fishery (Scotland) Act, 1889, sec. 7 (1)—Sea Fisheries Regulation (Scotland) Act, 1895, sec. 10 (4), (5)—Bye-laws Nos. 10 and 14 of Fishery Board for Scotland.

3. *Held* (1) that it was no defence to a charge of trawling within a prohibited area that the accused occupied a subordinate position on the vessel and acted under the orders of his superior officers; (2) that the prosecutor was not bound to prove that the accused knew the position of the vessel when the offence was committed. *Question* whether it would have been a sufficient defence for the accused to prove that he did not know that the trawling was within the prohibited area. *Gordon v. Shaw*, Jan. 17, 1908, (J.) p. 17.

See *Justiciary Cases*, 8.

FOREIGN. *Contract—Lex loci or lex fori—Maritime Lien—Expenditure on British ship in foreign port.*

In a process in Scotland for the judicial sale of a British ship, then lying in a Scottish port, warrant for sale was granted, and the ship was sold. A claim for a preferential ranking on the purchase price was lodged in the process by a New York firm, who alleged that by American law they had a good lien over the ship for certain expenditure incurred by them on her account while she was lying at New York. *Held* that the question whether any claimants in the process had a lien over the ship fell to be determined by Scots law, and not by American law. *Clark v. Bowring & Co.*, July 16, 1908, p. 1168.

See *Ship*, 6.

FRANCHISE. See *Election Law*.

FRAUD. See *Contract*, 1—*Undue Influence*.

FRIENDLY SOCIETY. See *Writ*, 1.

GAME. *Title to prosecute—Informer—Partridges Act, 1799.*

Held that the Partridges Act, 1799, did not give a title to a private individual, as informer, to prosecute for a penalty under the Act, and that the concurrence of the procurator-fiscal did not supply the defect in the instance. *Question* whether the procurator-fiscal would have had a title to prosecute. *McDouall v. Irvine*, Nov. 2, 1907, p. 60.

GROUND-ANNUAL. *Extinction—Confusio.*

Opinion, that a ground-annual may be extinguished *confusione*. *King v. Johnston*, Feb. 28, 1908, p. 684.

HARBOUR. *Rights and Obligations of Harbour Commissioners—Dock—Access—Use of Lock—Special charge for use of lock—Harbours, Docks, and Piers Clauses Act, 1847, secs. 2, 3, 33, 51, 52, and 83—Leith Harbour and Docks Act, 1892, secs. 4, 58, 59, and 60, and Schedule (B).*

Held that in virtue of sec. 33 of the Harbour, Docks, and Piers Clauses Act, 1847, incorporated with the Leith Harbour and Docks Acts, 1875 and 1892, and of sec. 58 of the Leith Harbour and Docks Act, 1892, a shipowner was entitled to have access to and egress from any of the docks included in Leith Harbour for any of his vessels free of any charge other than the rates payable under sec. 58 and Schedule (B) of the special Act of 1892, at all times when such access and egress could be given with safety, either by means of the locks giving access to such docks or otherwise, and when accommodation was available, but subject to the right of the harbour-master to give directions for all or any of the purposes set out in the Harbours, Docks, and Piers Clauses Act, 1847, and also subject to the right of the Leith Docks Commissioners to make bye-laws as allowed by that Act or either of their special Acts of 1875 and 1892; and that sec. 60 of the Leith Harbour Act of 1892 entitling the Commissioners to make "reasonable charges for work done, services rendered, facilities afforded, and use of plant," &c., applied only to special facilities (the use of cranes, &c.), asked for and received after the vessel had got access to the harbour and docks. *Somerville v. Leith Dock Commissioners*, March 17, 1908, p. 797.

See *Judicial Factor*, 1—*Valuation Acts*, 3.

HERITABLE OFFICE. *Hereditary Standard Bearer of Scotland—Nature of Office.*

Opinion, per curiam, that the office of hereditary standard bearer of Scotland is transferable by disposition and subject to diligence. *Earl of Lauderdale v. Wedderburn*, July 18, 1908, p. 1237.

See *Jurisdiction—Prescription—Res Judicata*, 1.

HUSBAND AND WIFE. *Jus Administrationis*—*Wife living apart from her husband "with his consent"*—*Married Women's Property (Scotland) Act, 1881, sec. 5.*

1. Circumstances in which—in a petition by a wife praying the Court to dispense with her husband's consent to the granting of certain deeds by her—the Court *held* that the wife was in fact living apart from her husband with his consent, although he had repeatedly protested against her continuing to live apart, and *granted* the petition. *M'Lennan v. M'Lennan*, Nov. 21, 1907, p. 164.

Expenses in consistorial actions—*Wife's Expenses of reclaiming note.*

2. *Per curiam* (after consulting Judges of the Second Division)—Where in an action of divorce a wife has been unsuccessful in the Outer-House, and then presents a reclaiming note, the question whether she is entitled to her expenses, if she is again unsuccessful, must depend on whether the case was a fair one to bring before the Court. The *prima facie* view of the case is that the Lord Ordinary is right, and therefore it is for the wife to shew that the case was a fair one for reclaiming. *Thomson v. Thomson*, Nov. 22, 1907, p. 179.
3. Circumstances in which the Court *allowed* a wife, against whom decree of divorce had been pronounced by a Lord Ordinary, the expenses of a reclaiming note, although the Court adhered to the Lord Ordinary's judgment. *Thomson v. Thomson*, Nov. 22, 1907, p. 179.

Donation inter virum et uxorem—*Revocation*—*Sums of money consumed.*

4. In an action by a wife against her husband for the recovery of certain sums of money, she alleged that these sums had been lent or paid to, or applied for behoof of, her husband by her, as donations *inter virum et uxorem*, and that these donations had been revoked by her. The Court allowed a proof *prout de jure quoad* those sums which *ex facie* did not bear to have been applied and consumed, but *quoad* those sums which *ex facie* had been applied and consumed, repelled the pursuer's claim as irrelevant. *Fenton Livingstone v. Fenton Livingstone*, March 9, 1907, p. 286.

Donation inter virum et uxorem—*Implied Revocation.*

5. A husband in 1878 invested £4000 in name of trustees in trust for his wife in *liferent allenary*. Neither the wife nor the trustees ever received payment of the interest on the sum so invested. In 1889, the wife, at the request of the husband, signed a letter acknowledging receipt of the annual interest which had accrued on the trust funds. In a question raised after the husband's death, as to whether the wife's right to the interest, being a donation *inter virum et uxorem*, had been revoked by the husband, *held* that the letter of 1889 negatived any presumption of revocation which might arise from the non-payment of the interest. *Question* whether the non-payment of income by the truster was a *habile* mode of revoking a gift of income, constituted by a formal trust-deed and by handing over of the capital to the trustees. *Boyd's Trustees v. Boyd*, July 11, 1908, p. 1147.

Wife's separate estate—*Loan to husband by wife out of her separate estate*—*Sequestration of Husband*—*Claim by Wife's Executor*—*Married Women's Property (Scotland) Act, 1881, sec. 1 (4).*

6. A wife lent to her husband a sum of money out of estate acquired by her under a deed of settlement, which excluded his *jus mariti* and right of administration. A year after the wife's death the husband was sequestrated, and, the loan not having been repaid, his wife's executor lodged a claim in the sequestration as an ordinary creditor for the amount of the debt. *Held* (1) that section 1 (4) of the *Married Women's Property Act, 1881*, applied to money lent by a wife to her husband out of her separate estate, whether the *jus mariti* was excluded by deed or by the operation of the statute; (2) that the

HUSBAND AND WIFE—*Continued.*

wife, at the date of her death, had merely a *jus crediti* liable to be defeated in the event of her husband's bankruptcy, and that her executor took no higher right; and, accordingly (3) that the claim by the wife's executor to an ordinary ranking fell to be disallowed, under reservation of the claimant's right to participate in any balance of the husband's estate after the claims of other creditors for value had been satisfied. *Mitchell's Executor v. Mitchell's Trustee*, July 2, 1908, p. 1046.

Divorce—Desertion—Insanity of defender.

7. The circumstance that a spouse, who has been in desertion for four years, becomes insane after the expiry of that period and remains so at the date of an action of divorce on the ground of desertion brought by the injured spouse, does not render the action incompetent. *Scott v. Scott*, July 11, 1908, p. 1124.

Divorce—Desertion—"Reasonable Cause"—Act 1573, cap. 55.

8. Circumstances in which *held* that a wife who had deserted her husband had no reasonable cause for non-adherence. *Question* whether in an action of adherence a wife can successfully defend herself upon any other grounds than would be required in order to sustain an action at her instance for separation and aliment. *M'Ewan v. M'Ewan*, July 18, 1908, p. 1263.

Divorce—Desertion—Interruption—Action of separation at defender's instance—Act 1573, cap. 55.

9. A wife deserted her husband, and after having been in desertion for about a year raised an action of separation against him, in which she was unsuccessful. Thereafter she continued to refuse to live with him. In an action of divorce on the ground of desertion at the instance of the husband, raised four years after the date of desertion, the wife pleaded that the period during which the action of separation was being carried on should be deducted from the four years, as during that period she was not in "malicious and obstinate defection." *Held* that in the circumstances of the case she was not entitled to the deduction claimed. *M'Ewan v. M'Ewan*, July 18, 1908, p. 1263.

Divorce—Desertion—Privy Admonition—Act 1573, cap. 55.

10. A husband, whose wife had deserted him, and who had frequently expressed his desire that she should return, signed an agreement with her about a year and a half after the date of desertion with reference to the custody of the child of the marriage, in which he stated that "he adheres to his former requests to her to return to live with him, and desires that she should do so." He had no further communication with her, and about two years and a half later raised an action of divorce for desertion. *Held*, in view of the circumstances of the case, that this declaration was a standing offer to his wife to return and needed no repetition, and that the husband had not failed in his duty to give "privy admonitions for due adherence" in terms of the Act 1573, cap. 55. *M'Ewan v. M'Ewan*, July 18, 1908, p. 1263.

Divorce—Adultery—Lenocinium.

11. A husband who was not on good terms with his wife, and had reason to suspect her conduct, was informed that she intended to visit a man at Gateshead, with whom he knew she had been corresponding, and he instructed detectives to watch her movements. His wife informed him that she desired to visit friends at Stirling, and asked if she should go. She also asked for money. He replied "Certainly go," and gave her £2. She went to Gateshead, where an act of adultery was committed. *Held* that the facts did not support a plea of *lenocinium*, and decree of divorce granted. *Thomson v. Thomson*, Nov. 22, 1907, p. 179.

- See *Minor and Pupil*.

INCOME-TAX. See *Revenue*.

INNKEEPER. *Limitation of Liability to guests—Negligence—Onus probandi—Deposit expressly for safe custody—Innkeepers Liability Act, 1863.*

A commercial traveller for a manufacturing jeweller on arriving at a hotel on a Saturday afternoon handed to the hotel porter a bag, containing jewels to the value of £1800, to be placed in the office. The traveller made no statement as to its value, but he was in use to visit the hotel, and the hotelkeepers knew that he was in the habit of carrying jewellery with him. At 11.30 p.m. he asked for the bag with the view of taking it to his bedroom, when it was discovered that his bag had been stolen. Another bag of the same size and appearance had been left at the office by one of three guests in the hotel who disappeared the same evening without paying their bill, and leaving behind them certain burglar's tools. In an action by the jeweller against the hotelkeepers for the value of the bag, the defenders pleaded, inter alia, the statutory limitation of liability to £30 under the Innkeepers Liability Act, 1863, sec. 1. The pursuer pleaded, inter alia;—(1) that the goods having been deposited with the defenders for safe custody he was entitled to indemnity; and (2) that the goods having been stolen through the default or neglect of the defenders or of their servants, they were liable in damages. The Extra Division held (1) that the bag had not been deposited "expressly" for safe custody within the meaning of sec. 1, subsec. (2), of the Act; (2) that the onus of proving that it had been lost through "default or neglect" on the part of the defenders or of their servants lay upon the pursuer, and that that onus had not been discharged; and therefore (3) that the defenders were entitled to the benefit of the statutory limitation of liability. In an appeal the House affirmed the judgment. Whitehouse v. Pickett, June 26, 1908, (H. L.) p. 31.

INSANITY. See *Husband and Wife*, 7—*Poor*, 3.

INSURANCE. *Widows' Fund of Corporation—Contributor expelled from the Corporation—Right to remain a contributor—Glasgow Faculty of Procurators Widows' Fund Act, 1833—Glasgow Faculty of Procurators Act, 1875, sec. 3.*

1. *In 1901 C., a member of the Faculty of Procurators of Glasgow, who had become a contributor to the Glasgow Procurators Widows' Fund in 1870, was struck off the roll of the Faculty in respect of his having been convicted of a crime, and subsequently the Widows' Fund Society declined to receive his contributions. In an action of declarator brought by C. and his wife and children against the Widows' Fund Society, the First Division held that as C. was no longer a member of the Faculty of Procurators he was not entitled to contribute to the Widows' Fund, and that at his death his widow and children would have no right to the benefit of the fund. In an appeal, held that while it was a condition of a person being admitted as a member of the Widows' Fund that he should be a member of the Faculty of Procurators, it was not a condition of the contract of insurance that he should continue to be a member of that Faculty during his life, and that C. was still a contributor. Colquhoun v. Society of Contributors to Widows' Fund of Faculty of Procurators in Glasgow, March 17, 1908, (H. L.) p. 10.*

Life Insurance—Declarator of right to unmaturred policy.

2. *Assignees of an unsundered policy of life insurance raised an action of declarator during the lifetime of the insured, in which they called as defenders (1) the insurance company, and (2) former holders of the policy. The action concluded for declarator (1) that the pursuers were in right of the policy, and (2) that the insurance com-*

INSURANCE—Continued.

pany were bound, on the sums contained in the policy falling due, to make payment thereof to the pursuers, or the persons deriving right from them. The insurance company alone lodged defences. *Held* that the action so far as directed against the company was incompetent and premature, and should be dismissed, in respect that, until the policy matured, it was impossible to say to whom the proceeds would be payable, and that the insurance company were not the proper contradictors in a question as to whom the policy in the meantime belonged. *Allgemeine Deutsche Credit Anstalt v. Scottish Amicable Life Assurance Society*, Oct. 26, 1907, p. 33.

Life Insurance—Collecting Societies and Industrial Assurance Companies Act, 1896, sec. 4 (2), and sec. 14 (1)—Transfer to another company—Notice.

3. F., who was insured with an industrial assurance company (company A), in September 1906 applied for and obtained a policy of insurance from another industrial assurance company (company B). F. paid the weekly premium on both insurances down to 10th December 1906. F. thereafter applied for and obtained from the B company a policy on the same terms as he got from the A company. The provisions of the new policy were more favourable to the assured than the provisions of the general tables of company B, and the insurance required to be sanctioned by the directors of company B. The directors were not, but the agent who negotiated with F. was, aware that F. had been insured with company A. F.'s insurance with company A did not lapse for about two months after he had ceased paying his contributions. No notice was sent by company B to company A. *Held* that the transaction was a transfer of F.'s insurance from company A to company B, and that company B not having given notice in terms of the Collecting Societies and Industrial Assurance Companies Act, 1896, sec. 4 (2), had committed an offence under sec. 14 (1). *Salvation Army Assurance Society v. British Legal Life Assurance Co.*, July 11, 1908, p. 1138.

See *Revenue*, 2.

INTERDICT. *Interim Interdict.*

An interim interdict remains in force until it is recalled; it does not *ipso facto* come to an end when answers are lodged. *Home Drummond v. M'Lachlan*, Oct. 18, 1907, p. 12.

See *River, Loch, and Sea*, 1, 2—*Title to sue and defend*, 6.

ISSUE. *Form of issue—Solatium—Negligence—Admission of liability.*

1. Form of issue *approved* in an action of damages against a railway company, at the instance of the widow and children of a passenger who had died from injuries received in a railway accident, where the defenders admitted liability for the injuries of the deceased. *Black v. North British Railway Co.*, Jan. 18, 1908, p. 444.

Form of issue.

2. Form of issue *approved* in an action of damages against the proprietors of a hydropathic for wrongous detention of the pursuer by their manager. *Mackenzie v. Cluny Hill Hydropathic Co., Limited*, Nov. 23, 1907, p. 200.

JOINT AND SEVERAL. *Summons—Decree.*

In an action of payment against six defenders "jointly and severally," three of the defenders were assoilzied. *Held* that a decree against the remaining defenders conjunctly and severally was competent. *Fleming v. Gemmill*, Dec. 20, 1907, p. 340.

See *River, Loch, and Sea*, 3.

JUDICIAL FACTOR. *Powers of Factor—Power to levy rates—Greenock Harbour Act, 1880, sec. 70.*

1. *Held* that a judicial factor appointed under sec. 70 of the Greenock Harbour Act of 1880 had no power at his own hand to alter the harbour rates fixed by the harbour trustees, his only duty being to receive and to apply them. *Greenock Harbour Trustees v. Judicial Factor of Greenock Harbour Trust*, June 11, 1908, p. 944.

Disabilities.

2. Judicial factor *held* not bound to communicate to the factory estate the benefit of fees paid to his firm by borrowers from the factory estate, or of fees paid to his firm by beneficiaries on the factory estate. *Sleigh v. Sleigh's Judicial Factor*, July 9, 1908, p. 1112.

JURISDICTION. *Heritable Office—Hereditary Standard Bearer of Scotland.*

Held that the Court of Session had jurisdiction to determine claims to the office of Hereditary Standard Bearer of Scotland, that office being a heritable office and not a mere title of honour, and the right to the office being a right of property which was within the cognisance of the Court. *Earl of Lauderdale v. Wedderburn*, July 18, 1908, p. 1237.

See *Arrestment*, 6, 8—*Justiciary Cases*, 1—*Sheriff*, 1, 2.

JUSTICIARY CASES. *Jurisdiction—Review—Suspension—Exclusion of Suspension—Special Statutory Appeal—Licensing (Scotland) Act, 1903, secs. 53, 91, 102, and 103.*

1. A publican who had been convicted of breach of certificate, "upon a complaint bearing that it was a third offence," brought a suspension upon the ground that (after evidence for the prosecution and the defence had been led, the cases for the respective parties closed, and parties heard with regard to the particular breach alleged, and after the justices had found the accused guilty thereof), a witness was put in to prove two previous convictions against the accused; that this evidence was incompetently admitted; that no other evidence of the offence charged being a third offence had been led; and that such evidence should have been led, as this was a substantive part of the charge. *Held* that the procedure complained of amounted to nothing more at most than a "deviation in point of form from the statutory enactment," that consequently the only form of review competent was an appeal under sec. 102 of the Licensing (Scotland) Act, 1903, and that the suspension was incompetent. *Mitchell v. Morrison*, May 13, 1908, (J.) p. 65.

Statutory Offences—Mens rei—Offence committed by member of crew of vessel acting under orders.

2. *Held* that it was no defence to a charge of trawling within prohibited waters that the accused occupied a subordinate position on the vessel and acted under the orders of his superior officers. *Gordon v. Shaw*, Jan. 17, 1908, (J.) p. 17.

Statutory Offences—Guilty Knowledge—Onus on Prosecutor.

3. *Held* that, in a prosecution against a member of the crew of a trawler for trawling in prohibited waters contrary to a bye-law of the Scottish Fishery Board, the prosecutor was not bound to prove that the accused knew the position of the vessel when the offence was committed. *Question* whether it would have been a sufficient defence for the accused to prove that he did not know that the trawling was within the prohibited area. *Gordon v. Shaw*, Jan. 17, 1908, (J.) p. 17.
4. *Question* whether in the case of statutory offences, if the word "knowingly" is not used, ignorance can ever be a defence. *Gordon v. Shaw*, Jan. 17, 1908, (J.) p. 17.

JUSTICIARY CASES—*Continued.*

Statutory Offences—Betting—Street Betting Act, 1906, secs. 1 (1) and (4) and 3—“Passage.”

5. In a prosecution under the Street Betting Act, 1906, for loitering in a public passage for the purpose of betting, it was proved (a) that the passage in question was a passage to which the public had no right of access, but to which the public in fact could obtain access owing to the lock of the door being broken, and (b) that it led directly to a court which gave access to at least one common stair. *Held* that the passage in question was not a public passage within the meaning of sec. 1 (4) of the Street Betting Act, 1906; and (2) that it was not a passage leading to a common close or common stair within the meaning of sec. 3 of that Act. *Hasson v. Neilson*, May 12, 1908, (J.) p. 57.

Statutory Offences—Prevention of Corruption Act, 1906, sec. 1—Police-constable—Bribery.

6. In a complaint under the Prevention of Corruption Act, 1906, charging an attempt to bribe a police-constable in Glasgow while in the execution of his duty and acting for his employer, the Chief Constable, *held* that the police-constable was an agent in the sense of the Act. *Graham v. Hart*, Jan. 17, 1908, (J.) p. 26.

Statutory Offences—Prevention of Crimes Act, 1871, secs. 7 and 20—“Crime”—“Theft which may be punished with penal servitude.”

7. *Held* that where a person had been convicted in the Sheriff Court on indictment of theft, aggravated by five previous convictions of theft and attempt to steal obtained in the Sheriff and Police Courts (followed by sentences varying from fourteen days' to six months' imprisonment), he had been convicted of a “crime,” and had had “a previous conviction of a crime” proved against him, within the meaning of the Prevention of Crimes Act, 1871, although he had never been convicted in any Court which could competently impose a sentence of penal servitude. *Martin v. Boyd*, May 12, 1908, (J.) p. 52.

Statutory Offences—Salmon Fishing—Weekly Close Time—Reasonable Excuse—Sunday Labour—Salmon Fisheries (Scotland) Act, 1868, sec. 24, and Schedule D, Bye-law 3.

8. In a prosecution for a contravention of the Salmon Fisheries (Scotland) Act, 1868, and sec. 24, and Schedule D, Bye-law 3, it was proved that the leaders of certain bag-nets had not been removed by the occupier of the fishery on a Saturday night, and could not have been then removed owing to a storm; that they could have been removed without danger on Sunday, but that no attempt was made to do so, and that they were not removed till Monday morning. The accused pleaded that the removal of the nets on the Sunday was an impossibility, inasmuch as it would have involved a breach of the Sunday Labour Statutes, 1579, c. 70, 1661, c. 18, and 1690, c. 5, which she was not bound to commit or procure others to commit. *Held* that the accused was not justified in failing to comply with the bye-law, the operation thereby prescribed being a work of necessity and not struck at by the Sunday Labour Statutes, and in any event enjoined by an Act of Parliament of later date. *Middleton v. Tough*, March 10, 1908, (J.) p. 32.

Procedure—Indictment—Relevancy—Locus—Latitude—Reset.

9. In a summary complaint for reset of forty-four different articles the crime was libelled as having been committed at four different specified places in Glasgow, “or at one or other of said places, or elsewhere in Glasgow, the particular place or places being to the complainer unknown.” *Held* that, this being a case of reset, the latitude taken

JUSTICIARY CASES—*Continued.*

regards the *locus* was legitimate. *Gold v. Neilson*, Nov. 7, 1907, (J.) p. 5.

Procedure—Indictment—Relevancy—Specification—Fair Notice—Reset—Criminal Procedure (Scotland) Act, 1887, secs. 19 and 58.

10. An indictment for reset set forth that "during the period between 1st July 1907 and 3d March 1908," at a place libelled, "on different occasions during said period, the particular occasions being to the prosecutor unknown," the accused "did reset in all 25 lbs. of brass and copper electric and gas fittings, and 25 lbs. of solder, the same having been dishonestly appropriated by theft." Annexed there were (1) a list of productions, including certain specified brass and copper electric and gas fittings, and 2 lbs. 10 ounces of solder; and (2) a list of witnesses. *Held* that, in view of the provisions of the Criminal Procedure (Scotland) Act, 1887, secs. 19 and 58, the indictment was relevant; and that read along with the lists of productions and witnesses it gave the accused sufficient notice of the charge he had to meet. *Maguire v. H. M. Advocate*, May 12, 1908, (J.) p. 49.

Procedure—Proof—Proof of previous conviction—Proof of previous conviction of theft aggravated by previous conviction—Prevention of Crimes Act, 1871, secs. 7 and 20—Criminal Procedure (Scotland) Act, 1887, sec. 67.

11. *Held* in a prosecution under the Prevention of Crimes Act, 1871, that in view of sec. 67 of the Criminal Procedure (Scotland) Act, 1887, the production of an extract of a previous conviction on indictment in the Sheriff Court of theft aggravated by five previous convictions, three of theft and two of attempt to steal, scheduled thereto, was, in the absence of any objection by the prisoner to such previous convictions, sufficient evidence both of a conviction on indictment of a "crime," and of previous conviction of a "crime," within the meaning of the Prevention of Crimes Act, 1871. *Martin v. Boyd*, May 12, 1908, (J.) p. 52.
12. *Procedure—Proof—Public-House Offence—Third Offence—Procedure in proving that offence is third offence.* *Mitchell v. Morrison*, May 13, 1908, (J.) p. 65.

Procedure—Proof—Witness—Citation of witnesses for precognition on oath—Lotteries Act, 1823.

13. The Procurator-fiscal of a county presented a petition to the Sheriff setting forth that at a Masonic bazaar held in October 1907 a lottery had been carried on in contravention of the Lotteries Act, 1823, and that the Chief Constable had endeavoured to get evidence against persons engaged in the lottery from persons able to give information, but that they had refused to give it, and praying for a warrant to cite all available witnesses for precognition on oath if necessary. The Sheriff granted the warrant craved, and certain persons were cited. The Court *suspended* the warrant and citations. *Observed* that it was conceivable that in very serious cases such a warrant and citation might be justifiable. *Forbes v. Main*, March 20, 1908, (J.) p. 46.

Summary Procedure—Competency of challenging validity of regulation in Summary Proceeding—Motor-Car Act, 1903, secs. 9 and 18.

14. *Question* whether it was competent in a summary proceeding to challenge the validity of a regulation made by the Secretary for Scotland under sec. 18 (3) of the Motor-Car Act, 1903. *Stewart v. Todrick*, Dec. 4, 1907, (J.) p. 8.

Summary Procedure—Complaint—Instance—Company.

15. A summary complaint may be presented at the instance of an incorporated company without the conjunction of an officer of the company. *Fairbairn v. Lochryan Oyster Fishery Co., Limited*, May 31, 1907, (J.) p. 1.

JUSTICIARY CASES—*Continued.*

Summary Procedure—Conduct of Trial—Record of Proceedings—List of witnesses—Misnomer of witness—Summary Procedure (Scotland) Act, 1864, sec. 16.

16. In the record of proceedings on a summary complaint the name of the first witness was entered as "Joseph Milligan" instead of "Joseph Milliken," but Milliken's designation and address were correctly stated. *Held* that the misnomer was not a sufficient ground for suspending a conviction. *Gold v. Neilson*, Nov. 7, 1907, (J.) p. 5.

Summary Procedure—Conviction—Charge of resetting different articles at different times and places—Conviction in general terms—Reset.

17. A person was charged on a summary complaint with resetting forty-four different articles during a period of three weeks at four specified places in Glasgow, "or at one or other of said places, or elsewhere in Glasgow." Objections to the relevancy were repelled, and the accused on evidence was found "guilty of the crime charged." *Held* that it was not necessary in the conviction to specify the particular articles which the accused was found guilty of resetting, or the particular times and places at which the articles had been reset. *Gold v. Neilson*, Nov. 7, 1907, (J.) p. 5.

18. *Observed* (per the Lord Justice-Clerk) that a conviction of "guilty as libelled" means guilty of all that is libelled or of a substantial part thereof, and that in the ordinary case where the crime is alleged to have been committed as regards a number of different articles, and there is doubt as to the guilt of the accused as to some of the articles libelled, it is not necessary to mention this in the conviction. *Gold v. Neilson*, Nov. 7, 1907, (J.) p. 5.

Summary Procedure—Conviction—Alternative charge and general conviction—Street Betting Act, 1906, sec. 1 (1).

19. A person was charged with loitering in a street libelled "for the purpose of bookmaking or betting or wagering, or agreeing to bet or wager, or paying or receiving or settling bets," contrary to the Street Betting Act, 1906, sec. 1. He was found "guilty of the offence charged." *Held* that this was not a case to which the rule against a general conviction proceeding upon an alternative charge could be held to apply, and conviction *sustained*. *Stenhouse v. Dykes*, May 13, 1908, (J.) p. 61.

Summary Procedure—Conviction—Food and Drugs—Delivery of milk in several cans—Deficiency of quality in each can—Sale of Food and Drugs Act, 1875, secs. 6, 13—Sale of Food and Drugs Act Amendment Act, 1879, sec. 3.

20. Samples having been taken from fourteen out of sixteen cans of milk in course of delivery in one consignment, and all the samples having been found deficient in quality, the consignor was charged with and convicted of fourteen offences under section 6 of the Sale of Food and Drugs Act, 1875. *Held* that, there having been only one delivery, it was incompetent to charge and convict of more than one offence. *Telford v. Fyfe*, July 16, 1908, (J.) p. 83.

Summary Procedure—Sentences—Competency—Form—Summary Procedure (Scotland) Act, 1864, sec. 18, Schedule K, No. 6, sec. 34.

21. A conviction in form No. 6 of Schedule K of the Summary Procedure Act, 1864, granted warrant to arrest all debts and sums of money owing to the accused, and to poind his goods and sell the same, and appointed a return of such poinding and sale to be made "within eight days from the expiration of the period hereby allowed for payment." No period was allowed for payment, the interlocutor ordaining instant execution. *Opinion* that the conviction was not incompetent as being impossible of execution. *Telford v. Fyfe*, July 16, 1908, (J.) p. 83.

JUSTICIARY CASES—*Continued.*

Summary Procedure—Sentence—Imprisonment in default of immediate payment of fine—Street Betting Act, 1906, secs. 1 (1) (a) and 3—Summary Procedure Act, 1864, sec. 18 (3) and (6), Schedule K, 3 and 6—Summary Jurisdiction (Scotland) Act, 1881, sec. 6 (b).

22. A person who had been convicted of an offence under sec. 1 (1) (a) of the Street Betting Act, 1906, was fined £10, "and in default of immediate payment thereof" was sentenced to be imprisoned for thirty days, this sentence being in the form of Schedule K, 3, of the Summary Procedure Act, 1864. *Held* that, in view of the provisions of sec. 3 of the Street Betting Act, 1906, and of sec. 6 (b) of the Summary Jurisdiction (Scotland) Act, 1881, this was a case of a contravention of an Act of Parliament under which the accused, in default of payment of a penalty, was liable to be imprisoned for a period limited to a certain time in the sense of sec. 18 (3) of the Summary Procedure Act, 1864, and that consequently a sentence in the form of Schedule K, 3, of that Act was competent. *Stenhouse v. Dykes*, May 13, 1908, (J.) p. 61.

Summary Procedure—Sentence—Common Law Offence—Notice of Penalty—Summary Procedure (Scotland) Act, 1864, sec. 29—Burgh Police (Scotland) Act, 1892, sec. 490.

23. A summary complaint in a burgh Police Court, charging assault at common law, was headed "Under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887," and did not contain any reference to the Burgh Police (Scotland) Act, 1892. *Held* that it was competent for the Magistrate on this complaint to pronounce a sentence within the maximum authorised by sec. 490 of the Burgh Police (Scotland) Act, 1892, although the sentence was in excess of the maximum authorised by sec. 29 of the Summary Procedure (Scotland) Act, 1864. *Findlay v. Walker*, July 18, 1907, (J.) p. 2.

Summary Procedure—Appeal from Sheriff to Court of Quarter Sessions—Merchandise Marks Act, 1887, secs. 2 (5), 21.

24. The Merchandise Marks Act, 1887 (50 and 51 Vict. cap. 28), enacts:—Sec. 2 (5). "If any person feels aggrieved by any conviction made by a Court of Summary Jurisdiction, he may appeal therefrom to a Court of Quarter Sessions." Sec. 21. "In the application of this Act to Scotland the following modifications shall be made:—
 . . . The expression 'Court of Summary Jurisdiction' means the Sheriff Court, and all jurisdiction necessary for the purpose of this Act is hereby conferred on Sheriffs." *Held* that in a prosecution in Scotland under the Merchandise Marks Act, 1887, the above enactments did not make it competent to appeal from the judgment of the Sheriff to a Court of Quarter Sessions. *Turnbull v. H. M. Advocate*, March 20, 1908, (J.) p. 47.

Review—Suspension—Improper statement by prosecutor.

25. In a suspension, the complainer, *inter alia*, alleged that in his address to the magistrate the prosecutor (the procurator-fiscal) had made an allegation which was not proved in the evidence. In his answers the procurator-fiscal stated that the magistrate had intimated that he would not allow himself to be influenced by the allegation complained of. The Court *refused* the suspension. *Martin v. Boyd*, May 12, 1908, (J.) p. 52.

Review—Suspension—Sentence—Illegal Sentence—Detention in Reformatory—Restriction of Sentence—Competency—Reformatory Schools Act, 1893, sec. 1.

26. Three boys, all fifteen years of age, were each sentenced to be detained for four years in a reformatory, the effect of this sentence being that the period of detention would not expire until after the time at which

JUSTICIARY CASES—*Continued.*

the offenders would attain the age of nineteen years, which is contrary to sec. 1 of the Reformatory Schools Act, 1893. The offenders having brought a suspension, counsel for the Crown did not oppose the quashing of the sentence. The Court *quashed* the conviction and sentence as *ultra vires* and illegal. *Sweenie v. Hart*, June 18, 1908, (J.) p. 81.

27. *Observed* that there might be circumstances in which the Court would, instead of quashing a sentence of detention in a reformatory, reduce the period of detention so as to make it conform to the statute. *Sweenie v. Hart*, June 18, 1908, (J.) p. 81.

See *Public Health—Public-House—Trade-Mark*.

LANDLORD AND TENANT. See *Lease—River, Loch, and Sea*, 1, 2.

LEASE. *Constitution—Verbal lease followed by written lease—Obligation inserted in written lease—Date from which obligation takes effect.*

1. In 1895 a moorland farm was let verbally for nineteen years, and the tenant entered into possession. The parties were at variance as to the amount of heather-burning per annum that was to be undertaken by the landlord, and that question remained unsettled till 1902, when a lease was signed by the parties, in which the landlord undertook to burn, one year with another, one-twelfth part of the heather annually. The lease also bore that the farm was let "for the period of nineteen years from and after the term of Martinmas 1895, which, notwithstanding the date hereof, is declared to be the term of entry hereunder." *Held* that the obligation to burn one-twelfth part of the heather annually ran from Martinmas 1895, and not from the date of the lease in 1902. *Ramsay v. Howison*, March 5, 1908, p. 697.

Construction—"Tenantable condition and repair."

2. An obligation on the part of a landlord to put buildings, fences, drains, &c., at the commencement of a lease "in tenantable condition and repair" is more onerous than the obligation which lies upon a tenant at the end of a lease to leave these subjects in tenantable condition and repair. *Davidson v. Logan*, Nov. 29, 1907, p. 350.

Damages—Claim by tenant for breach of condition of the lease—Failure to burn heather—Payment of rent without reservation.

3. The tenant of a farm, under a lease which contained an obligation by the landlord to burn one year with another a certain quantity of heather per annum, possessed under the lease for nine years, during which period, although he repeatedly complained of the landlord's failure to burn sufficient heather, he paid the rent each half year without deduction or reservation of any claim for damages, and took clean receipts therefor. In the tenth year he brought an action against the landlord for damages suffered in that and the preceding year, in consequence of the failure to burn sufficient heather. The landlord pleaded in defence that the tenant, by paying the rent up to the ninth year without reservation, was barred from claiming damages for default committed prior to that date. *Held*, in the circumstances, that as the damage from failure to burn heather was cumulative, and as it was impossible to determine by what year the damage would declare itself, the tenant could not be assumed by his actings to have waived his claim. *Ramsay v. Howison*, March 5, 1908, p. 697.

Damages—Insanitary House—Title to Sue—Wife and Children of Tenant.

4. *Held* that the wife and children of the tenant of a dwelling-house had no title to sue the landlord for damages for loss and injury caused to them by illness due to the insanitary condition of the house. *Cameron v. Young*, Feb. 27, 1908, (H. L.) p. 7.

LEASE—Continued.

Damages—Landlord's liability for fault of tenant.

5. Landlord held liable for pollution of a river caused by improper use of drains by his tenant. *Fleming v. Gemmill*, Dec. 20, 1907, p. 340.

Outgoing—Obligation in lease to take over sheep stock—Transmission of obligation against succeeding heir of entail.

6. Heir of entail in possession held not bound to implement an obligation in a lease, granted by the preceding heir of entail, to purchase the tenant's stock of sheep at the termination of the lease. *Gillespie v. Riddell*, Feb. 20, 1908, p. 628.

Outgoing—Obligation in lease to take over sheep stock—Transmission of obligation against personal representatives of lessor—Lease by heir of entail.

7. Executors of an heir of entail held bound to implement an obligation in a lease, granted by him, to purchase the tenant's sheep stock at a valuation at the expiration of the tenancy. *Gardiniers v. Stewart's Trustees*, June 16, 1908, p. 985.

Outgoing—Compensation for Improvements—Agreement—Fair and reasonable Compensation—Arbitration—Powers and Duties of Arbiter—Agricultural Holdings (Scotland) Act, 1883, sec. 5, and Agricultural Holdings Act, 1900, secs. 1 and 2 (1).

8. In an arbitration between a landlord and an outgoing tenant as to the amount of compensation for improvements to which the tenant was entitled, the tenant objected to the scale of compensation fixed by the lease at the commencement of his tenancy on the ground that it was not fair and reasonable, and claimed compensation on the scale fixed by the Act of 1883. Held that the arbiter, in order to explicate his jurisdiction, was bound to decide whether the scale of compensation fixed by the lease was, at its date, fair and reasonable and so fell to be applied. Observed that the decision of the arbiter on this question would not be final, and might be challenged in a process of interdict or of reduction. *Bell v. Graham*, June 16, 1908, p. 1060.

Long Lease—Right in security—Assignment in security of long lease—Action of mails and duties—Competency—Registration of Leases (Scotland) Act, 1857, secs. 6 and 20—Heritable Securities (Scotland) Act, 1847, sec. 2.

9. Held that as the Registration of Leases (Scotland) Act, 1857, in giving to the person in right of an assignment in security of a recorded long lease a right to enter on possession and uplift the rents, had provided a special procedure for his doing so, it by implication excluded any other mode of procedure, and that an action of mails and duties at his instance was incompetent. *Dunbar v. Gill*, July 4, 1908, p. 1054.

LOTTERIES. See *Justiciary Cases*, 13.

LUNATIC. See *Husband and Wife*, 1—*Poor*, 3.

MARITIME LIEN. See *Ship*, 2, 3.

MARRIAGE-CONTRACT. *Estate conveyed—Election—Whether wife's conveyance of acquirenda to marriage-contract trustees carried her right to elect between legitim and a testamentary provision.*

By her antenuptial contract of marriage a wife conveyed to the trustees therein named the whole estate then belonging to her, "or to which she may succeed or acquire right during the subsistence of the marriage." Her father having died during the subsistence of the marriage, leaving a settlement under which she was a beneficiary, questions arose between herself and her marriage-contract trustees as

MARRIAGE-CONTRACT—Continued.

to the exercise of the right to elect between legitim and the testamentary provision. *Held* that the right to elect remained with the wife, and had not been carried to the trustees by the conveyance of *acquirenda* in the marriage-contract. *Mackenzie's Trustees v. Beveridge's Trustees*, July 17, 1908, p. 1185.

MASTER AND SERVANT. Duration of Contract—Agreement by master to give "regular employment" to servant.

1. By an agreement in settlement of a claim under the Workmen's Compensation Act, 1897, the master, in addition to agreeing to make immediate payment of a lump sum to the claimant, agreed to give the claimant "regular employment at a fixed weekly wage of 23s." After three years the master dismissed him. *Held* that the agreement did not give the claimant a right to permanent employment so long as he was willing and able to do the work. *Lawrie v. Brown & Co., Limited*, March 6, 1908, p. 705.

Liability of master for negligence of servant—Whether servant of A, pro hac vice, servant of B.

2. Arrangement between owner of trawl boat and Fishery Board which *held* not to make master of trawler servant, *pro hac vice*, of Fishery Board. *Burgoyne v. Walker*, Dec. 11, 1907, p. 321.

Liability of master for slander uttered by servant.

3. *Held* that an employer is liable for a verbal slander uttered by his servant in the course of the servant's employment and for the benefit of the master. Averments *held* relevant to support an action against a master for a slander uttered by his servant. Averments *held* irrelevant in an action against a master for words uttered by his servant. *Finburgh v. Moss' Empires, Limited*, June 9, 1908, p. 928.
4. Averments *held* irrelevant to support an action against a master for a slander uttered by his servant. *Beaton v. Corporation of Glasgow*, June 17, 1908, p. 1010.

Liability of master for wrongful act of servant—Wrongous Detention.

5. Averments *held* relevant in an action against the proprietors of a hydropathic for wrongful detention of a guest by their manager. *Mackenzie v. Cluny Hill Hydropathic Co., Limited*, Nov. 23, 1907, p. 200.

Servant's Duties—Sunday Labour—Acts, 1579, c. 70, 1661, c. 18, and 1690, c. 5.

6. *Observations* on the application of the Scots Acts anent Sunday labour. *Middleton v. Tough*, March 10, 1908, (J.) p. 32.

Workmen's Compensation Act, 1897, sec. 1, subsec. (1)—Accident arising out of and in course of employment.

7. A station policeman in the employment of a railway company was run down by an engine on a siding at the station and died shortly afterwards of his injuries. There was no evidence to shew how or why he came to be at the spot where he was injured, but he might legitimately have been there in the course of his duties as station policeman. *Held* that the deceased being a station policeman, the presumption was that he had been injured by accident arising out of and in course of his employment, in the sense of sec. 1, subsec. (1), of the Workmen's Compensation Act, 1897, and that in the absence of evidence to the contrary this must be taken to be the fact. *Grant v. Glasgow and South-Western Railway Co.*, Nov. 22, 1907, p. 187.
8. Smith and Paton, two drawers in a coalpit, were sitting in a hutch, Smith driving the horse. In passing near the working place of another drawer, Burley, Paton took hold of a hutch Burley had been using and pulled it after him. Burley followed and in endeavouring to

MASTER AND SERVANT—Continued.

recapture his hutch pushed Paton with a prop. Paton then threw some rubbish at Burley; in avoiding the rubbish Burley struck his head against a projection on the wall and was injured. Burley having claimed compensation under the Workmen's Compensation Act, 1897, *held* that although the accident arose in the course of Burley's employment, it did not arise out of it within the meaning of sec. 1 (1) of the Act. *Burley v. Baird & Co., Limited*, Feb. 7, 1908, p. 545.

Workmen's Compensation Act, 1897, sec. 1 (2) (b)—Election to take Compensation under Act—Election inferred from acceptance of weekly payments.

9. In defence to an action of damages at common law for personal injuries, brought by a workman against his master, the master pleaded that the action was barred, in virtue of sec. 1 (2) (b) of the Workmen's Compensation Act, by the pursuer having elected to take compensation under the Act. On a proof it appeared that at the end of the week in which he was injured the workman was paid a sum in lieu of wages, and was told that for the next two weeks he would get nothing, but after that he would be paid half wages. He subsequently, for a period of about six months, received each week a sum amounting to slightly more than half his average weekly wage. These payments were at first made at his house, but afterwards, when he had partially recovered, he called for them regularly at his employer's office. No receipts were taken for these payments. *Held* that the pursuer had elected to accept, and had accepted, compensation under the Workmen's Compensation Act, and was thereby barred from raising this action. *Mackay v. Rosie*, Nov. 21, 1907, p. 174.

Workmen's Compensation Act, 1897, sec. 1 (3)—Arbitration Proceedings—Competency—Unrecorded agreement not acted on for seven years.

10. In March 1899 a miner sustained injuries, by which he was totally incapacitated for his work, and by agreement with his employers he was paid compensation under the Workmen's Compensation Act, 1897, from March 1899 till May 1900, at the rate of 14s. 4d. per week, being half his previous wages (the statutory maximum). No memorandum of the agreement was ever recorded, and it was never formally varied or ended under the Act. In May 1900 the employers ceased the weekly payments, and the workman returned to their service, in which he remained working and earning wages, when he was able, as a pit bottomer, till April 1907, when, as the result of his injuries in 1899, he became totally incapacitated for work. No compensation was paid to the workman between May 1900 and April 1907. In 1907 the workman claimed compensation as from May 1900, and the employers having refused to pay compensation as claimed, he instituted arbitration proceedings under the Act. The employers maintained that in respect of the agreement arbitration was incompetent. *Held* that there was no subsisting agreement between the parties, and that consequently arbitration proceedings were competent. *Dempster v. Baird & Co., Limited*, March 7, 1908, p. 722.

Workmen's Compensation Act, 1897, sec. 7, (2)—Dependants—Wife living apart from husband and not supported by him—Child living with wife and supported by her.

11. In 1895 a wife voluntarily left her husband, and a month afterwards gave birth to a child. By means of her earnings as a weaver, and the assistance of the relatives with whom she lived, she supported herself and child, never asking for and never receiving aliment from her husband. In 1907 her husband was killed by accident in the course of his employment as a workman. *Held* that neither the wife

MASTER AND SERVANT—Continued.

nor the child were either wholly or in part dependent upon the earnings of the workman at the time of his death, and accordingly that they were not entitled to compensation under the Workmen's Compensation Act, 1897. *Lindsay v. Stewart M'Glashen & Son, Limited*, March 14, 1908, p. 762.

Workmen's Compensation Act, 1897, First Schedule (1) (a)—"Where death results from the injury"—*Suicide of workman who had become insane in consequence of accident.*

12. The widow of a workman, John Malone, who had committed suicide, brought a claim against his employers for compensation for his death. She averred:—The deceased, who had already lost the sight of his left eye in the course of his employment, received an injury to his right eye by a splinter of iron penetrating it. As a result of the injury the sight of that eye began to fail, and eventually he became almost blind. "Owing to the gradual loss of sight in his right eye and consequent blindness, the said John Malone's mind became affected and he became insane, and on 20th August 1907 he committed suicide in his house at 401 Rutherglen Road. The death of the said John Malone was due to the foresaid accident." The arbiter having dismissed the claim as irrelevant, the Court *recalled* his determination and *remitted* to him to allow a proof. *Malone v. Cayzer, Irvine, & Co.*, Jan. 23, 1908, p. 479.

Workmen's Compensation Act, 1897, First Schedule (1) (b)—*Incapacity resulting from injury—Injured workman suffering from disease—Incapacity contributed to by disease.*

13. A miner, whose right eye was sound, but whose left eye was affected by disease, was able to work under ground. In the course of his employment he met with an accident to his sound eye which so injured it as to render it of little use. Owing to the condition of the diseased eye he was thereafter unable to resume his work under ground. It was proved that the condition of the diseased eye was neither caused nor aggravated by the accident. *Held* that the workman was suffering from incapacity resulting from the accident. *Lee v. William Baird & Co., Limited*, June 6, 1908, p. 905.

Workmen's Compensation Act, 1897, First Schedule (12)—*Review of weekly payments—Refusal of workman to undergo surgical operation.*

14. In an arbitration under the Workmen's Compensation Act, 1897, the employers prayed the arbiter under the First Schedule, (12), of the Act to review and end or diminish a weekly payment which was being made to a workman who had been totally incapacitated in consequence of an injury to his left hand. The following facts were proved, viz.:—That the workman's loss of the use of his left hand was caused by the removal of the third finger and the top of the thumb, the existence of pain in the palm, and the permanent curvature of the second finger into the palm; that three doctors, who had examined the workman, recommended that the second finger should be removed, and that a nodule in the palm, which they believed to be the source of the pain, should also be removed; that the proposed operations were simple or minor operations, not attended with appreciable risk or serious pain, and were likely to restore to the workman in large measure, or altogether, the use of his hand for the purpose of his former work; that the workman refused to undergo the operations; and that "his continued incapacity to use his left hand and any continued pain in his left palm are fairly attributable to the want of such operations." *Held* that the workman by refusing to undergo the operations had precluded himself from any right to receive further compensation. *Donnelly v. Baird & Co., Limited*, Feb. 1, 1908, p. 536.

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Workmen's Compensation Act, 1897, Second Schedule (8)—Memorandum of Agreement—Suspension of Charge—Charge for period when earning wages.

15. In July 1906 the employers of a workman, who had been injured, agreed to pay him 14s. 5d. per week, being half his former wage (the statutory maximum) as compensation under the Workmen's Compensation Act, 1897, and the workman received payment of that sum from July to September 1906. A memorandum of the agreement was recorded. The agreement did not refer to the workman's total incapacity, but he admitted that he received the weekly payment in respect of total incapacity. In September 1906 he returned to work with the same employers, and continued in their employment till May 1907, earning wages which averaged 23s. 2d. per week. In May 1907 he charged the employers on the recorded memorandum to pay him compensation at the full rate of 14s. 5d. per week for the period from September 1906 to May 1907. The sum charged for with the addition of the wages earned by him during that period gave an average sum per week considerably in excess of his average weekly earnings before the accident. The employers brought a suspension, and tendered payment of the full difference between his earnings from September 1906 to May 1907 and his earnings for a like period before the accident. The Court, in respect of the workman's refusal to accept the sum tendered, *suspended* the charge. *William Baird & Co., Limited, v. M'Whinnie*, Jan. 17, 1908, p. 440.

Workmen's Compensation Act, 1897, Second Schedule (8)—Memorandum of Agreement—Suspension of Charge.

16. The employers of a workman, who had been injured, agreed to pay him 15s. 11d. per week, the statutory maximum, as compensation under the Workmen's Compensation Act, 1897, and the workman received payment of that sum from February 1904 to September 1905. A memorandum of the agreement was recorded under the Act. The workman having partially recovered returned to work, earned wages, and accepted payments first of 7s. 9d. and later of 5s. per week between October and December 1905. On 10th January 1906 he left the service of the employers, and thereafter intimated that he was totally incapacitated. The employers having refused to pay more than 5s. per week of compensation, the workman in March 1906 charged them under the recorded agreement for payment of 15s. 11d. per week from 10th January 1906. In a suspension the employers averred (1) that the agreement founded on had been superseded by subsequent agreements to accept first 7s. 9d. and then 5s. per week; (2) that the workman was not incapacitated for work; and asked for a proof of these averments. The Court *refused* the suspension, upon the ground that it was contrary to the intention of the Act that such questions should be determined by proof in a suspension; and that the employers could have had a sufficient remedy by adopting proceedings under the Act either to have the payments under the original agreement reviewed, or to have the alleged subsequent agreement recorded. *Fife Coal Co., Limited, v. Lindsay*, Jan. 17, 1908, p. 431.

Workmen's Compensation Act, 1897, Second Schedule (8) and (14)—Recorded Memorandum of Agreement—Action of damages for breach of Agreement—Competency.

17. A memorandum of agreement, recorded under par. (8) of the Second Schedule of the Workmen's Compensation Act, 1897, bore to be "in the matter of an agreement under the Workmen's Compensation Act, 1897," between L. and B. & Co., and set forth that L. had claimed compensation under the Act from B. & Co.; that the parties were agreed that the maximum compensation to which L. was entitled was

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17s. 6d.; and that B. & Co. "agree in lieu of such compensation to give" B "regular employment as a foreman," and "to pay him the fixed weekly wage of 23s. . . . and also to pay him on the date hereof the sum of £90 sterling, and these in full of all his claims for compensation under the said Act." B. & Co. paid £90 to L., and they also employed him on the agreed-on terms for about three years. They then dismissed him. L. brought an action of damages for breach of contract against B. & Co., pleading that the memorandum of agreement embodied two agreements—(a) an agreement to pay £90 as compensation under the Act, and (b) a common law agreement to give the pursuer employment. *Held* that the action was incompetent in respect that the agreement being indivisible and being recorded, only the remedies provided by the Workmen's Compensation Act were available to L. *Lawrie v. Brown & Co., Limited*, March 6, 1908, p. 705.

Workmen's Compensation Act, 1906, sec. 1 (1)—*Accident arising out of and in the course of the employment.*

Mullen, a workman, justifiably left the works in which he was employed, to obtain refreshment. While returning to his work he met a squad of his fellow-workmen, who were engaged in hauling a bogie across a public street which intersected the works. M'Ginlay, a fellow-workman of Mullen, came up, and improperly seized the rope by which the bogie was being hauled, and began to pull against the squad. In doing this M'Ginlay slipped and fell over the rope, and was in danger of being injured by the bogie. Mullen came to M'Ginlay's assistance, and succeeded in rescuing him from danger, but before he himself could get out of the way he was jammed by the bogie, and sustained severe injuries. *Held* that Mullen had not been injured by accident arising out of and in the course of his employment. *Mullen v. Stewart & Co., Limited*, June 17, 1908, p. 991. A workman, while engaged, in the course of his employment, in moving a weight, had an attack of cerebral hæmorrhage as the result of the exertion he was using. The work was being performed in the ordinary manner. He was put to bed, and four days later a second attack supervened, which caused permanent paralysis. At the time of the first attack his arteries were in a degenerate condition, which rendered such an attack more likely to occur. *Held* that the workman's final disablement had been caused by accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906. *M'Innes v. Dunsmuir & Jackson*, June 23, 1908, p. 1021.

A workman engaged in overtime work on a vessel went ashore at night, against the orders of his foreman, to purchase bread. The vessel was moored 6 or 7 feet from the quay, and a gangway was to the knowledge of the workman placed between the vessel and the quay. The deck of the vessel was 3 feet above the quay. The workman in returning went past the end of the gangway, and attempted to jump from the quay to the vessel, but fell into the water and was drowned. It was a rule of the employment (which, however, was frequently broken) that men should not jump between the vessel and the quay, and the deceased had been warned against this practice. *Held* that the accident did not arise out of and in the course of the deceased's employment. *Martin v. Fullerton & Co.*, June 30, 1908, p. 1030.

In an application for compensation under the Workmen's Compensation Act, 1906, the *onus* is on the claimant to prove that the accident arose out of and in the course of the workman's employment. *O'Brien v. Star Line, Limited*, July 18, 1908, p. 1258.

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22. A fireman, whose duty it was to remain on board the ship where he was employed, went ashore without permission, and returned to the ship in the evening intoxicated. In the morning he was found fatally injured at the bottom of a hold. The only access to the hold was in a part of the vessel where the fireman had no right to be, through a door which was kept locked, but which had been broken open. In a claim for compensation brought by dependants of the fireman, the above facts were proved. There was no evidence to shew how the door of the hold had been broken open, or how the fireman had got to the hold, or how the accident had happened. *Held* that the claimants had failed to prove that the accident arose out of and in the course of the fireman's employment; and accordingly that they were not entitled to compensation. *O'Brien v. Star Line, Limited*, July 18, 1908, p. 1258.

Workmen's Compensation Act, 1906, sec. 1 (2) (c)—Serious and Wilful Misconduct—Coal Mines Regulations Act, 1887, secs. 51 and 52—Breach of Special Rule.

23. By the Additional Special Rules in force in a coal mine, under the provisions of the Coal Mines Regulations Act, 1887, it was provided, Rule 3:—"The bottomer at a mid-working in a vertical shaft . . . shall not open the gate fencing the shaft until the cage is stopped at such mid-working." A bottomer at a mid-working in that mine, who required a cage, signalled for a cage at the bottom of the shaft to be sent to the mid-working. He did so by the ordinary method in use in that mine, viz., by calling to the bottomer at the foot of the shaft, who thereupon signalled to the engineman at the surface to draw up the cage. On receiving such a signal the engineman usually stopped the cage in the course of its ascent at the mid-working, but was not bound to do so, and did not invariably do so. On the signal to raise the cage being given the bottomer opened the gate, and, without ascertaining whether the cage had really stopped, went behind a hutch to push it into the cage, but the cage on the occasion in question had not been stopped at the mid-working, and the hutch fell to the foot of the shaft, drawing the bottomer with it, whereby he was injured, but not seriously and permanently disabled. In an application for compensation under the Workmen's Compensation Act, 1906, the arbitrator found that the injuries were attributable to the serious and wilful misconduct of the workman, and assoilzied the defenders. In an appeal, *held* that the facts found proved were sufficient to entitle the arbitrator to arrive at that conclusion, and appeal *dismissed*. *George v. Glasgow Coal Co., Limited*, May 27, 1908, p. 846.

Workmen's Compensation Act, 1906, secs. 1 (3), 13, First Sched. 8—Arbitrator—Jurisdiction—Proof of relationship incidental to arbitration.

24. In an arbitration under the Workmen's Compensation Act, 1906, a claim was made by a girl who alleged that she was an illegitimate child of the deceased workman. The arbitrator sisted procedure in order that she might establish her allegation in a competent Court. In an appeal the Court *recalled* the sist, *holding* that it was the duty of the arbitrator, in determining the question whether the claimant was a dependant, to decide incidentally her relationship to the deceased. *Johnstone v. Spencer & Co.*, June 18, 1908, p. 1015.

Workmen's Compensation Act, 1906, secs. 3 and 15—Contracting-out—Scheme certified under Act of 1897—Re-certification.

25. The Workmen's Compensation Act, 1906, came into operation on 1st July 1907. A workman entered an employment on 9th August 1907, and agreed to accept a scale of compensation provided by a scheme certified under the Workmen's Compensation Act, 1897,—

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the certificate bearing that the scheme was to expire on 31st December 1908. On 15th August 1907, when the scheme had not been re-certified under sec. 15 of the Workmen's Compensation Act, 1906, the workman was injured by an accident arising out of and in the course of his employment. *Held*, on a construction of secs. 3 and 15 of the Act of 1906, that, the workman having entered on his employment after 1st July 1907, he was not barred from obtaining compensation under the Act by having agreed to accept the provisions of a scheme certified under the Act of 1897, but which had not been re-certified under the Act of 1906. *Wallace v. Hawthorne, Leslie, & Co., Limited*, March 7, 1908, p. 713.

Workmen's Compensation Act, 1906, sec. 4 (1)—Subcontracting—Work "undertaken" by the Principal.

A firm of chemical manufacturers contracted with a certain person to tar the outside of tanks used in their business to protect them from the weather, and a workman in the employment of the contractor was killed by an accident while engaged on the works. In a claim for compensation by the workman's widow, *held* that the work of tarring the tanks was not part of the work "undertaken" by the chemical manufacturers, within the meaning of sec. 4 (1) of the Workmen's Compensation Act, 1906, and that they were not liable to pay compensation. *Zugg v. J. & J. Cunningham, Limited*, May 14, 1908, p. 827.

Workmen's Compensation Act, 1906, sec. 7 (2)—Seaman—Fishing Vessel—Remuneration by share in profits or gross earnings.

The sole remuneration of the mate or first fisherman of a steam-trawler while at sea was one and one-eighth share (each share being one-fourteenth) of the net balance of the gross price of the fish caught on a trip after deducting certain specified expenses, which did not include the wages of other members of the crew who were paid by fixed wages. *Held* that such remuneration was a share in the profits or the gross earnings of the vessel, and that the fisherman so paid fell under the exception contained in sec. 7 (2) of the Workmen's Compensation Act, 1906, and was consequently precluded from claiming compensation under that Act. *Gill v. Aberdeen Steam Trawling and Fishing Co., Limited*, Dec. 14, 1907, p. 328.

Workmen's Compensation Act, 1906, sec. 13—Dependant—"Wholly dependent."

A widow who had five sons, working miners, four of whom were married and had children, lived with and was entirely supported by her unmarried son. In a claim at her instance for compensation under the Workmen's Compensation Act, 1906, in respect of the death of the son who supported her, *held* that notwithstanding her right to relief from the four other sons, who were able to contribute to her support, she was wholly dependent upon the earnings of the deceased at the time of his death within the meaning of the Act. *Rintoul v. Dalmeny Oil Co., Limited*, June 25, 1908, p. 1025.

Workmen's Compensation Act, 1906, sec. 13—Casual Employment—Employment for the purposes of the employer's trade or business.

A jobbing window cleaner was in use about once a month to clean the windows of the house of a medical practitioner, who used a portion of the house in connection with his professional practice. There was no formal contract between the parties, and the window cleaner called and did the work without receiving on each occasion a special invitation or special permission to do so. On one occasion while cleaning the window of the dining-room he fell and was injured. *Held* that the window cleaner's employment was of a casual nature, and that he was not employed for the purposes of the employer's

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trade or business, and that he was, therefore, not entitled to compensation. *Rennie v. Reid*, July 3, 1908, p. 1051.

Workmen's Compensation Act, 1906, First Schedule, (1) (a) (i.)—Claim by Dependant's Executor.

30. *Held* that the right to compensation, conferred by the Workmen's Compensation Act, 1906, on the dependant of a deceased workman, vests in the dependant on the death of the workman, and transmits to the representatives of the dependant, although the dependant may have made no claim for compensation during his lifetime. *Hendry v. United Collieries Limited*, July 18, 1908, p. 1215.

Workmen's Compensation Act, 1906, First Schedule (1) (a)—Death of Workman—Amount of Compensation—Dependant—Sum "reasonable and proportionate to the injury."

31. In an application for compensation under the Workmen's Compensation Act, 1906, for the death of a workman, the arbitrator found that an illegitimate pupil child of the deceased, for whose support the deceased had been paying aliment under a decree of affiliation and aliment, was partially dependent on his earnings, and that the sum available for compensation under the Act was £150. No other dependant having applied for compensation, the arbitrator awarded the whole sum of £150, less £5, 10s. of funeral expenses, to the illegitimate child. *Held*, on an appeal, that in making the award the arbitrator had proceeded on a wrong principle, in respect that the Act does not provide for the maximum sum being awarded in every case, but only for an award of reasonable compensation within that limit; and case *remitted* to him to ascertain the prospective value of the contributions that would probably have been made by the deceased, if he had lived, for the support of his illegitimate child. *Murray v. Gourlay*, March 17, 1908, p. 769.

Workmen's Compensation Act, 1906, First Schedule, (1) (a)—Funeral Expenses.

32. *Opinion, per curiam*, that reasonable funeral expenses are a proper charge on the fund available for compensation. *Murray v. Gourlay*, March 17, 1908, p. 769.

Workmen's Compensation Act, 1906, First Schedule, (1) (b) and (2) (a) and (c)—Amount of Compensation—"Average Weekly Earnings"—Mode of Computation.

33. In ascertaining the amount of the average weekly earnings of a workman entitled to compensation under the Workmen's Compensation Act, 1906, the leading canon is, as stated in sec. 2 (a) of the First Schedule, that "average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." *Carter v. Lang & Sons*, July 17, 1908, p. 1198.
34. In an ordinary case the average weekly earnings of a workman entitled to compensation under the Workmen's Compensation Act, 1906, are to be ascertained by dividing the total amount earned during the relevant period of his employment by the number of weeks actually worked within that period, and, if there are regularly recurring trade holidays when no work can be done, by deducting from the result thus obtained a fraction equal to the fraction of the year during which for this reason no wages can be earned. *Carter v. Lang & Sons*, July 17, 1908, p. 1198.
35. In ascertaining the average weekly earnings of a workman the question whether those days in any week on which the workman was absent from work are to be disregarded depends on the nature of the employment, and in an employment where it is customary to work for only a limited number of days in the week, the amount earned in

TER AND SERVANT—*Continued.*

these days may be taken as the weekly earnings of the workman.

Carter v. Lang & Sons, July 17, 1908, p. 1198.

In the application of sec. 2 (c) of the First Schedule to the Workmen's Compensation Act, 1906, "absence from work due to illness or any other unavoidable cause" means absence from work due to a cause personal to the workman, as distinguished from causes due to the work, such as trade holidays or an accidental stoppage of machinery. Carter v. Lang & Sons, July 17, 1908, p. 1198.

The question whether, in view of the shortness of the employment or of the other considerations indicated in sec. 2 (a) of the First Schedule to the Workmen's Compensation Act, 1906, it is practicable to compute the rate of remuneration at the date of the accident from the facts of the workman's own employment, is a question of fact for the determination of the arbitrator, and is to be settled in each case by a consideration of the whole circumstances of the employment. Carter v. Lang & Sons, July 17, 1908, p. 1198.

A workman who had been incapacitated by accident, and who was entitled to compensation, had been at the date of the accident for thirteen weeks in his employment. During that period he had earned for one week nothing, and for another week very little, on account of illness, and again for one week had earned nothing, and for another week very little, on account of trade holidays. The arbitrator calculated his average weekly earnings by dividing his total earnings by thirteen. In an appeal by stated case, the Court enunciated certain general rules for the computation of a workman's average weekly earnings for the purposes of the Workmen's Compensation Act, 1906, recalled the determination of the arbitrator, and remitted to him to proceed. Carter v. Lang & Sons, July 17, 1908, p. 1198.

orkmen's Compensation Act, 1906, First Schedule (16)—Review of Weekly Payments—Payments under unrecorded Verbal Agreement—Date from which Payments may be Ended, Diminished, or Increased.

Employers, who were paying compensation to a workman under an unrecorded verbal agreement, presented an application on 21st December 1907 under the Workmen's Compensation Act, 1906, First Schedule (16) to have the payments reviewed, and the compensation ended as at 1st November 1907, on the ground that incapacity had then ceased. The arbitrator found it proved that the workman's incapacity ceased on 1st November 1907, and on 29th January 1908 pronounced an interlocutor ending the payments from the date of the interlocutor. In an appeal on a stated case, held that as there was no recorded agreement, the compensation fell to be ended as from the date when incapacity ceased, and not from the date of the application for review, or the date of the arbitrator's decision. Southhook Fire-Clay Co., Limited, v. Laughland, May 14, 1908, p. 831.

3 *Expenses, 7—Fishing, 3—Public-House, 2—Ship, 3, 4.*

ES AND MINERALS. See *Succession*, 12.

OR AND PUPIL. *Custody and Access—Legitimate Children—Questions between parents—Access to child by divorced wife—Guardianship of Infants Act, 1886.*

circumstances in which the Court refused to ordain the father of a boy seven years of age to allow the mother (who had been divorced from the father for adultery) access to the boy, on the ground that it might be prejudicial to the boy. C. D. v. A. B., Feb. 27, 1908, p. 737.

3 *Donation, 1—Process, 9.*

1. See *Lease, 3.*

MOTOR CAR. See *Reparation*, 17—*Road*—*Statute*, 1—*Succession*, 4.

NEGLIGENCE. See *Reparation*, 7, 8, 16-19.

NOBILE OFFICIUM. See *Charitable and Educational Bequests and Trusts*, 6, 7—*Trust*, 2.

ONUS. See *Donation*, 2—*Justiciary Cases*, 3, 4—*Innkeeper—Master and Servant*, 7, 21—*Passive Title—Presumption—Succession*, 5.

PACTA ILLICITA. See *Contract*, 2.

PARENT AND CHILD. *Illegitimate Children—Filiation—Admission by defender of intercourse subsequent to date of conception.*

1. Where the defender in an action of filiation admits an act of connection prior in date to the alleged act on which the pursuer founds very little corroboration of the pursuer's evidence will be required; but where the act admitted by the defender is subsequent in date to the alleged act founded on by the pursuer the corroboration of her evidence must be substantial. *Havery v. Brownlee*, Jan. 15, 1908, p. 424.

Illegitimate Children—Filiation—Opportunity—Corroboration—False denials by defender.

2. *Observed* that in actions of filiation and aliment opportunity alone will not amount to corroboration of the pursuer's evidence, unless it is of such a character as to bring in the element of suspicion, or has a complexion put upon it by statements made by the defender which are proved to be false. *Dawson v. M'Kenzie*, Feb. 21, 1908, p. 648.

See *Minor and Pupil*.

PASSIVE TITLE. *Vitious Intromission—Onus.*

A farmer, after the death of his uncle who lodged with him and assisted him on the farm, took from his uncle's repositories a cheque in his uncle's favour for £46, and in exchange for it got from the granter a cheque in his own favour. In an action by a creditor of the uncle against the nephew as a vitious intromitter with the uncle's estate, after a proof, the Court *held* (1) that the uncle had no interest in the stock of the farm, and that the cheque represented the price of three bulls, part of the stock sold by him in the management of the farm, (2) that the pursuer had failed to prove that the uncle had any claim against the farm which would have entitled him to retain the cheque, and (3) that the defender was not liable as a vitious intromitter even to the extent of the sum in the cheque. *Opinion* (*per* Lord Low) that, even if the uncle had been joint owner of the bulls along with the nephew, the nephew, by acting as he did with regard to the cheque, would not have made himself liable as a vitious intromitter. *Greig v. Christie*, Dec. 20, 1907, p. 370.

PAYMENT. See *Accounting—Bank*, 2.

PERSONAL OR TRANSMISSIBLE. *Workmen's Compensation Act, 1906, secs. 1 (1) and 2, and First Schedule (1) (a) (i.)—Dependant—Dependant's Executor.*

Held that the right to compensation, conferred by the Workmen's Compensation Act, 1906, on the dependant of a deceased workman, vests in the dependant on the death of the workman, and transmits to the representatives of the dependant, although the dependant may have made no claim for compensation during his lifetime. *Hendry v. United Collieries, Limited*, July 18, 1908, p. 1215.

POLICE. *Street—New Street—Petition for warrant to form new street—Petitioner not owner of solum of new street—Burgh Police (Scotland) Act, 1903, sec. 11.*

1. *Held* that sec. 11 of the Burgh Police (Scotland) Act, 1903, confers upon town-councils only a right to veto or regulate the formation of

e—Continued.

new street on the property of the petitioner and of other persons consenting. *Glasgow and South-Western Railway Co. v. Hutchison*, Feb. 19, 1908, p. 587.

petition by proprietors of feuing ground to a town-council for warrant to form and lay out a new street, which was objected to by the proprietor of part of the *solum* of the proposed street, *dismissed* as incompetent. *Glasgow and South-Western Railway Co. v. Hutchison*, Feb. 19, 1908, p. 587.

et—Private Street—Railway—Road forming “part of any railway” —Burgh Police (Scotland) Act, 1892, sec. 4 (31).

An unformed road in a burgh, 40 feet in width, was bounded on one side by a line of railway from which it was separated by a wall. The *solum* of the road *ex adverso* of the railway to the extent of 30 feet of its width was the property of the railway company, who had acquired it by voluntary disposition under a power to purchase land for extraordinary purposes. Over the road there existed a public right of way for traffic of every description. *Held* that the road was not “part of a railway” in the sense of sec. 4 (31) of the Burgh Police (Scotland) Act, 1892, but was a private street within the meaning of the Burgh Police Acts. *Glasgow and South-Western Railway Co. v. Hutchison*, Feb. 19, 1908, p. 587.

et—New Street—Burgh Police (Scotland) Act, 1903, sec. 11.

The owner of building ground within a burgh, abutting on an unformed private road over which there existed a public right of way for traffic of every description, presented a petition to the Dean of Guild for warrant to erect buildings on his ground. The Dean of Guild refused the petition on the ground that he had no power to entertain it until the town-council had granted warrant for the formation of the road in question into a new street. *Opinion* that the erection of the buildings would not cause the road to become a “new street” in the sense of sec. 11 of the Burgh Police (Scotland) Act, 1903, and that the Dean of Guild was wrong in refusing the petition. *Glasgow and South-Western Railway Co. v. Hutchison*, Feb. 19, 1908, p. 587.

ainage—Sewers—Formation—Procedure—Burgh Police (Scotland) Act, 1892, secs. 217, 220, 221—Public Health (Scotland) Act, 1897, sec. 103—Burgh Sewerage, Drainage, and Water Supply (Scotland) Act, 1901, secs. 1-5 and 7.

Held that notwithstanding the provisions of the Burgh Sewerage, Drainage, and Water Supply Act, 1901, it is competent for the town-council of a burgh, as sewerage authority in the burgh, (1) to carry out drainage operations in the burgh under the powers conferred by the 103d section of the Public Health Act, 1897, and (2) to do so without following the procedure or being subject to the conditions imposed by the Burgh Police Act, 1892. *Montgomerie & Co., Limited, v. Haddington Corporation*, Feb. 21, 1908, (H. L.) p. 6.

ainage—Sewers—Formation—Notice to Proprietors—Public Health (Scotland) Act, 1897, sec. 103.

Terms of letter, which, in the circumstances, was *held* not to be a reasonable notice to a proprietor in terms of the Public Health (Scotland) Act, 1897, sec. 103. *Montgomerie & Co., Limited, v. Haddington Corporation*, Nov. 12, 1907, p. 127.

ainage—Sewers—Formation—Failure to give reasonable notice to proprietor—Effect—Public Health (Scotland) Act, 1897, secs. 103 and 109.

A burgh sewerage authority laid two sewage-pipes on and above the *solum* of the bed of a river in the burgh without giving reasonable notice, in the sense of sec. 103 of the Public Health Act, 1897, to a proprietor of lands on the bank of the river, who was owner of the river bed at least *ad medium filum*, with a right of common interest

POLICE—Continued.

in the whole *alleges*, and who *alleges* that the result of the drainage operations was to subject his property to additional risk of flooding. The proprietor brought an action for removal of the pipes. *Held* that the proprietor was not entitled to have the sewer-pipes removed, and the river bed restored to the condition in which it existed prior to the operations, in respect that if the pipes were removed as demanded, he could not prevent the Local Authority, if they thereafter gave reasonable notice, from re-laying the pipes in the same position. *Montgomery & Co., Limited v. Farnhill Corporation*, Nov. 12, 1907, p. 127.

Prevention of Scurvy—Furnham—Public Health (Scotland) Act, 1897, sec. 114.

1. *Decisions of Local Authorities in Brown v. Magistrates of Kirkcudbright*, 8 F. T. R. 44, as to the functions of the Sheriff under sec. 109 of the Public Health Act, 1897, approved. *Montgomery & Co., Limited v. Farnhill Corporation*, Nov. 12, 1907, p. 127.

Police Officers—Breach of Regulations—"Public Show"—Glasgow Police Further Powers Act, 1892, sec. 7.

1. A machine or machines, which operated directly off a public street, contained a number of automatic machines operated by placing a penny in the slot. Most of the machines exhibited pictures or produced music by phonographic records; a few told fortunes, gave electric shocks, or recorded weight or strength. The doors were always open during business hours, and admission was free. *Held* that the entertainment was a "public show" within the meaning of sec. 7 of the Glasgow Police Further Powers Act, 1892. *Allan v. Neilson*, June 13, 1908, J., p. 76.

See Burglary, 3—Property—Railway, 3.

POLICE FORCE. Police-Constable—Bribery—Police-Constable agent of the Chief Constable—Prevention of Corruption Act, 1906, sec. 1.

In a complaint under the Prevention of Corruption Act, 1906, sec. 1, charging an attempt to bribe a police-constable in Glasgow while in the execution of his duty and acting for his employer the Chief Constable, *held* that the police-constable was an agent in the sense of the Act. *Graham v. Hart*, Jan. 17, 1908, (J.), p. 26.

POOR. Settlement—Residential Settlement—Capacity to acquire Settlement—Priority—Education (Scotland) Act, 1901, secs. 1 and 2.

1. *Held* that the capacity of a female child to acquire a residential settlement on attaining puberty at twelve years of age was not affected by the enactments of the Education (Scotland) Act, 1901, secs. 1 and 2. *Govan Parish Council v. Glassary Parish Council*, Nov. 2, 1907, p. 64.

Settlement—Derivative Settlement—Loss of—Deserted Wife—Nothing known as to Husband.

2. W., who was born in the parish of Glasgow and had a residential settlement in the parish of Row, in October 1901 deserted his wife and children, and was not heard of again. The wife went to reside in Paisley, and in April 1902 received parochial relief from Paisley. Row reimbursed Paisley for the advances made. After doing so for two and a half years Row repudiated further liability, on the ground that the husband had lost his settlement in that parish by non-residence for the statutory period of three years, and that his wife's settlement, which was derived from him, had lapsed also. In an action by the relieving parish against Row and against the Parish Council of Glasgow, *held* that the wife was the pauper; that her settlement remained unchanged during chargeability; and that Row was still liable for her support. *Parish Council of Paisley v. Parish Councils of Row and Glasgow*, March 11, 1908, p. 731.

POOR—*Continued.*

Lunatic—Residential Settlement—Retention—Lunatics (Scotland) Act, 1857, sec. 75.

3. The Lunatics (Scotland) Act, 1857, sec. 75, enacts:—"Every pauper lunatic detained in any district asylum under this Act shall be deemed and held to belong and be chargeable to the parish of the legal settlement of such lunatic at the time the order for his reception in such asylum was granted, and the expense of his maintenance in such district asylum shall be defrayed by such parish accordingly, and the residence of any pauper lunatic in any such district asylum shall be deemed to be the residence of such lunatic in the parish legally chargeable with the maintenance of such lunatic." A lunatic who was born in the parish of Parton, and who had, on 15th August 1895, a residential settlement in the parish of Kelton, was admitted to an asylum in another parish as a pauper lunatic on that date. For a few months after her admission she was maintained by the parish of Kelton. For the next ten years she was maintained by her brother in the same asylum as a private patient, and her name taken off the poor's-roll. Thereafter her brother ceased to contribute to her support, and she again fell upon the rates, being detained in the same asylum under the order granted when she was first admitted. In a question between the parish of Kelton, who contended that she had lost her residential settlement by non-residence during the period when she was a private patient, and the parish of Parton, who contended that her settlement remained the same as at the date of her admission, *held* that the lunatic had not lost her residential settlement, and that she was chargeable to the parish of Kelton as the parish of her settlement at the time when the order for her reception was granted. *Rigg v. Bell*, June 12, 1908, p. 974.

See *Charitable and Educational Bequests and Trusts*, 5—*Presumption.*

PRESCRIPTION. *Negative Prescription—Decree in Absence—Court of Session Act, 1868, sec. 24.*

In 1671 Charles Maitland of Hatton raised an action in the Court of Session concluding for declarator, *inter alia*, that he was entitled to the office of Hereditary Standard Bearer of Scotland, and called John Scrymgeour as a defender. John Scrymgeour appeared, and, after stating certain defences, was allowed to withdraw from the action, and in his absence decree was pronounced in favour of the pursuer as concluded for. In 1902 an action was raised in the Court of Session at the instance of the Earl of Lauderdale, also concluding for declarator that he was entitled to the office of Hereditary Standard Bearer. The pursuer claimed as in right of his ancestor, Charles Maitland, and founded, *inter alia*, on the decree of 1671. The action was defended by Henry Scrymgeour Wedderburn, a descendant of John Scrymgeour. *Held* that in respect of the operation of the negative prescription, and of sec. 24 of the Court of Session Act, 1868, the decree of 1671 could not now be impugned, and that the pursuer, as in right of the decree, was entitled to the office. *Earl of Lauderdale v. Wedderburn*, July 18, 1908, p. 1237.

PRESUMPTION. *Presumption of Life.*

Observations (per the Lord President) as to the application of the presumption of life in poor-law cases. Parish Council of Paisley v. Parish Councils of Row and Glasgow, March 11, 1908, p. 731.

PREVENTION OF CORRUPTION. See *Justiciary Cases*, 6.

PROCESS. *Summons—Instance—Several Pursuers—Community of interest—"Convenience."*

1. A testator died leaving a deed of settlement by which he bequeathed a share of his estate to his daughter, and appointed his executors to

Process—Continued.

act as her tutors and curators. At the time of his death his daughter was in pupillarity, and his executors acted as her tutors and curators, and appointed a law-agent as factor for the purpose of managing the estate. After the daughter attained majority the factor continued to act as her agent and to manage for her her income from the estate. Subsequently an action was brought against the daughter at the instance of the tutors and curators and of the factor, of which the conclusions were (1) for payment to the tutors and curators of certain sums alleged to have been overpaid by them to her during the subsistence of the curatory, and (2) for payment to the factor of certain sums alleged to have been overpaid by him to her after the termination of the curatory. *Held* that the action as raised was incompetent, in respect that it was at the instance of unconnected pursuers each suing for a separate debt. *Paxton v. Brown*, Jan. 14, 1908, p. 406.

Summons—Conclusions—Joint and Several Liability.

2. In an action of payment against six defenders "jointly and severally," three of the defenders were assolizied. *Held* that a decree against the remaining defenders conjunctly and severally was competent. *Fleming v. Gemmill*, Dec. 20, 1907, p. 340.

Citation—Corporation—Citation of Corporation by citing its members.

3. A corporation was cited by calling its members by name, as representing the corporation but not as individuals. The majority of the corporation resolved to defend the action. *Held* that they were entitled to lodge defences in name of the whole members as representing the corporation. *Eadie v. Glasgow Corporation*, Nov. 21, 1907, p. 207.

Record—Averments—Ground of action not averred on record and disclosed to pursuer by the evidence for the defender at the proof.

4. The proprietor of a farm in his own occupation having let it on lease, the landlord and the tenant entered into a submission as to the amount payable by the landlord under an obligation to put the buildings in "tenantable condition and repair." The arbiters having issued an award, the tenant, being dissatisfied with the amount awarded, brought a reduction, setting forth various grounds of reduction. At the proof it appeared from the evidence of the arbiters that they had fixed the sum awarded on the principle of taking the landlord's obligation as the obligation of an outgoing tenant, and not as the obligation of a landlord. This was not averred either by the pursuer or by the defender, and was not, until the proof, known to the pursuer. *Held* that the absence of any averment by the pursuer did not bar him from taking the objection that the arbiters had not determined the question submitted to them. *Davidson v. Logan*, Nov. 29, 1907, p. 350.

Record—Printing and Lodging—Failure to lodge prints—A. S., Nov. 2, 1872, sec. 5.

5. Circumstances in which the Court recalled an interlocutor of a Lord Ordinary, dismissing an action on the ground that prints of the record had not been lodged as required by sec. 5 of the Act of Sederunt of 2d November 1872. *Robertson v. Johnston*, Jan. 8, 1908, p. 383.

Record—Amendment—Instance—A. S., March 20, 1907, sec. 2.

6. A testator died leaving a deed of settlement by which he bequeathed a share of his estate to his daughter, and appointed his executors to act as her tutors and curators. At the time of his death his daughter was in pupillarity, and his executors acted as her tutors and curators, and appointed a law-agent as factor for the purpose of managing the

PROCESS—Continued.

estate. After the daughter attained majority the factor continued to act as her agent and to manage for her her income from the estate. Subsequently an action was brought against the daughter at the instance of the tutors and curators and of the factor, of which the conclusions were (1) for payment to the tutors and curators of certain sums alleged to have been overpaid by them to her during the subsistence of the curatory, and (2) for payment to the factor of certain sums alleged to have been overpaid by him to her after the termination of the curatory. The summons having been held to be incompetent in respect that it was at the instance of unconnected pursuers each suing for a separate debt, *held* that it could be competently amended by striking out one set of pursuers; and amendment to that effect *allowed*. *Paxton v. Brown*, Jan. 14, 1908, p. 406.

Disclaimer.

7. A corporation was cited by calling its members by name, as representing the corporation but not as individuals. The majority of the corporation resolved to defend the action. *Held* that they were entitled to lodge defences in name of the whole members as representing the corporation, and that dissenting members were not entitled to disclaim the defences. *Eadie v. Glasgow Corporation*, Nov. 21, 1907, p. 207.

Appointment of curator ad litem—Minor defender not appearing.

8. It is not competent on the motion of a pursuer to appoint a curator *ad litem* to a minor defender who has not appeared in the action. This rule applies in the case of a multiplepounding. *Mackenzie's Trustees v. Mackenzie*, June 17, 1908, p. 995.

Preliminary Defences—All parties not called—Claim against general estate of testator—Competency of suing individual legatee.

9. *Held* that an individual legatee cannot be called upon to discuss the validity of a claim against the testator's estate, which may or may not affect his legacy, in an action to which the general representatives of the testator have not been made parties. *Gillespie v. Riddell*, Feb. 20, 1908, p. 628.

Reclaiming Note—Allowance of Proof—Court of Session Act, 1868, secs. 28 and 54—A. S., 10th March 1870, secs. 1, 2.

10. In an action of accounting the defenders stated preliminary pleas in which they denied their liability to account. The Lord Ordinary in the Procedure-roll pronounced an interlocutor appointing the defenders "before answer" to lodge the account called for in the summons. *Held* that the interlocutor did not "import an appointment of proof or a refusal or postponement of the same," within the meaning of the Act of Sederunt, 10th March 1870, and that consequently it could not be reclaimed against without leave. *Lamont & Co. v. Dublin and Glasgow Steam Packet Co.*, June 23, 1908, p. 1017.

Reclaiming Note—Printing and Boxing—Omission to box Record—Justifiable Mistake—Court of Session Act, 1825, sec. 18—A. S., 11th July 1828, sec. 77—Court of Session Act, 1808, sec. 16.

11. Circumstances in which the Court *sustained* the competency of a reclaiming note although copies of the record had not been boxed until after the reclaiming days had expired. *Hutchison v. Hutchison*, June 17, 1908, p. 1001.

Reclaiming Note—Leave to reclaim—Refusal of leave—Court of Session Act, 1868, sec. 54.

12. *Held* that where the Lord Ordinary in the exercise of his discretion had refused leave to reclaim, the Court could not interfere with his decision. *Lamont & Co. v. Dublin and Glasgow Steam Packet Co.*, June 23, 1908, p. 1017.

PROCESS—Continued.

Interlocutor—Alteration of interlocutor—Timeous Application.

13. *Observed* (per the Lord President),—"When an interlocutor is signed and given out to the parties it must be noted by the profession that if anything is to be said about altering the form of it, it must be said at once." *Kennedys v. Clyde Shipping Co., Limited*, June 5, 1908, p. 895.

Decree—Decree in Absence—Court of Session Act, 1868, sec. 24.

14. In 1671 Charles Maitland of Hatton raised an action in the Court of Session concluding for declarator, *inter alia*, that he was entitled to the office of Hereditary Standard Bearer of Scotland, and called John Scrymgeour as a defender. John Scrymgeour appeared, and, after stating certain defences, was allowed to withdraw from the action, and in his absence decree was pronounced in favour of the pursuer as concluded for. In 1902 an action was raised in the Court of Session at the instance of the Earl of Lauderdale also concluding for declarator that he was entitled to the office of Hereditary Standard Bearer. The pursuer claimed as in right of his ancestor, Charles Maitland, and founded, *inter alia*, on the decree of 1671. The action was defended by Henry Scrymgeour Wedderburn, a descendant of John Scrymgeour. *Held* that in respect of the operation of the negative prescription, and of sec. 24 of the Court of Session Act, 1868, the decree of 1671 could not now be impugned, and that the pursuer, as in right of the decree, was entitled to the office. *Earl of Lauderdale v. Wedderburn*, July 18, 1908, p. 1237.

Proof—Proof or Jury Trial—Discretion of Lord Ordinary—Action of Damages—Special Cause—Evidence (Scotland) Act, 1866, sec. 4.

15. In an action of damages at the instance of a father as tutor of his pupil child about five years of age, who had sustained personal injuries through being run over by a tramway car, the Lord Ordinary refused to send the case to a jury and allowed a proof, stating as his grounds for doing so that the case was of doubtful relevancy, and that it raised a question as to contributory negligence, which in the case of a child was always of a delicate nature, and also questions depending upon expert evidence as to the construction of tramway cars. The Court refused to interfere with what the Lord Ordinary had done in the exercise of his discretion as to the mode of trial. *Cass v. Edinburgh and District Tramways Co., Limited*, May 23, 1908, p. 841.

Proof—Jury Trial—New Trial—Excessive Damages—Consent of Parties.

16. In an application for a new trial on the ground of excessive damages, the Court cannot refuse a new trial and itself assess the damages without obtaining the consent of both parties. *Boal v. Scottish Catholic Printing Co., Limited*, Feb. 27, 1908, p. 667.
17. *Particular Actions—Declarator—Declarator ab ante—Competency.* *Allgemeine Deutsche Credit Anstalt v. Scottish Amicable Life Assurance Society*, Oct. 26, 1907, p. 33; *Penny's Trustees v. Adam*, Feb. 25, 1908, p. 662; *Cuthbert v. Cuthbert's Trustees*, June 12, 1908, p. 967.

Particular Actions—Action of Maills and Duties—Competency—Registration of Leases (Scotland) Act, 1857, secs. 6 and 20—Heritable Securities (Scotland) Act, 1847, sec. 2.

18. *Held* that an action of maills and duties at the instance of a person in right of an assignation in security of a lease recorded under the Registration of Leases (Scotland) Act, 1857, is not competent. *Dunbar v. Gill*, July 4, 1908, p. 1054.

See *Arrestment*, 3-8—*Bankruptcy*, 6—*Company*, 10—*Expenses*, 2, 5, 8—*Interdict—Issue—Charitable and Educational Requests and Trusts*, 6, 7—*Res Judicata—Ship*, 10—*Title to Sue and Defend—Trust*, 2.

PROOF. Admissibility of Parole Proof.

1. *Held* in a reduction of a decree-arbitral, which bore to be the award of, and was signed by, the arbiters and oversman, that it was incompetent by parole evidence to prove that the oversman never acted, and that the award was the award of the arbiters only. *Davidson v. Logan*, Nov. 29, 1907, p. 350.

Admissibility of Parole Proof—Bills of Exchange Act, 1882, sec. 100.

2. *Held* that where bills were granted in implement of a written agreement, the terms of this agreement could not be modified by parole evidence. *Stagg & Robson, Limited, v. Stirling*, Feb. 28, 1908, p. 675.

PROPERTY. Gable—Boundary—Building Condition—Encroachment.

In erecting a four-storey house, Pottinger obtained the permission of the neighbouring proprietor, Wilson, to build upon the gable wall of an adjoining two-storey house belonging to Wilson. The wall in question was only 9½ inches thick, and in order to satisfy the requirement of the Dean of Guild that the thickness of the added portion should be 14 inches, the added portion was built in such a manner that, while it was flush with the original on the side next Pottinger's property, it projected 4½ inches beyond the wall on Wilson's side. After the building operations were completed, Wilson raised an action concluding (1) for declarator that Pottinger had illegally encroached on his property, and (2) for removal of the encroachment. The Court *dismissed* the action, *per* the Lord President on the ground that Wilson had by signing plans consented to the encroachment, and *per* Lord McLaren and Lord Kinnear on the ground that, when Wilson gave permission to build on his gable wall, the agreement was subject to the implied condition that the building was to be in such form as the Dean of Guild should direct, that it had been erected in accordance with his directions, and that accordingly there had been no unlawful encroachment. *Wilson v. Pottinger*, Feb. 7, 1908, p. 580.

PUBLIC AUTHORITIES PROTECTION. See *Expenses*, 10.

PUBLIC HEALTH. Sale of Food and Drugs—Delivery of milk in several cans—Deficiency of quality in each can—Sale of Food and Drugs Act, 1875, secs. 6, 13—Sale of Food and Drugs Act Amendment Act, 1879, sec. 3.

1. Samples having been taken from fourteen out of sixteen cans of milk in course of delivery in one consignment, and all the samples having been found deficient in quality, the consignor was charged with and convicted of fourteen offences under sec. 6 of the Sale of Food and Drugs Act, 1875. *Held* that, there having been only one delivery, it was incompetent to charge and convict of more than one offence. *Telford v. Fyfe*, July 16, 1908, (J.) p. 83.

Sale of Food and Drugs—Milk in course of delivery—Fair Sample—Sale of Food and Drugs Act Amendment Act, 1879, sec. 3.

2. A consignment of milk was delivered in sixteen cans which were cylindrical in shape and about two feet deep. Each can was taken into a store-room by the consignor's servant, where it was opened by him. An inspector of nuisances then agitated the milk in the can with a wooden spoon about a foot in length, and a sample was taken by dipping a measure into the milk just under the surface and removing about fourteen ounces. Samples were thus taken from fourteen cans. The milk in the cans was on delivery poured into a large vat in the store-room. *Opinion* that the method of sampling was not unfair or improper, and that it afforded a fair test of the contents of each can; and, further, that it would have been incompetent to take a sample after delivery into the vat, the milk being then no longer in course of delivery. *Telford v. Fyfe*, July 16, 1908, (J.) p. 83.

PUBLIC HEALTH—Continued.

Sale of Food and Drugs—Prosecutions by officers of Local Government Board and Board of Agriculture as private purchasers—Sale of Food and Drugs Act, 1875, secs. 6, 12, 14, 20—Sale of Food and Drugs Act, 1899, secs. 2 (1) (2), 3 (2) (3), 23, 24.

3. The Sale of Food and Drugs Act, 1899, confers on the Local Government Board and the Board of Agriculture, and the corresponding boards in Scotland and Ireland, powers, in default of action by the Local Authority, to institute proceedings at the instance of their officers against persons infringing the provisions of the Sale of Food and Drugs Acts, and prescribes procedure to be followed in such prosecutions. *Held* that the exercise of these powers was optional and not obligatory; that the officers of these boards were entitled to institute proceedings as private individuals in the method prescribed by the Sale of Food and Drugs Act, 1875; and that they were not limited in prosecutions at their instance to the procedure prescribed by the Act of 1899. *Falconer v. Whyte*, March 20, 1908, (J.) p. 40. See *Police*, 5-8.

PUBLIC-HOUSE. *Public-House Offences—Breach of Certificate—Third offence—Proof—Licensing (Scotland) Act, 1903, secs. 53, 91, 102, and 103.*

1. A publican who had been convicted of breach of certificate, upon a complaint bearing that it was a "third offence," brought a suspension upon the ground that (after evidence for the prosecution and the defence had been led, the cases for the respective parties closed, and parties heard with regard to the particular breach alleged, and after the justices had found the accused guilty thereof), a witness was put in to prove two previous convictions against the accused; that this evidence was incompetently admitted; that no other evidence of the offence charged being a third offence had been led; and that such evidence should have been led, as this was a substantive part of the charge. *Held* that the procedure complained of amounted to nothing more at most than a "deviation in point of form from the statutory enactment," that consequently the only form of review competent was an appeal under sec. 102 of the Licensing (Scotland) Act, 1903, and that the suspension was incompetent. *Opinions* that the procedure followed by the Justices was competent and proper. *Mitchell v. Morrison*, May 13, 1908, (J.) p. 65.

Public-House Offences—Sale of exciseable liquors to children—Responsibility of Publican for assistant—Licensing (Scotland) Act, 1903, sec. 59.

2. Under sec. 59 of the Licensing (Scotland) Act, 1903, every holder of a certificate who knowingly sells or delivers, or allows any person to sell or deliver, exciseable liquors to any person under fourteen years of age, except in corked or sealed vessels in quantities not less than one pint, is guilty of an offence. Exciseable liquors in quantities less than one pint were sold in open vessels to a girl of eleven years of age by a publican's assistant, who had means of knowing the age of the child. The sale took place outwith the publican's presence and actual personal knowledge, but no sufficient instructions had been given by him to his assistant not to supply children under fourteen years of age with exciseable liquors except as provided by sec. 59 of the Licensing (Scotland) Act, 1903. *Held* that the publican had been rightly convicted of a contravention of that section. *Greig v. Macleod*, Dec. 4, 1907, (J.) p. 14.

RAILWAY. *Construction and Maintenance—Questions with Local Authorities—Bridge carrying highway over railway—"Public Highway"—Maintenance of Road—Railways Clauses Consolidation (Scotland) Act, 1845, sec. 39.*

1. The Railways Clauses Consolidation (Scotland) Act, 1845, sec. 39,

RAILWAY—Continued.

enacts that where a line of railway crosses "any turnpike road or public highway," and the road is carried over the railway by means of a bridge, such bridge and the approaches thereto "shall be executed and at all times thereafter maintained at the expense of the [railway] company." *Held* that the words "public highway" applied only to roads which were public *de jure*. Corporation of Glasgow v. Caledonian Railway Co., Nov. 29, 1907, p. 244.

Construction and Maintenance—Questions with Local Authorities—Road—Bridge over Railway—Caledonian Railway (Additional Powers) Act, 1872, secs. 4, 26.

2. The Caledonian Railway Act, 1872, sec. 4, enacts that the Company "may make and maintain" certain railways, and "may execute the other works and operations hereinafter mentioned." With reference to one of the railways authorised, which crossed a certain road, sec. 26 enacts:—"In constructing railway No. 2 the following provisions shall be binding on the Company, who shall construct the works hereinafter specified in manner hereinafter directed . . . (3) the road . . . shall be carried over the railway by a bridge not less than 40 feet wide." The railway company by virtue of the powers conferred on them by secs. 4 and 26 of the foregoing special Act, constructed railway No. 2, and, where it crossed the road, carried the road over the railway by means of a bridge. *Held* that since the section of the special Act providing for the construction of the bridge did not specify that the road upon it was to be maintained by the railway company, no such duty lay upon it under the provisions of that Act. Corporation of Glasgow v. Caledonian Railway Co., Nov. 29, 1907, p. 244.

Construction and Maintenance—Questions with Third Parties—Road forming "part of any railway"—Burgh Police (Scotland) Act, 1892, sec. 4 (31).

3. An unfenced road in a burgh, 40 feet in width, was bounded on one side by a line of railway from which it was separated by a wall. The *solum* of the road *ex adverso* of the railway to the extent of 30 feet of its width was the property of the railway company, who had acquired it by voluntary disposition under a power to purchase land for extraordinary purposes. Over the road there existed a public right of way for traffic of every description. *Held* that the road was not "part of a railway" in the sense of sec. 4 (31) of the Burgh Police (Scotland) Act, 1892, but was a private street within the meaning of that Act. Glasgow and South-Western Railway Co. v. Hutchison, Feb. 19, 1908, p. 587.

Construction and Maintenance—Questions between Companies—Siding—Renewal of Siding—Identity of Subject—Running Powers—Caledonian and General Terminus Railways Amalgamation Act, 1865, sec. 15.

4. The Caledonian and General Terminus Railways Amalgamation Act, 1865, conferred on certain railway companies running powers over the sidings of the railways vested by the Act in the Caledonian Railway, "constructed at the time of the commencement of this Act, or any renewals thereof." Circumstances connected with the construction of a siding in which *held* that the siding in question was a renewal of a siding in existence at the commencement of the Act. North British Railway Co. v. Caledonian Railway Co., Oct. 18, 1907, p. 16.

Traffic and Carriage—Passengers—Injuries to Passengers—Failure of railway servants to close carriage doors before setting train in motion.

5. *Averments in an action of damages for personal injuries brought against a railway company by a passenger who, after alighting from a train, had been knocked down by an open carriage door as the train was leav-*

RAILWAY—Continued.

ing the station, upon which held that the pursuer had averred facts from which a jury might infer negligence. Toal v. North British Railway Co., May 26, 1908, (H. L.) p. 29.

Traffic and Carriage—Passengers—Injuries to Passengers—Crowd on Station Platform.

6. Circumstances in which *held* that the injuries of a woman who had been pushed off a railway platform by a crowd were not due to negligence on the part of the Railway Company. M'Callum v. North British Railway Co., Jan. 14, 1908, p. 415.

Traffic and Carriage—Passengers—Railways Clauses Consolidation (Scotland) Act, 1845, sec. 96—Travelling without paying fare—Intent to avoid payment.

7. A workman, who had travelled by a workman's train, attempted to leave the station where he alighted without giving up a ticket (his intention being to defraud the railway company), but was prevented from doing so, and thereupon produced from his pocket and tendered a workman's ticket valid and available for the journey. Workmen's tickets are not dated, and can be used at any time. *Held* that the workman had not been guilty of travelling "without having previously paid his fare and with intent to avoid payment thereof" in the sense of the Railways Clauses Consolidation (Scotland) Act, 1845, sec. 96. Caledonian Railway Co. v. Roper, May 13, 1908, (J.) p. 69.

Traffic and Carriage—Goods—Agreements with Traders—Owner of cattle undertaking risk of carriage if sent by route specified—Damage sustained on different route—Railway and Canal Traffic Act, 1854, sec. 7—Limitation of Company's Liability.

8. A railway company agreed with the owner of three head of cattle consigned by rail from Maxton Station to Alnwick, *via* Kelso, for exhibition at a cattle show at Alnwick, that if they were not sold they should be taken back to Maxton at half fare, provided the owner consigned them by the same route as that by which they had been sent, and undertook the risk of their conveyance. Between Kelso and Alnwick there were two railway routes equally convenient, one by Wooler, the other by Tweedmouth. The Railway Company sent the cattle to Alnwick by the Wooler route. The cattle were not sold at the show, and the owner's agent in sending them back from Alnwick Station signed a consignment note bearing that they were sent for carriage back to Maxton "by the same route as on the journey here, at the reduced rate," "and in consideration of your charging such reduced rate," "the undersigned agrees to free and relieve you of all liability" for loss or damage, unless caused by wilful misconduct on the part of their servants. The Railway Company chose to send the cattle back by the Tweedmouth route and they were destroyed by fire at Tweedmouth Junction. In an action brought by the owner of the cattle against the Railway Company for £800 as the value of the cattle the defenders maintained (1) that they were not liable, as they had sent them back by the route contracted for, *viz.*, by Kelso; (2) that the stipulation that they should be returned by the same route was a stipulation solely for their own benefit, and conferred no right on the sender of the cattle; (3) that in any view their liability was restricted to £15 for each animal, in respect that no declaration of an excess value was made on behalf of the owner in terms of the Railway and Canal Traffic Act, 1854, sec. 7. *Held* (1) that the Railway Company had broken the contract, and could not found on the indemnity clause therein, but (2) that their liability for the loss of the cattle was limited to £15 per animal. Lord Polwarth v. North British Railway Co., Nov. 15, 1907, p. 1275. See *Stamp, 2-4—Valuation Acts, 1.*

REFORMATORY. See *Justiciary Cases*, 26, 27.

REPARATION. *Capacity to commit wrong—Company.*

1. Limited liability company held liable for verbal slander uttered by their servant in the course of his employment and for the benefit of the company. *Finburgh v. Moss' Empires, Limited*, June 9, 1908, p. 928.

Liability of master for wrongful act of servant—Wrongous Detention.

2. A lady who had been a guest at a hydropathic establishment, brought an action of damages against the proprietors of the Hydropathic, in which she averred that when she was at the Hydropathic she went, at the request of the defenders' manager, to his private room; that she there found a Mr and Mrs R., who were fellow guests; that Mrs R. had conceived an ill-will against the pursuer, and that the defenders' manager knew this; that Mr and Mrs R. placed themselves against the door to prevent the pursuer from leaving the room; that the manager said that he would not allow the pursuer to leave the room until she apologised to Mrs R. for slamming a door in her face—"a thing the pursuer had never done"—and that the manager aided and abetted Mr and Mrs R. in preventing the pursuer from leaving the room for about fifteen minutes. The defenders pleaded that the action was irrelevant in respect that the pursuer's averments shewed that the manager was not, on the occasion in question, acting within the scope of his employment. Held that the pursuer's averments were relevant. *Mackenzie v. Cluny Hill Hydropathic Co., Limited*, Nov. 23, 1907, p. 200.

Liability of master for slander uttered by servant.

3. Held that an employer is liable for a verbal slander uttered by his servant in the course of the servant's employment and for the benefit of the master. *Finburgh v. Moss' Empires, Limited*, June 9, 1908, p. 928.
4. In an action of damages for slander brought by a married woman against a limited liability company as the owners of a theatre, the pursuer averred that while she was witnessing a performance in the defenders' theatre the defenders' servants falsely stated, within the hearing of her husband and others, that she was a notorious prostitute who had been thrown out of the theatre two weeks previously for being drunk and disorderly, and said that she must leave the theatre; and that the statements complained of were made by the defenders' servants in the course of their service and for the defenders' benefit. The pursuer referred for its terms to a bye-law, made under statutory authority, founded on by the defenders, which was applicable to the theatre, and which provided that the licensed manager should not permit men or women of bad fame to enter the theatre. Held that the pursuer's averments were relevant. *Finburgh v. Moss' Empires, Limited*, June 9, 1908, p. 928.
5. In an action of damages for slander brought by a married man against a limited liability company, as the owners of a theatre, the pursuer averred that while he and his wife were witnessing a performance in the defenders' theatre the under-manager falsely stated that the pursuer's wife was a bad character and must leave the theatre, that on the pursuer explaining that the lady was his wife, the under-manager replied that "he had heard that story before," and that the under-manager subsequently falsely stated to the manager of the theatre that the pursuer's wife was a notorious prostitute who had two weeks previously been thrown out of the theatre for being drunk and disorderly. The pursuer further averred that the statements complained of were made of and concerning him, and represented that he was a person of loose and immoral habits and character,

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act as her tutors and curators. At the time of his death his daughter was in pupillarity, and his executors acted as her tutors and curators, and appointed a law-agent as factor for the purpose of managing the estate. After the daughter attained majority the factor continued to act as her agent and to manage for her her income from the estate. Subsequently an action was brought against the daughter at the instance of the tutors and curators and of the factor, of which the conclusions were (1) for payment to the tutors and curators of certain sums alleged to have been overpaid by them to her during the subsistence of the curatory, and (2) for payment to the factor of certain sums alleged to have been overpaid by him to her after the termination of the curatory. *Held* that the action as raised was incompetent, in respect that it was at the instance of unconnected pursuers each suing for a separate debt. *Paxton v. Brown*, Jan. 14, 1908, p. 406.

Summons—Conclusions—Joint and Several Liability.

2. In an action of payment against six defenders "jointly and severally," three of the defenders were assolizied. *Held* that a decree against the remaining defenders conjunctly and severally was competent. *Fleming v. Gemmill*, Dec. 20, 1907, p. 340.

Citation—Corporation—Citation of Corporation by citing its members.

3. A corporation was cited by calling its members by name, as representing the corporation but not as individuals. The majority of the corporation resolved to defend the action. *Held* that they were entitled to lodge defences in name of the whole members as representing the corporation. *Eadie v. Glasgow Corporation*, Nov. 21, 1907, p. 207.

Record—Averments—Ground of action not averred on record and disclosed to pursuer by the evidence for the defender at the proof.

4. The proprietor of a farm in his own occupation having let it on lease, the landlord and the tenant entered into a submission as to the amount payable by the landlord under an obligation to put the buildings in "tenantable condition and repair." The arbiters having issued an award, the tenant, being dissatisfied with the amount awarded, brought a reduction, setting forth various grounds of reduction. At the proof it appeared from the evidence of the arbiters that they had fixed the sum awarded on the principle of taking the landlord's obligation as the obligation of an outgoing tenant, and not as the obligation of a landlord. This was not averred either by the pursuer or by the defender, and was not, until the proof, known to the pursuer. *Held* that the absence of any averment by the pursuer did not bar him from taking the objection that the arbiters had not determined the question submitted to them. *Davidson v. Logan*, Nov. 29, 1907, p. 350.

Record—Printing and Lodging—Failure to lodge prints—A. S., Nov. 2, 1872, sec. 5.

5. Circumstances in which the Court recalled an interlocutor of a Lord Ordinary, dismissing an action on the ground that prints of the record had not been lodged as required by sec. 5 of the Act of Sederunt of 2d November 1872. *Robertson v. Johnston*, Jan. 8, 1908, p. 383.

Record—Amendment—Instance—A. S., March 20, 1907, sec. 2.

6. A testator died leaving a deed of settlement by which he bequeathed a share of his estate to his daughter, and appointed his executors to act as her tutors and curators. At the time of his death his daughter was in pupillarity, and his executors acted as her tutors and curators, and appointed a law-agent as factor for the purpose of managing the

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estate. After the daughter attained majority the factor continued to act as her agent and to manage for her her income from the estate. Subsequently an action was brought against the daughter at the instance of the tutors and curators and of the factor, of which the conclusions were (1) for payment to the tutors and curators of certain sums alleged to have been overpaid by them to her during the subsistence of the curatory, and (2) for payment to the factor of certain sums alleged to have been overpaid by him to her after the termination of the curatory. The summons having been held to be incompetent in respect that it was at the instance of unconnected pursuers each suing for a separate debt, *held* that it could be competently amended by striking out one set of pursuers; and amendment to that effect *allowed*. *Paxton v. Brown*, Jan. 14, 1908, p. 406.

Disclaimer.

7. A corporation was cited by calling its members by name, as representing the corporation but not as individuals. The majority of the corporation resolved to defend the action. *Held* that they were entitled to lodge defences in name of the whole members as representing the corporation, and that dissenting members were not entitled to disclaim the defences. *Eadie v. Glasgow Corporation*, Nov. 21, 1907, p. 207.

Appointment of curator ad litem—Minor defender not appearing.

8. It is not competent on the motion of a pursuer to appoint a curator *ad litem* to a minor defender who has not appeared in the action. This rule applies in the case of a multiplepounding. *Mackenzie's Trustees v. Mackenzie*, June 17, 1908, p. 995.

Preliminary Defences—All parties not called—Claim against general estate of testator—Competency of suing individual legatee.

9. *Held* that an individual legatee cannot be called upon to discuss the validity of a claim against the testator's estate, which may or may not affect his legacy, in an action to which the general representatives of the testator have not been made parties. *Gillespie v. Riddell*, Feb. 20, 1908, p. 628.

Reclaiming Note—Allowance of Proof—Court of Session Act, 1868, secs. 28 and 54—A. S., 10th March 1870, secs. 1, 2.

10. In an action of accounting the defenders stated preliminary pleas in which they denied their liability to account. The Lord Ordinary in the Procedure-roll pronounced an interlocutor appointing the defenders "before answer" to lodge the account called for in the summons. *Held* that the interlocutor did not "import an appointment of proof or a refusal or postponement of the same," within the meaning of the Act of Sederunt, 10th March 1870, and that consequently it could not be reclaimed against without leave. *Lamont & Co. v. Dublin and Glasgow Steam Packet Co.*, June 23, 1908, p. 1017.

Reclaiming Note—Printing and Boxing—Omission to box Record—Justifiable Mistake—Court of Session Act, 1825, sec. 18—A. S., 11th July 1828, sec. 77—Court of Session Act, 1808, sec. 16.

11. Circumstances in which the Court *sustained* the competency of a reclaiming note although copies of the record had not been boxed until after the reclaiming days had expired. *Hutchison v. Hutchison*, June 17, 1908, p. 1001.

Reclaiming Note—Leave to reclaim—Refusal of leave—Court of Session Act, 1868, sec. 54.

12. *Held* that where the Lord Ordinary in the exercise of his discretion had refused leave to reclaim, the Court could not interfere with his decision. *Lamont & Co. v. Dublin and Glasgow Steam Packet Co.*, June 23, 1908, p. 1017.

POLICE—Continued.

in the whole *alveus*, and who alleged that the result of the drainage operations was to subject his property to additional risk of flooding. The proprietor brought an action for removal of the pipes. *Held* that the proprietor was not entitled to have the sewer-pipes removed, and the river bed restored to the condition in which it existed prior to the operations, in respect that, if the pipes were removed as demanded, he could not prevent the Local Authority, if they thereafter gave reasonable notice, from replacing the pipes in the same position. *Montgomerie & Co., Limited, v. Haddington Corporation*, Nov. 12, 1907, p. 127.

Drainage—Sewers—Formation—Public Health (Scotland) Act, 1897, sec. 109.

8. *Dictum* of Lord Adam in *Brown v. Magistrates of Kirkcudbright*, 8 F. 77, p. 88, as to the functions of the Sheriff under sec. 109 of the Public Health Act, 1897, *approved*. *Montgomerie & Co., Limited, v. Haddington Corporation*, Nov. 12, 1907, p. 127.

Police Offences—Breach of Regulations—"Public Show"—Glasgow Police (Further Powers) Act, 1892, sec. 7.

9. A saloon or arcade, which opened directly off a public street, contained a number of automatic machines operated by placing a penny in the slot. Most of the machines exhibited pictures or produced music by phonographic records; a few told fortunes, gave electric shocks, or recorded weight or strength. The doors were always open during business hours, and admission was free. *Held* that the entertainment was a "public show" within the meaning of sec. 7 of the Glasgow Police (Further Powers) Act, 1892. *Allan v. Neilson*, June 18, 1908, (J.) p. 76.

See Burgh, 3—Property—Railway, 3.

POLICE FORCE. *Police-Constable—Bribery—Police-Constable agent of the Chief Constable—Prevention of Corruption Act, 1906, sec. 1.*

In a complaint under the Prevention of Corruption Act, 1906, sec. 1, charging an attempt to bribe a police-constable in Glasgow while in the execution of his duty and acting for his employer the Chief Constable, *held* that the police-constable was an agent in the sense of the Act. *Graham v. Hart*, Jan. 17, 1908, (J.) p. 26.

POOR. *Settlement—Residential Settlement—Capacity to acquire Settlement—Puberty—Education (Scotland) Act, 1901, secs. 1 and 2.*

1. *Held* that the capacity of a female child to acquire a residential settlement on attaining puberty at twelve years of age was not affected by the enactments of the Education (Scotland) Act, 1901, secs. 1 and 2. *Govan Parish Council v. Glassary Parish Council*, Nov. 2, 1907, p. 64.

Settlement—Derivative Settlement—Loss of—Deserted Wife—Nothing known as to Husband.

2. W., who was born in the parish of Glasgow and had a residential settlement in the parish of Row, in October 1901 deserted his wife and children, and was not heard of again. The wife went to reside in Paisley, and in April 1902 received parochial relief from Paisley. Row reimbursed Paisley for the advances made. After doing so for two and a half years Row repudiated further liability, on the ground that the husband had lost his settlement in that parish by non-residence for the statutory period of three years, and that his wife's settlement, which was derived from him, had lapsed also. In an action by the relieving parish against Row and against the Parish Council of Glasgow, *held* that the wife was the pauper; that her settlement remained unchanged during chargeability; and that Row was still liable for her support. *Parish Council of Paisley v. Parish Councils of Row and Glasgow*, March 11, 1908, p. 731.

—Continued.

Lunatic—Residential Settlement—Retention—Lunatics (Scotland) Act, 1857, sec. 75.

The Lunatics (Scotland) Act, 1857, sec. 75, enacts:—"Every pauper lunatic detained in any district asylum under this Act shall be deemed and held to belong and be chargeable to the parish of the legal settlement of such lunatic at the time the order for his reception in such asylum was granted, and the expense of his maintenance in such district asylum shall be defrayed by such parish accordingly, and the residence of any pauper lunatic in any such district asylum shall be deemed to be the residence of such lunatic in the parish legally chargeable with the maintenance of such lunatic."

A lunatic who was born in the parish of Parton, and who had, on 15th August 1895, a residential settlement in the parish of Kelton, was admitted to an asylum in another parish as a pauper lunatic on that date. For a few months after her admission she was maintained by the parish of Kelton. For the next ten years she was maintained by her brother in the same asylum as a private patient, and her name taken off the poor's-roll. Thereafter her brother ceased to contribute to her support, and she again fell upon the rates, being detained in the same asylum under the order granted when she was first admitted. In a question between the parish of Kelton, who contended that she had lost her residential settlement by non-residence during the period when she was a private patient, and the parish of Parton, who contended that her settlement remained the same as at the date of her admission, *held* that the lunatic had not lost her residential settlement, and that she was chargeable to the parish of Kelton as the parish of her settlement at the time when the order for her reception was granted. *Rigg v. Bell*, June 12, 1908, p. 974.

e Charitable and Educational Bequests and Trusts, 5—Presumption.

CRPTION. *Negative Prescription—Decree in Absence—Court of Session Act, 1868, sec. 24.*

1671 Charles Maitland of Hatton raised an action in the Court of Session concluding for declarator, *inter alia*, that he was entitled to the office of Hereditary Standard Bearer of Scotland, and called John Scrymgeour as a defender. John Scrymgeour appeared, and, after stating certain defences, was allowed to withdraw from the action, and in his absence decree was pronounced in favour of the pursuer as concluded for. In 1902 an action was raised in the Court of Session at the instance of the Earl of Lauderdale, also concluding for declarator that he was entitled to the office of Hereditary Standard Bearer. The pursuer claimed as in right of his ancestor, Charles Maitland, and founded, *inter alia*, on the decree of 1671. The action was defended by Henry Scrymgeour Wedderburn, a descendant of John Scrymgeour. *Held* that in respect of the operation of the negative prescription, and of sec. 24 of the Court of Session Act, 1868, the decree of 1671 could not now be impugned, and that the pursuer, as in right of the decree, was entitled to the office. *Earl of Lauderdale v. Wedderburn*, July 18, 1908, p. 1237.

UMPTION. *Presumption of Life.*

Observations (per the Lord President) as to the application of the presumption of life in poor-law cases. Parish Council of Paisley v. Parish Councils of Row and Glasgow, March 11, 1908, p. 731.

VENTION OF CORRUPTION. See *Justiciary Cases*, 6.

NESS. *Summons—Instance—Several Pursuers—Community of interest—"Convenience."*

A testator died leaving a deed of settlement by which he bequeathed a share of his estate to his daughter, and appointed his executors to

PROCESS—Continued.

act as her tutors and curators. At the time of his death his daughter was in pupillarity, and his executors acted as her tutors and curators, and appointed a law-agent as factor for the purpose of managing the estate. After the daughter attained majority the factor continued to act as her agent and to manage for her her income from the estate. Subsequently an action was brought against the daughter at the instance of the tutors and curators and of the factor, of which the conclusions were (1) for payment to the tutors and curators of certain sums alleged to have been overpaid by them to her during the subsistence of the curatory, and (2) for payment to the factor of certain sums alleged to have been overpaid by him to her after the termination of the curatory. *Held* that the action as raised was incompetent, in respect that it was at the instance of unconnected pursuers each suing for a separate debt. *Paxton v. Brown*, Jan. 14, 1908, p. 406.

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4. The proprietor of a farm in his own occupation having let it on lease, the landlord and the tenant entered into a submission as to the amount payable by the landlord under an obligation to put the buildings in "tenantable condition and repair." The arbiters having issued an award, the tenant, being dissatisfied with the amount awarded, brought a reduction, setting forth various grounds of reduction. At the proof it appeared from the evidence of the arbiters that they had fixed the sum awarded on the principle of taking the landlord's obligation as the obligation of an outgoing tenant, and not as the obligation of a landlord. This was not averred either by the pursuer or by the defender, and was not, until the proof, known to the pursuer. *Held* that the absence of any averment by the pursuer did not bar him from taking the objection that the arbiters had not determined the question submitted to them. *Davidson v. Logan*, Nov. 29, 1907, p. 350.

Record—Printing and Lodging—Failure to lodge prints—A. S., Nov. 2, 1872, sec. 5.

5. Circumstances in which the Court recalled an interlocutor of a Lord Ordinary, dismissing an action on the ground that prints of the record had not been lodged as required by sec. 5 of the Act of Sederunt of 2d November 1872. *Robertson v. Johnston*, Jan. 8, 1908, p. 383.

Record—Amendment—Instance—A. S., March 20, 1907, sec. 2.

6. A testator died leaving a deed of settlement by which he bequeathed a share of his estate to his daughter, and appointed his executors to act as her tutors and curators. At the time of his death his daughter was in pupillarity, and his executors acted as her tutors and curators, and appointed a law-agent as factor for the purpose of managing the

ss—*Continued.*

state. After the daughter attained majority the factor continued to act as her agent and to manage for her her income from the estate. Subsequently an action was brought against the daughter at the instance of the tutors and curators and of the factor, of which the conclusions were (1) for payment to the tutors and curators of certain sums alleged to have been overpaid by them to her during the subsistence of the curatory, and (2) for payment to the factor of certain sums alleged to have been overpaid by him to her after the termination of the curatory. The summons having been held to be incompetent in respect that it was at the instance of unconnected pursuers each suing for a separate debt, *held* that it could be competently amended by striking out one set of pursuers; and amendment to that effect *allowed*. *Paxton v. Brown*, Jan. 14, 1908, p. 406.

Disclaimer.

A corporation was cited by calling its members by name, as representing the corporation but not as individuals. The majority of the corporation resolved to defend the action. *Held* that they were entitled to lodge defences in name of the whole members as representing the corporation, and that dissenting members were not entitled to disclaim the defences. *Eadie v. Glasgow Corporation*, Nov. 21, 1907, p. 207.

Appointment of curator ad litem—Minor defender not appearing.

It is not competent on the motion of a pursuer to appoint a curator *ad litem* to a minor defender who has not appeared in the action. This rule applies in the case of a multiplepinding. *Mackenzie's Trustees v. Mackenzie*, June 17, 1908, p. 995.

Preliminary Defences—All parties not called—Claim against general estate of testator—Competency of suing individual legatee.

Held that an individual legatee cannot be called upon to discuss the validity of a claim against the testator's estate, which may or may not affect his legacy, in an action to which the general representatives of the testator have not been made parties. *Gillespie v. Riddell*, Feb. 20, 1908, p. 628.

Reclaiming Note—Allowance of Proof—Court of Session Act, 1868, secs. 28 and 54—A. S., 10th March 1870, secs. 1, 2.

In an action of accounting the defenders stated preliminary pleas in which they denied their liability to account. The Lord Ordinary in the Procedure-roll pronounced an interlocutor appointing the defenders "before answer" to lodge the account called for in the summons. *Held* that the interlocutor did not "import an appointment of proof or a refusal or postponement of the same," within the meaning of the Act of Sederunt, 10th March 1870, and that consequently it could not be reclaimed against without leave. *Lamont & Co. v. Dublin and Glasgow Steam Packet Co.*, June 23, 1908, p. 1017.

Reclaiming Note—Printing and Boxing—Omission to box Record—Justifiable Mistake—Court of Session Act, 1825, sec. 18—A. S., 11th July 1828, sec. 77—Court of Session Act, 1808, sec. 16.

Circumstances in which the Court *sustained* the competency of a reclaiming note although copies of the record had not been boxed until after the reclaiming days had expired. *Hutchison v. Hutchison*, June 17, 1908, p. 1001.

Reclaiming Note—Leave to reclaim—Refusal of leave—Court of Session Act, 1868, sec. 54.

Held that where the Lord Ordinary in the exercise of his discretion had refused leave to reclaim, the Court could not interfere with his decision. *Lamont & Co. v. Dublin and Glasgow Steam Packet Co.*, June 23, 1908, p. 1017.

PROCESS—Continued.*Interlocutor—Alteration of interlocutor—Timeous Application.*

13. *Observed* (*per* the Lord President),—"When an interlocutor is signed and given out to the parties it must be noted by the profession that if anything is to be said about altering the form of it, it must be said at once." *Kennedys v. Clyde Shipping Co., Limited*, June 5, 1908, p. 895.

Decree—Decree in Absence—Court of Session Act, 1868, sec. 24.

14. In 1671 Charles Maitland of Hatton raised an action in the Court of Session concluding for declarator, *inter alia*, that he was entitled to the office of Hereditary Standard Bearer of Scotland, and called John Scrymgeour as a defender. John Scrymgeour appeared, and, after stating certain defences, was allowed to withdraw from the action, and in his absence decree was pronounced in favour of the pursuer as concluded for. In 1902 an action was raised in the Court of Session at the instance of the Earl of Lauderdale also concluding for declarator that he was entitled to the office of Hereditary Standard Bearer. The pursuer claimed as in right of his ancestor, Charles Maitland, and founded, *inter alia*, on the decree of 1671. The action was defended by Henry Scrymgeour Wedderburn, a descendant of John Scrymgeour. *Held* that in respect of the operation of the negative prescription, and of sec. 24 of the Court of Session Act, 1868, the decree of 1671 could not now be impugned, and that the pursuer, as in right of the decree, was entitled to the office. *Earl of Lauderdale v. Wedderburn*, July 18, 1908, p. 1237.

Proof—Proof or Jury Trial—Discretion of Lord Ordinary—Action of Damages—Special Cause—Evidence (Scotland) Act, 1866, sec. 4.

15. In an action of damages at the instance of a father as tutor of his pupil child about five years of age, who had sustained personal injuries through being run over by a tramway car, the Lord Ordinary refused to send the case to a jury and allowed a proof, stating as his grounds for doing so that the case was of doubtful relevancy, and that it raised a question as to contributory negligence, which in the case of a child was always of a delicate nature, and also questions depending upon expert evidence as to the construction of tramway cars. The Court *refused* to interfere with what the Lord Ordinary had done in the exercise of his discretion as to the mode of trial. *Cass v. Edinburgh and District Tramways Co., Limited*, May 23, 1908, p. 841.

Proof—Jury Trial—New Trial—Excessive Damages—Consent of Parties.

16. In an application for a new trial on the ground of excessive damages, the Court cannot refuse a new trial and itself assess the damages without obtaining the consent of both parties. *Boal v. Scottish Catholic Printing Co., Limited*, Feb. 27, 1908, p. 667.
17. *Particular Actions—Declarator—Declarator ab ante—Competency.* *Allgemeine Deutsche Credit Anstalt v. Scottish Amicable Life Assurance Society*, Oct. 26, 1907, p. 33; *Penny's Trustees v. Adam*, Feb. 25, 1908, p. 662; *Cuthbert v. Cuthbert's Trustees*, June 12, 1908, p. 967.

Particular Actions—Action of Maills and Duties—Competency—Registration of Leases (Scotland) Act, 1857, secs. 6 and 20—Heritable Securities (Scotland) Act, 1847, sec. 2.

18. *Held* that an action of maills and duties at the instance of a person in right of an assignation in security of a lease recorded under the Registration of Leases (Scotland) Act, 1857, is not competent. *Dunbar v. Gill*, July 4, 1908, p. 1054.

See *Arrestment*, 3-8 — *Bankruptcy*, 6 — *Company*, 10 — *Expenses*, 2, 5, 8 — *Interdict—Issue—Charitable and Educational Requests and Trusts*, 6, 7 — *Res Judicata—Ship*, 10 — *Title to Sue and Defend—Trust*, 2.

Admissibility of Parole Proof.

Held in a reduction of a decree-arbitral, which bore to be the award of, and was signed by, the arbiters and oversman, that it was incompetent by parole evidence to prove that the oversman never acted, and that the award was the award of the arbiters only. *Davidson v. Logan*, Nov. 29, 1907, p. 350.

Admissibility of Parole Proof—Bills of Exchange Act, 1882, sec. 100.

Held that where bills were granted in implement of a written agreement, the terms of this agreement could not be modified by parole evidence. *Stagg & Robson, Limited, v. Stirling*, Feb. 28, 1908, p. 675.

ERTY. Gable—Boundary—Building Condition—Encroachment.

In erecting a four-storey house, Pottinger obtained the permission of the neighbouring proprietor, Wilson, to build upon the gable wall of an adjoining two-storey house belonging to Wilson. The wall in question was only 9½ inches thick, and in order to satisfy the requirement of the Dean of Guild that the thickness of the added portion should be 14 inches, the added portion was built in such a manner that, while it was flush with the original on the side next Pottinger's property, it projected 4½ inches beyond the wall on Wilson's side. After the building operations were completed, Wilson raised an action concluding (1) for declarator that Pottinger had illegally encroached on his property, and (2) for removal of the encroachment. The Court *dismissed* the action, *per* the Lord President on the ground that Wilson had by signing plans consented to the encroachment, and *per* Lord McLaren and Lord Kinnear on the ground that, when Wilson gave permission to build on his gable wall, the agreement was subject to the implied condition that the building was to be in such form as the Dean of Guild should direct, that it had been erected in accordance with his directions, and that accordingly there had been no unlawful encroachment. *Wilson v. Pottinger*, Feb. 7, 1908, p. 580.

LIC AUTHORITIES PROTECTION. See Expenses, 10.

LIC HEALTH. Sale of Food and Drugs—Delivery of milk in several cans—Deficiency of quality in each can—Sale of Food and Drugs Act, 1875, secs. 6, 13—Sale of Food and Drugs Act Amendment Act, 1879, sec. 3.

Samples having been taken from fourteen out of sixteen cans of milk in course of delivery in one consignment, and all the samples having been found deficient in quality, the consignor was charged with and convicted of fourteen offences under sec. 6 of the Sale of Food and Drugs Act, 1875. *Held* that, there having been only one delivery, it was incompetent to charge and convict of more than one offence. *Telford v. Fyfe*, July 16, 1908, (J.) p. 83.

ale of Food and Drugs—Milk in course of delivery—Fair Sample—Sale of Food and Drugs Act Amendment Act, 1879, sec. 3.

A consignment of milk was delivered in sixteen cans which were cylindrical in shape and about two feet deep. Each can was taken into a store-room by the consignor's servant, where it was opened by him. An inspector of nuisances then agitated the milk in the can with a wooden spoon about a foot in length, and a sample was taken by dipping a measure into the milk just under the surface and removing about fourteen ounces. Samples were thus taken from fourteen cans. The milk in the cans was on delivery poured into a large vat in the store-room. *Opinion* that the method of sampling was not unfair or improper, and that it afforded a fair test of the contents of each can; and, further, that it would have been incompetent to take a sample after delivery into the vat, the milk being then no longer in course of delivery. *Telford v. Fyfe*, July 16, 1908, (J.) p. 83.

PUBLIC HEALTH—Continued.

Sale of Food and Drugs—Prosecutions by officers of Local Government Board and Board of Agriculture as private purchasers—Sale of Food and Drugs Act, 1875, secs. 6, 12, 14, 20—Sale of Food and Drugs Act, 1899, secs. 2 (1) (2), 3 (2) (3), 23, 24.

3. The Sale of Food and Drugs Act, 1899, confers on the Local Government Board and the Board of Agriculture, and the corresponding boards in Scotland and Ireland, powers, in default of action by the Local Authority, to institute proceedings at the instance of their officers against persons infringing the provisions of the Sale of Food and Drugs Acts, and prescribes procedure to be followed in such prosecutions. *Held* that the exercise of these powers was optional and not obligatory; that the officers of these boards were entitled to institute proceedings as private individuals in the method prescribed by the Sale of Food and Drugs Act, 1875; and that they were not limited in prosecutions at their instance to the procedure prescribed by the Act of 1899. *Falconer v. Whyte*, March 20, 1908, (J.) p. 40. See *Police*, 5-8.

PUBLIC-HOUSE. *Public-House Offences—Breach of Certificate—Third offence—Proof—Licensing (Scotland) Act, 1903, secs. 53, 91, 102, and 103.*

1. A publican who had been convicted of breach of certificate, upon a complaint bearing that it was a "third offence," brought a suspension upon the ground that (after evidence for the prosecution and the defence had been led, the cases for the respective parties closed, and parties heard with regard to the particular breach alleged, and after the justices had found the accused guilty thereof), a witness was put in to prove two previous convictions against the accused; that this evidence was incompetently admitted; that no other evidence of the offence charged being a third offence had been led; and that such evidence should have been led, as this was a substantive part of the charge. *Held* that the procedure complained of amounted to nothing more at most than a "deviation in point of form from the statutory enactment," that consequently the only form of review competent was an appeal under sec. 102 of the Licensing (Scotland) Act, 1903, and that the suspension was incompetent. *Opinions* that the procedure followed by the Justices was competent and proper. *Mitchell v. Morrison*, May 13, 1908, (J.) p. 65.

Public-House Offences—Sale of exciseable liquors to children—Responsibility of Publican for assistant—Licensing (Scotland) Act, 1903, sec. 59.

2. Under sec. 59 of the Licensing (Scotland) Act, 1903, every holder of a certificate who knowingly sells or delivers, or allows any person to sell or deliver, exciseable liquors to any person under fourteen years of age, except in corked or sealed vessels in quantities not less than one pint, is guilty of an offence. Exciseable liquors in quantities less than one pint were sold in open vessels to a girl of eleven years of age by a publican's assistant, who had means of knowing the age of the child. The sale took place outwith the publican's presence and actual personal knowledge, but no sufficient instructions had been given by him to his assistant not to supply children under fourteen years of age with exciseable liquors except as provided by sec. 59 of the Licensing (Scotland) Act, 1903. *Held* that the publican had been rightly convicted of a contravention of that section. *Greig v. Macleod*, Dec. 4, 1907, (J.) p. 14.

RAILWAY. *Construction and Maintenance—Questions with Local Authorities—Bridge carrying highway over railway—"Public Highway"—Maintenance of Road—Railways Clauses Consolidation (Scotland) Act, 1845, sec. 39.*

1. The Railways Clauses Consolidation (Scotland) Act, 1845, sec. 39,

WAY—Continued.

enacts that where a line of railway crosses "any turnpike road or public highway," and the road is carried over the railway by means of a bridge, such bridge and the approaches thereto "shall be executed and at all times thereafter maintained at the expense of the [railway] company." *Held* that the words "public highway" applied only to roads which were public *de jure*. Corporation of Glasgow v. Caledonian Railway Co., Nov. 29, 1907, p. 244.

Construction and Maintenance—Questions with Local Authorities—Road—Bridge over Railway—Caledonian Railway (Additional Powers) Act, 1872, secs. 4, 26.

The Caledonian Railway Act, 1872, sec. 4, enacts that the Company "may make and maintain" certain railways, and "may execute the other works and operations hereinafter mentioned." With reference to one of the railways authorised, which crossed a certain road, sec. 26 enacts:—"In constructing railway No. 2 the following provisions shall be binding on the Company, who shall construct the works hereinafter specified in manner hereinafter directed . . . (3) the road . . . shall be carried over the railway by a bridge not less than 40 feet wide." The railway company by virtue of the powers conferred on them by secs. 4 and 26 of the foregoing special Act, constructed railway No. 2, and, where it crossed the road, carried the road over the railway by means of a bridge. *Held* that since the section of the special Act providing for the construction of the bridge did not specify that the road upon it was to be maintained by the railway company, no such duty lay upon it under the provisions of that Act. Corporation of Glasgow v. Caledonian Railway Co., Nov. 29, 1907, p. 244.

Construction and Maintenance—Questions with Third Parties—Road forming "part of any railway"—Burgh Police (Scotland) Act, 1892, sec. 4 (31).

An unformed road in a burgh, 40 feet in width, was bounded on one side by a line of railway from which it was separated by a wall. The *solum* of the road *ex adverso* of the railway to the extent of 30 feet of its width was the property of the railway company, who had acquired it by voluntary disposition under a power to purchase land for extraordinary purposes. Over the road there existed a public right of way for traffic of every description. *Held* that the road was not "part of a railway" in the sense of sec. 4 (31) of the Burgh Police (Scotland) Act, 1892, but was a private street within the meaning of that Act. Glasgow and South-Western Railway Co. v. Hutchison, Feb. 19, 1908, p. 587.

Construction and Maintenance—Questions between Companies—Siding—Renewal of Siding—Identity of Subject—Running Powers—Caledonian and General Terminus Railways Amalgamation Act, 1865, sec. 15.

The Caledonian and General Terminus Railways Amalgamation Act, 1865, conferred on certain railway companies running powers over the sidings of the railways vested by the Act in the Caledonian Railway, "constructed at the time of the commencement of this Act, or any renewals thereof." Circumstances connected with the construction of a siding in which *held* that the siding in question was a renewal of a siding in existence at the commencement of the Act. North British Railway Co. v. Caledonian Railway Co., Oct. 18, 1907, p. 16.

Traffic and Carriage—Passengers—Injuries to Passengers—Failure of railway servants to close carriage doors before setting train in motion. Averments in an action of damages for personal injuries brought against a railway company by a passenger who, after alighting from a train, had been knocked down by an open carriage door as the train was leav-

RAILWAY—Continued.

ing the station, upon which held that the pursuer had averred facts from which a jury might infer negligence. Toal v. North British Railway Co., May 26, 1908, (H. L.) p. 29.

Traffic and Carriage—Passengers—Injuries to Passengers—Crowd on Station Platform.

6. Circumstances in which *held* that the injuries of a woman who had been pushed off a railway platform by a crowd were not due to negligence on the part of the Railway Company. M'Callum v. North British Railway Co., Jan. 14, 1908, p. 415.

Traffic and Carriage—Passengers—Railways Clauses Consolidation (Scotland) Act, 1845, sec. 96—Travelling without paying fare—Intent to avoid payment.

7. A workman, who had travelled by a workman's train, attempted to leave the station where he alighted without giving up a ticket (his intention being to defraud the railway company), but was prevented from doing so, and thereupon produced from his pocket and tendered a workman's ticket valid and available for the journey. Workmen's tickets are not dated, and can be used at any time. *Held* that the workman had not been guilty of travelling "without having previously paid his fare and with intent to avoid payment thereof" in the sense of the Railways Clauses Consolidation (Scotland) Act, 1845, sec. 96. Caledonian Railway Co. v. Roper, May 13, 1908, (J.) p. 69.

Traffic and Carriage—Goods—Agreements with Traders—Owner of cattle undertaking risk of carriage if sent by route specified—Damage sustained on different route—Railway and Canal Traffic Act, 1854, sec. 7—Limitation of Company's Liability.

8. A railway company agreed with the owner of three head of cattle consigned by rail from Maxton Station to Alnwick, *via* Kelso, for exhibition at a cattle show at Alnwick, that if they were not sold they should be taken back to Maxton at half fare, provided the owner consigned them by the same route as that by which they had been sent, and undertook the risk of their conveyance. Between Kelso and Alnwick there were two railway routes equally convenient, one by Wooler, the other by Tweedmouth. The Railway Company sent the cattle to Alnwick by the Wooler route. The cattle were not sold at the show, and the owner's agent in sending them back from Alnwick Station signed a consignment note bearing that they were sent for carriage back to Maxton "by the same route as on the journey here, at the reduced rate," "and in consideration of your charging such reduced rate," "the undersigned agrees to free and relieve you of all liability" for loss or damage, unless caused by wilful misconduct on the part of their servants. The Railway Company chose to send the cattle back by the Tweedmouth route and they were destroyed by fire at Tweedmouth Junction. In an action brought by the owner of the cattle against the Railway Company for £800 as the value of the cattle the defenders maintained (1) that they were not liable, as they had sent them back by the route contracted for, *viz.*, by Kelso; (2) that the stipulation that they should be returned by the same route was a stipulation solely for their own benefit, and conferred no right on the sender of the cattle; (3) that in any view their liability was restricted to £15 for each animal, in respect that no declaration of an excess value was made on behalf of the owner in terms of the Railway and Canal Traffic Act, 1854, sec. 7. *Held* (1) that the Railway Company had broken the contract, and could not found on the indemnity clause therein, but (2) that their liability for the loss of the cattle was limited to £15 per animal. Lord Polwarth v. North British Railway Co., Nov. 15, 1907, p. 1275.

See Stamp, 2-4—Valuation Acts, 1.

RMATORY. See *Justiciary Cases*, 26, 27.

RATION. *Capacity to commit wrong—Company.*

imited liability company *held* liable for verbal slander uttered by heir servant in the course of his employment and for the benefit of he company. *Finburgh v. Moss' Empires, Limited*, June 9, 1908, p. 928.

Ability of master for wrongful act of servant—Wrongous Detention.

A lady who had been a guest at a hydropathic establishment, brought an action of damages against the proprietors of the Hydropathic, in which she averred that when she was at the Hydropathic she went, at the request of the defenders' manager, to his private room; that she there found a Mr and Mrs R., who were fellow guests; that Mrs R. had conceived an ill-will against the pursuer, and that the defenders' manager knew this; that Mr and Mrs R. placed themselves against the door to prevent the pursuer from leaving the room; that the manager said that he would not allow the pursuer to leave the room until she apologised to Mrs R. for slamming a door in her face—"a thing the pursuer had never done"—and that the manager aided and abetted Mr and Mrs R. in preventing the pursuer from leaving the room for about fifteen minutes. The defenders pleaded that the action was irrelevant in respect that the pursuer's averments shewed that the manager was not, on the occasion in question, acting within the scope of his employment. *Held* that the pursuer's averments were relevant. *Mackenzie v. Cluny Hill Hydropathic Co., Limited*, Nov. 23, 1907, p. 200.

Ability of master for slander uttered by servant.

Held that an employer is liable for a verbal slander uttered by his servant in the course of the servant's employment and for the benefit of the master. *Finburgh v. Moss' Empires, Limited*, June 9, 1908, p. 928.

In an action of damages for slander brought by a married woman against a limited liability company as the owners of a theatre, the pursuer averred that while she was witnessing a performance in the defenders' theatre the defenders' servants falsely stated, within the hearing of her husband and others, that she was a notorious prostitute who had been thrown out of the theatre two weeks previously for being drunk and disorderly, and said that she must leave the theatre; and that the statements complained of were made by the defenders' servants in the course of their service and for the defenders' benefit. The pursuer referred for its terms to a bye-law, made under statutory authority, founded on by the defenders, which was applicable to the theatre, and which provided that the licensed manager should not permit men or women of bad fame to enter the theatre. *Held* that the pursuer's averments were relevant. *Finburgh v. Moss' Empires, Limited*, June 9, 1908, p. 928.

In an action of damages for slander brought by a married man against a limited liability company, as the owners of a theatre, the pursuer averred that while he and his wife were witnessing a performance in the defenders' theatre the under-manager falsely stated that the pursuer's wife was a bad character and must leave the theatre, that on the pursuer explaining that the lady was his wife, the under-manager replied that "he had heard that story before," and that the under-manager subsequently falsely stated to the manager of the theatre that the pursuer's wife was a notorious prostitute who had two weeks previously been thrown out of the theatre for being drunk and disorderly. The pursuer further averred that the statements complained of were made of and concerning him, and represented that he was a person of loose and immoral habits and character,

REPARATION—*Continued.*

that he was associating with a notorious prostitute of drunken and disorderly habits, and was attempting by deliberate falsehood to pass her off as his wife; that the management and conduct of the theatre were left in the hands of the manager and under-manager, and that the statements complained of were made by the under-manager in the course of his employment and for the benefit of the defenders. The pursuer referred to a bye-law, made under statutory authority, which was applicable to the theatre, and which provided that the licensed manager should not permit men or women of bad fame to enter the theatre. *Held* that the pursuer's averments were irrelevant. *Finburgh v. Moss' Empires, Limited*, June 9, 1908, p. 928.

6. Murray, the Superintendent of the Gorbals Public Baths, Glasgow, employed by the Corporation of Glasgow, sent a report to Thomson, the General Manager of the Public Baths, Glasgow, also employed by the Corporation, commenting adversely on the conduct of Beaton, a swimming instructor at the Gorbals Baths, employed by the School Board of Glasgow. Thomson, the General Manager, sent the report to the School Board of Glasgow. In an action of damages raised by Beaton against the Corporation the pursuer averred that Thomson, "in the execution of his duty as General Manager of the Public Baths," had forwarded the report to the Glasgow School Board, who employed Beaton to teach swimming, and that the report was slanderous, and caused the School Board to dismiss him. "In writing and dispatching the said report the said Robert A. Murray and William Thomson acted within the scope of their authority from the defenders, and in the discharge of their duties as servants of the defenders, and in the supposed furtherance of the interests of the defenders." The defenders pleaded that the action was irrelevant, and that the defenders were not responsible for the acts of their servants "outwith the scope of their duties and authority." *Held* that *prima facie* it was no part of the duty of the general manager of baths to make communications on behalf of the Corporation to the School Board, that it was not enough to aver generally that the report was forwarded by the general manager "in the execution of his duty," and that in the absence of any averment that he had special authority to act as he did, the action was irrelevant. *Beaton v. Corporation of Glasgow*, June 17, 1908, p. 1010.

Liability of master for negligence of servant—Whether servant of A pro hac vice servant of B.

7. In pursuance of their scientific investigations, the Fishery Board for Scotland from time to time arranged with the owners of trawl boats to carry on board their boats an employee of the Fishery Board, who was allowed to collect from the catches, and retain for the use of the Board, specimens of different kinds of fish. In return for this service, trawl boats carrying a Fishery Board employee were allowed to fish within restricted waters, and to retain the catches, without rendering themselves liable to a charge of illegal trawling. The Fishery Board employee was entitled to point out the places where he wished the trawling to be conducted, but neither he nor the Board had any control over the navigation or management of any trawl boats so engaged. A trawl boat with a Fishery Board representative on board, under an arrangement of the above description, was stranded through the fault of her master, and the Fishery Board representative in consequence died from exposure. His widow brought an action of damages against the owner of the trawler, who pleaded that he was not responsible for the fault of the master in respect that the master was on the occasion in question *pro hac vice* in the service of

ACTION—*Continued.*

the Fishery Board. *Held* that the master was not *pro hac vice* the servant of the Fishery Board, and that the defender was liable in damages to the pursuer. *Burgoyne v. Walker*, Dec. 11, 1907, p. 321.

Liability of Landlord for Pollution by Tenant.

Landlord held liable for pollution of river caused by improper use by tenants of drains provided by him. *Fleming v. Gemmill*, Dec. 20, 1907, p. 340.

Liability of Defenders—Joint and Several Liability.

In an action of damages against several defenders for loss caused by the pollution of a stream, held that, as each of the defenders had contributed materially to the pollution, they were liable jointly and severally for the whole amount of the damage which ensued. *Fleming v. Gemmill*, Dec. 20, 1907, p. 340.

In an action of payment against six defenders "jointly and severally," decree of the defenders were assoltied. Held that a decree against the remaining defenders conjunctly and severally was competent. *Fleming v. Gemmill*, Dec. 20, 1907, p. 340.

Wrongous use of diligence—Imprisonment—Decree ad factum præstandum—Decree for delivery—Small-Debt Amendment (Scotland) Act, 1889, secs. 1 and 2, and Sched. B.—Imprisonment on decree under sec. 1 of the Small-Debt Amendment (Scotland) Act, 1889. *Stewart v. Dougall*, Dec. 13, 1907, p. 315.

Wrongous use of Diligence—Imprisonment—Decree ad factum præstandum—Decree for delivery of furniture sequestrated for rent—Malicious use of Diligence—Averments of Malice.

J. & Co. took decree in absence against R. for delivery of furniture retained by him from them under a hire purchase agreement, the instalments due under the agreement not having been paid, and thereupon on 13th May 1907—in the knowledge that the furniture had been sequestrated for rent by R.'s landlord, and that decree of cessio had been pronounced against R.—applied for and obtained a warrant upon which R. was imprisoned on 14th May 1907. In an action by J. & Co. against J. & Co. for damages for wrongous imprisonment on the ground that J. & Co. at the date when they put the warrant in force knew that it was impossible for R. to give delivery of the furniture, held that, notwithstanding the sequestration and the cessio, the defenders were entitled to enforce the decree by imprisonment; and that the pursuer having been imprisoned under a warrant legally obtained and executed, the defenders, in the absence of relevant averments of malice, were entitled to absolvitor. *Rudman v. Jay & Co.*, Feb. 7, 1908, p. 552.

Defender—Innuendo.

Averments in an action of slander by the husband of a woman, who had been called a prostitute and ordered to leave a theatre by the theatre manager, which were held irrelevant. *Finburgh v. Moss' Empires, Limited*, June 9, 1908, p. 928.

Defender—Privilege—Malice—Issue.

In an action by a married woman for having been called a prostitute and ordered to leave a theatre by the theatre manager, the pursuer referred for its terms to a bye-law, made under statutory authority, and founded on by the defenders, which was applicable to the theatre, and which provided that the licensed manager should not permit men or women of bad fame to enter the theatre. Held that the occasion was privileged and that malice must be inserted in the issue. *Finburgh v. Moss' Empires, Limited*, June 9, 1908, p. 928.

REPARATION—*Continued.*

Slander—Privilege—Judicial Slander—Averments regarding co-defender in divorce action—Malice—Sufficiency of averments of malice.

15. In an action of divorce for adultery brought by a husband against his wife, the wife's alleged paramour was called as co-defender. The husband founded on a written confession by the wife admitting that she had misconducted herself with the co-defender, and averred:—"In consequence of the information elicited by the pursuer from the defender, the pursuer has made inquiries and has ascertained, and now avers, that" upon certain dates "the defender misconducted herself with the co-defender, and that the co-defender is the father of the child which was born to the defender." The Lord Ordinary granted decree of divorce against the wife, but assoilzied the co-defender with expenses. Thereafter the co-defender brought an action against the husband for reparation for the slander contained in the statements in the divorce action. He averred that these statements were made falsely, calumniously, and maliciously, and without probable or any cause. That no inquiries had been made by the husband or on his behalf relative to the co-defender's conduct, and that no evidence was attempted to be led at the trial against him. That the wife had been induced by the husband to write the alleged confession, and that the husband knew that the confession was untrue. *Held* that this being a case of judicial slander it was necessary for the pursuer to set forth facts and circumstances from which malice could be inferred, that the pursuer had failed to set forth facts from which it could be inferred that the defender's statements in his action of divorce, which were relevant, were made from a malicious motive, and therefore that the present action was irrelevant, and the defender was entitled to absolvitor. *M. v. H.*, July 11, 1908, p. 1130.

Negligence—Duty to Public—Responsibility of Town-Council—River adjoining Public Park—Duty to fence—Child.

16. A father brought an action against the Corporation of Glasgow for damages for the death of his infant son, who had been drowned in the River Kelvin while playing in one of the public parks adjoining the river. The pursuer averred that at the place the bank of the river, which was unfenced, was worn away; that the river was liable to sudden floods, during which its flow became swift and violent, and its depth increased from $1\frac{1}{2}$ to 4 feet; that the accident occurred during one of these floods; that the river was thus a danger to the public, and especially to children; that it was the duty of the defenders to have had it fenced; and that the accident was due to their negligence in failing to perform this duty. *Held* that there was no relevant averment of fault on the part of the defenders, and action dismissed. *Stevenson v. Corporation of Glasgow*, July 2, 1908, p. 1034.

Negligence—Duty to Public—Horses shying at motor-car left unattended—Breach of statutory provisions—Roads and Bridges (Scotland) Act, 1878, sec. 123, incorporating the General Turnpike Act, 1831, sec. 96.

17. The driver of a motor-car drew up his car at the side of the road, leaving ample room for traffic to pass, stopped the engine, and left the car there unattended, while he paid a visit of fifteen minutes to a house near by. While he was away the horses of a passing wagonette shied at the motor-car, and got out of control, and damage was done to the wagonette and to the horses. The owner of the wagonette having raised an action of damages against the owner of the motor-car, the Sheriff-substitute held that the driver of the car was in breach of section 96 of the General Turnpike Act, 1831, in leaving the car unattended, and that the accident had resulted therefrom, and awarded damages. In an appeal, the Court *assoilzied* the defender,

ATION—*Continued.*

the ground that the accident had not resulted from the car being left unattended, but through the shying of the horses and the inability of the driver to control them. *Macfarlane v. Colam*, Nov. 1, 1907, 56.

negligence—Railway—Injury to passenger—Failure of railway servants to close carriage doors before setting train in motion.

an action of damages for personal injuries brought against a railway company by a passenger who, after alighting from a train, had been knocked down by an open carriage door as the train was leaving the station, the pursuer averred that "the said accident to the pursuer was due to the fault and negligence of defenders' servants, for whom defenders are responsible. When said train was stopped at said platform there were no porters or officials on the platform to see that the doors of the carriages were closed before the train was restarted. It is the duty of the defenders, and is the invariable practice of railway companies, to close the doors of compartments before a train is allowed to leave the station, but this the defenders and their servants culpably and negligently failed to do on the occasion of this accident to pursuer. The defenders and their said servants were also negligent in respect that they set said train in motion without closing said door." He also averred that the defenders' servants were negligent in failing to have the lamps at the station lighted, and that the station was so dark that the pursuer could not see whether the doors were closed or not. Held that the pursuer had averred facts from which a jury might infer negligence. *Toal v. North British Railway Co.*, May 26, 1908, (H. L.) p. 29.

negligence—Railway—Injury to passenger—Crowd on Station Platform. A married woman with an infant in her arms was standing with her husband at Waverley Station, Edinburgh, on a Saturday evening in September, waiting for additional carriages to be added to a train which was to leave a quarter of an hour later. Before the carriages were in position, an orderly crowd of passengers collecting behind the woman and pressing forward on the arrival of the carriages, the woman was pushed off the platform upon the carriages and was injured. In an action for damages raised by the woman against the railway Company, in which the above facts were proved, *held* that the pursuer's injuries were not due to negligence on the part of the railway Company, and defenders *assolized*. *McCallum v. North British Railway Co.*, Jan. 14, 1908, p. 415.

measure of Damages—Solatium—Death of husband and father—Admission of liability—Relevancy of considering (1) sufferings of deceased, (2) grossness of negligence of defenders. In an action of damages against a railway company, at the instance of the widow and children of a passenger who had died from injuries received in a railway accident, the defenders admitted liability for the injuries of the deceased. The pursuers proposed an issue in ordinary form, whether the deceased had been injured "through the fault of the defenders, to the loss, injury, and damage of the pursuers." The defenders objected to this form of issue, and proposed that the issue should contain a recital of the admission of liability, with the sole question,—*"What is the amount of the loss, injury, and damage sustained by the pursuers?"* The Court, following the established practice in such cases, *approved* of the issue in ordinary form; but were of *opinion* that, in estimating the amount of damages, including *solatium*, due to the pursuers, the sufferings of the deceased could be a relevant consideration, but not the grossness of the fault of the defenders. *Black v. North British Railway Co.*, Jan. 18, 1908, p. 444.

observed (per the Lord President), that the English doctrine of

REPARATION—*Continued.*

"exemplary damages," which was founded on malice, could not apply to cases where the person sued is not the actual wrongdoer, but is only responsible on the ground of *respondeat superior*. *Black v. North British Railway Co.*, Jan. 18, 1908, p. 444.

See *Innkeeper—Lease*, 4.

RES JUDICATA. *Right to heritable office—Determination of Court of Claims as to right to perform services of office at Coronation.*

1. In 1901 the King, by commission under the Great Seal, appointed a body of commissioners "to receive, hear, and determine" the claims of persons claiming the right to perform services at the time of the Coronation. Claims to the office of Hereditary Standard Bearer of Scotland were put forward by the Earl of Lauderdale, and by Henry Scrymgeour Wedderburn, and by another person. The Court of Claims pronounced this deliverance:—"The Court considers that the right to the office . . . is vested in the family of Scrymgeour, and that the petitioner, Henry Scrymgeour Wedderburn, has established a *prima facie* title to represent that family: And the Court adjudges that the claim of the said petitioner . . . be allowed him to be exercised on the day of their Majesties' Coronation." The other claims were disallowed. Subsequently an action was raised in the Court of Session at the instance of the Earl of Lauderdale for declarator that he was entitled to the office. The action was defended by Henry Scrymgeour Wedderburn, who pleaded, *inter alia*, "*res judicata*" in respect of the decision of the Court of Claims. *Held* that the Court of Claims did not decide the legal right to the office in perpetuity, but only determined the person who was *prima facie* entitled to officiate at the Coronation, and plea of *res judicata* repelled. *Earl of Lauderdale v. Wedderburn*, July 18, 1908, p. 1237.

Competent and Omitted—Decree for Expenses in name of Agent-disburser—Objections not stated timeously.

2. A party to an action in the Sheriff Court who had allowed the agent of his opponent to obtain decree for expenses in his own name, *held* to be barred by the exception of competent and omitted from suspending a charge on the allegation (1) that the agent had not, at the time when the motion for expenses was made, paid his dues as law-agent, and (2) that *de facto* he was not the agent-disburser. *Rennie v. James*, Feb. 28, 1908, p. 681.

RESTRAINT OF TRADE. See *Company*, 3—*Contract*, 2.

REVENUE. *Income-Tax—Income—Foreign Possessions—Business carried on abroad by person resident in United Kingdom—Income-Tax Act, 1853, sec. 2, Schedule D—Income-Tax Act, 1842, sec. 100, Schedule D, Cases I. and V.*

1. O., a British subject resident in Aberdeen, was the sole partner of the firm of O. & Sons, carrying on business in Toronto, Canada. O. carried on the business by managers in Toronto, who were required to render to him a weekly statement of all the transactions. O. had the sole right to manage and to control every department, and was alone entitled to the profits, and alone liable for the debts. O. having been assessed for income-tax under Schedule D, Case I., upon the whole profits of his business in Canada, appealed, contending that the Canadian business being entirely conducted by the managers there without his interference it was to be regarded as a foreign possession liable to income-tax only on the profits received in this country under Case V. *Held* that the business was carried on by O. in the United Kingdom, and that he was liable to be assessed on the whole profits of the business under Case I. of Schedule D. *Ogilvie v. Inland Revenue*, June 17, 1908, p. 1003.

UE—Continued.

Income-Tax—Income—Deductions—Fire and Accident Insurance—Balance of Profit—Unexpired Risks.

In an appeal by an accident assurance corporation against an assessment for income-tax on profits, the First Division held, following Scottish Union and National Insurance Co. v. Inland Revenue, Feb. 8, 1889, 6 R. 461 and 474, and Imperial Fire Insurance Co. v. Wilson, 1876, 5 L. T. R. 271, that in ascertaining for income-tax purposes the annual profits of a company carrying on the business of fire, sickness, accident, and guarantee insurance, no deduction fell to be made in respect of estimated losses on risks unexpired at the end of the year. The Assurance Corporation having appealed to the House of Lords, held that the appellants had failed to shew that the rule adopted in these cases had operated inequitably in their case, and appeal dismissed. General Accident Assurance Corporation, Limited, v. M'Gowan, April 8, 1908, (H. L.) p. 24.

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T IN SECURITY. *Heritable Security—Bond and Disposition in Security—Personal Obligation—Transmission to heir—"Personal right"—"Taking estate by succession"—Conveyancing (Scotland) Act, 1874, secs. 9 and 47.*

Held that a person in whom a personal right to an estate in land has vested by survivorship, but who has not made up a title thereto, or entered into possession, has not "taken" such estate by succession within the meaning of sec. 47 of the Conveyancing Act, 1874, and is not liable to personal diligence for the debts of his predecessor secured by bond over the lands. Fenton Livingstone v. Crichton's Trustees, July 18, 1908, p. 1208.

Heritable Security—Bond and Disposition in Security—Confusio—Bond over Entailed Lands—Defective Entail—Acquisition of Bond by Heir of Entail in Possession.

*The heir in possession of certain lands under a deed of entail, which was defective in the irritant clauses, died in ignorance of this fact and without evacuating the destination. While in possession of the lands he acquired right to a bond over the lands by succession *ab intestato* to the creditor in the bond. Held that the bond was not extinguished *confusione* in the person of the heir, in respect that he possessed the lands and the bond under different destinations, and that this was not affected by the invalidity of the entail, as the tailzied destination had not been evacuated by him. Colville's Trustees v. Marindin, June 6, 1908, p. 911.*

*Heritable Security—Bond and Disposition in Security—Discharge—Confusio—Disposition *ex facie* absolute to Bondholder—Unrecorded back-letter.*

*The holder of a bond and disposition in security obtained from the debtor, in security of an additional loan, a disposition *ex facie* absolute which was recorded, and granted a back-letter which was not recorded. In a question between this bondholder and the holder of a postponed bond granted prior to the *ex facie* absolute disposition, held that the radical right remaining with the granter prevented the first bond from being extinguished *confusione* when the absolute disposition was granted. King v. Johnston, Feb. 28, 1908, p. 684.*

Heritable Security—Assignment in security of long lease—Action of Maills and Duties—Competency—Registration of Leases (Scotland) Act, 1857, secs. 6 and 20—Heritable Securities (Scotland) Act, 1847, sec. 2.

Held that as the Registration of Leases (Scotland) Act, 1857, in giving to the person in right of an assignment in security of a recorded

RIGHT IN SECURITY—Continued.

lease a right to enter on possession and uplift the rents, had provided a special procedure for his doing so, it by implication excluded any other mode of procedure, and that an action of mails and duties at his instance was incompetent. *Dunbar v. Gill*, July 4, 1908, p. 1054.

RIVER, LOCH, AND SEA. Pollution—Interdict—Title to Sue.

1. In an action for interdict at the instance of the tenant of a farm to prevent pollution of a stream which flowed through his lands, and at which his cattle were watered, against the proprietors of houses (let to tenants) on the upper part of the stream, *held* that, as the pursuer was the assignee of the landlord's title, in so far as it was necessary for his own protection in the subjects let, he had the same right as the landlord to maintain the purity of the stream, and accordingly that he had a good title to pursue the action. *Fleming v. Gemmill*, Dec. 20, 1907, p. 340.

Pollution—Responsibility of Landlord for Pollution by Tenant.

2. The proprietors of a block of workmen's cottages erected for the use of their tenants earth closets, and made drains, which were only intended to receive water from wash-houses and sinks, but which were used by the occupants of the houses as a receptacle for sewage, with the result that a stream which flowed through an adjoining farm, and into which the drains discharged, was polluted, and injury was caused to the cattle which watered at the stream. In defence to an action of interdict and damages directed against the proprietors of the houses, the defenders pleaded that they had provided an effective drainage system, and were not responsible for pollution due to an improper use thereof by their tenants. The Court *held* that the improper use of the drains might have been anticipated, and that, as the proprietors had made the drains in such a way that pollution was a probable result, they were responsible therefor; but continued the cause that the defenders might submit a scheme to avoid pollution. *Fleming v. Gemmill*, Dec. 20, 1907, p. 340.

Pollution—Plurality of Defenders—Joint and Several Liability.

3. In an action of damages against several defenders for loss caused by the pollution of a stream, *held* that, as each of the defenders had contributed materially to the pollution, they were liable jointly and severally for the whole amount of the damage which ensued. *Fleming v. Gemmill*, Dec. 20, 1907, p. 340.

See *Fishing*, 1, 2.

ROAD. Road Authority—Motor-car—Road in Burgh maintained by County—Title to apply for Speed Limit—Motor-Car Act, 1903, secs. 9 and 18—Roads and Bridges (Scotland) Act, 1878, sec. 47.

The burgh of Dunbar, under sec. 47 of the Roads and Bridges (Scotland) Act, 1878, devolved the "management and maintenance" of a road within the burgh upon the County Council of Haddington. The County Council, as being the Road Authority, thereafter applied for and obtained a Regulation made by the Secretary for Scotland, under secs. 9 and 18 of the Motor-Car Act, 1903, restricting the speed of motor-cars on this road to ten miles an hour. The driver of a motor-car having been convicted of a contravention of the Regulation, brought a suspension pleading that the Regulation was *ultra vires*, in respect that the County Council were not the Local Authority entitled to apply for the Regulation. The Court *refused* the suspension, *per* Lord McLaren and Lord Pearson, on the ground that the Regulation was not *ultra vires*, and, *per* Lord Kinnear, on the ground that even if the Regulation was *ultra vires* the burgh of

-Continued.

unbar was alone entitled to take the objection. *Stewart v. Todck*, Dec. 4, 1907, (J.) p. 8.

Railway, 1-3—Reparation, 17.

Sale of Moveables—Constitution and Validity—No consensus in them—Identity of Purchaser—Question with innocent third party.

Telford falsely represented to Morrison that he was the son of Wilson, a dairyman, and had authority from him to purchase two cows. Morrison, who knew Wilson to be a dairyman and in good credit, was deceived by the representation, agreed to sell the cows on the usual credit, and delivered them to Telford, who never paid the price. Hereafter Robertson purchased the cows from Telford in good faith and without knowing that they had been improperly obtained, and paid the price demanded by Telford. In an action by Morrison against Robertson for delivery of the cows, *held* (1) that the cows were never sold to Telford, and (2) that the purchaser from him had no title to retain them. *Morrison v. Robertson*, Dec. 19, 1907, p. 332.

Sale of Moveables—Subject—Implied condition as to fitness—Reliance on seller's Skill and Judgment—Sale of Goods Act, 1893, sec. 14 (1)—Application of sec. 14 (1) to non-manufactured goods.

Jeffrey, a salesman for Crichton & Stevenson, coalmasters, having asked Honeyman, a shipbroker, for an order, Honeyman told him that he had a ship coming in for which he would require bunker coal, and that he had been using Auchlochan unscreened coal. Jeffrey told him that his firm could supply Slamannan coal from Strathaven Colliery, unscreened, which he thought would suit if Auchlochan suited. Honeyman expressed his willingness to give an order, but said that the order must be given through Love, a coal merchant with whom he dealt. Honeyman communicated this conversation to Love, and at a subsequent meeting between Love and Jeffrey the latter received an order for Strathaven coal, and was told the name of the ship for which it was intended, both parties knowing that the order had reference to the coal which Honeyman had agreed to take. The coal when delivered proved quite unfit for the purpose of bunkering the ship, and was rejected. In an action by Crichton & Stevenson against Love, for the price of the coal, *held* (1) that the conversation between Jeffrey and Honeyman was in the mind of both parties when the order was given, and formed part of the transaction, (2) that considering the transaction thus, the buyer had made known to the seller the particular purpose for which the coal was required, and had relied on the seller's skill and judgment in the matter, (3) that the warranty as to fitness thereby implied had not been fulfilled, and that the buyer was not liable for the price of the coal. *Crichton & Stevenson v. Love*, March 19, 1908, p. 818.

Sale of Moveables—Subject—Disconformity to Contract—Sale by Sample—Rejection—Partial Rejection—"Goods of a different description"—Invalid partial rejection no bar to claim of damages—Sale of Goods Act, 1893, secs. 11 (2) and 30 (3).

A buyer of "maroon twills," under a sale by sample, having discovered that part of the goods was not conform to sample in quality intimated rejection of this part of the goods, and returned them to the seller, who refused to take them back and sent them again to the buyer. *Held* (1) that the defective goods being goods of the kind bought, although inferior to sample in quality, were not "goods of a different description" in the sense of sec. 30 (3) of the Sale of Goods Act, 1893, and that the buyer was not entitled to reject the defective part of the goods and retain the rest; but (2) that as the seller was not prejudiced

SALE—Continued.

by the attempted partial rejection, the buyer was not barred thereby from claiming damages for breach of the contract. *Aitken, Campbell, & Co., Limited, v. Boullen & Gatenby*, Jan. 24, 1908, p. 490.

Sale of Moveables—Transference of property—Ship—Property in ship in course of construction—Sale of Goods Act, 1893.

4. A shipbuilder contracted to build a ship for an Italian firm of ship-owners. The purchase price was to be paid by instalments at certain stages of the construction. The contract bore that the vessel should not be considered as delivered and finally accepted by the firm until it had passed a certain trial trip. When the ship was completed, and the greater part of the purchase price had been paid, but before the trial trip, the ship was arrested in the hands of the shipbuilder for a debt alleged to be due by the Italian firm to the arresters. In a petition by the shipbuilder the First Division recalled the arrestments, on the ground that the property in the ship had not passed to the Italian firm. In an appeal, held that, under the Sale of Goods Act, 1893, the passing of the property depended on the intention of the parties as expressed in the contract, and, on a construction of the contract, that it was not the intention of the parties here that the property in the ship should pass until it was finally handed over to the shipowners, and appeal dismissed. *Sir James Laing & Sons, Limited, v. Barclay, Curle, & Co., Limited*, Nov. 25, 1907, (H. L.) p. 1.

Sale of Heritage—Assignment of Rents—Legal and Conventional Terms—Pastoral Farms—Titles to Land Consolidation (Scotland) Act, 1868, sec. 8.

5. A disposition of an estate, with entry at 2d February 1905, contained a clause of assignation of rents in the statutory form. The farms on the estate were pastoral, and were let on leases of which the term of entry was Whitsunday, and under which the legal terms of payment of rent were conventionally postponed till the following term. In an action by the seller against the purchaser, who had uplifted the rents legally payable at Whitsunday 1905 and conventionally payable at Martinmas 1905, the pursuer maintained that in the case of leases of pastoral farms with entry at Whitsunday (when the first half year's rent became legally due) the rents legally due at each term were really due for the possession during the half year preceding the legal term of payment, and consequently that the rents legally due at Whitsunday 1905, being due for the possession during the half year ending Whitsunday 1905, were not "rents to become due for the possession following the term of entry" of the defender within the meaning of sec. 8 of the Titles to Land Consolidation (Scotland) Act, 1868. Held that the rents legally payable at Whitsunday 1905 were for the possession subsequent to Whitsunday 1905, and so were carried to the defender by the clause of assignation of rents. *Wigan v. Cripps*, Jan. 10, 1908, p. 394.

Sale of Heritage—Assignment of Rents—Minute of Sale providing for apportionment of rents—Disposition containing statutory clause of assignation of rents—Whether disposition superseded minute.

6. The proprietor of an estate consisting of pastoral farms let under leases of which the term of entry was Whitsunday, and under which the legal terms of payment of rent were conventionally postponed until the following term, agreed by minute of sale to sell the estate with entry at 2d February 1905. The minute of sale contained, *inter alia*, this clause:—"The rents, rates, and taxes for the possession of said lands for the half year from Martinmas 1904 to Whitsunday 1905 shall be apportioned between" the seller and the purchaser. The disposition in favour of the purchaser following on the minute contained a clause of assignation of rents in the statutory form. In an

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action by the seller against the purchaser, who had uplifted the rents legally payable at Martinmas 1904 and conventionally payable at Whitsunday 1905, the pursuer maintained that the minute of sale was superseded by the disposition, and consequently that the clause in the minute apportioning the rents was no longer effectual. *Held* that the rents legally due at Martinmas 1904 and conventionally payable at Whitsunday 1905 vested at Martinmas 1904 in the pursuer; and therefore that the clause in the minute providing for the apportionment of rents constituted a contract for payment of money by the pursuer to the defender which was not affected by the disposition of the lands. *Wigan v. Cripps*, Jan. 10, 1908, p. 394.

AGE. See *Ship*, 18, 19.

OL. *Powers, Rights, and Duties of School Board—Duty to provide education—Title to compel fulfilment—Education (Scotland) Act, 1872, sec. 1—Education (Scotland) Act, 1901, sec. 1.*

The Education (Scotland) Acts confer no right upon a child to compel a school board to provide him with education. *Sinclair v. Moulin School Board*, March 17, 1908, p. 772.

Observed that the only person entitled to bring an action against a school board to compel them to provide a child with education is the parent (as defined by the Education (Scotland) Act, 1872, sec. 1). *Sinclair v. Moulin School Board*, March 17, 1908, p. 772.

Powers, Rights, and Duties of School Board—Duty to provide education—Defective Children—Education of Defective Children (Scotland) Act, 1906, secs. 1 and 2.

Opinions (1) that the school board, subject to the Education Department, are the proper judges of the question whether a child is defective, and that the Court will not inquire into the correctness of their decision, except upon relevant averments of *mala fides*, oppression, or the like; (2) that a school board were entitled both to refuse to receive a child into the ordinary school as being "defective," and also at the same time to refuse to make any special provision for its education elsewhere. *Sinclair v. Moulin School Board*, March 17, 1908, p. 772.

ISTRATION. See *Bankruptcy*, 4-6.

RIFF. *Jurisdiction—Administrative or Judicial—Petition to designate land for burial ground—Burial Grounds (Scotland) Act, 1855.*

Held that proceedings under a petition to designate certain lands as a burial ground, in terms of the Burial Grounds (Scotland) Act, 1855, were administrative and not judicial. *Liddall v. Ballingry Parish Council*, July 4, 1908, p. 1082.

Jurisdiction—Jurisdiction of Sheriff to review Sheriff-substitute—Burial Grounds (Scotland) Act, 1855, secs. 9, 10, 32.

In a petition, under the Burial Grounds Act, 1855, for the designation of a burial ground, a decision of the Sheriff-substitute cannot competently be appealed to the Sheriff. *Strichen Parish Council v. Goodwillie*, May 20, 1908, p. 835.

Jurisdiction—Sheriff-substitute as arbitrator under Workmen's Compensation Act—Incidental Question—Workmen's Compensation Act, 1906, secs. 1 (3), 13, First Sched. (8).

Held that the Sheriff-substitute, acting as arbitrator under the Workmen's Compensation Act, 1906, in determining the question whether the claimant was a dependant, had jurisdiction, and was bound, to decide any incidental question as to his or her relationship to the deceased. *Johnstone v. Spencer & Co.*, June 18, 1908, p. 1015.

SHERIFF—Continued.

Small-Debt Court—Review—Decree in absence or in foro by default—Litiscontestation—Small-Debt (Scotland) Act, 1837, sec. 16.

4. In a Sheriff Court small-debt case both parties appeared at the first diet, when, after a statement of the defence and some discussion thereon, the case was continued for proof. At the adjourned diet the defender failed to appear, and decree was pronounced against him. He thereafter applied for and obtained a sist under section 16 of the Small-Debt (Scotland) Act, 1837, and was ultimately assoilzied. The pursuer appealed upon the ground that the sist was incompetent, the decree having been a decree *in foro* after litiscontestation, and not a decree in absence. *Held* that the decree was a decree in absence, that the sist was consequently competent, and appeal *dismissed*. *Observations* on the use of the expression litiscontestation with regard to procedure in the Sheriff Small-Debt Court. *Ratcliffe v. Farquharson*, May 14, 1908, (J.) p. 71.

Small-Debt Court—Review—Competency—Deviation from statutory form—Counter Claim—Small-Debt (Scotland) Act, 1837, secs. 11, 31.

5. In a small-debt action for payment of £14 as house rent due under a written lease, the Sheriff, after a proof, gave decree for £5. The pursuer appealed. Appeal *sustained* on the ground of incompetency and deviation from statutory form, in respect that as the decree was for a sum which had no relation to what was sued for, it was incompetent; or, otherwise, that if, as explained by the defender, the Sheriff had deducted from the sum sued for a sum in name of damages for breach of contract on the part of the landlord in failing to do his best to re-let the house, such a claim was a counter claim, of which the defender was bound to give notice, as required by section 11 of the Small-Debt Act, 1837, and that, as he had failed to do so, the Sheriff was not entitled to consider it. *Mair's Trustees v. Miller*, May 8, 1908, (J.) p. 74.

See *Bankruptcy*, 4-6—*Diligence—Expenses*, 1, 3, 4, 5, 12

SHIP.

1. *Transference of property—Property in ship in course of construction—Sale of Goods Act, 1893. Sir James Laing & Sons, Limited, v. Barclay, Curle, & Co., Limited*, Nov. 25, 1907, (H. L.) p. 1.

Maritime Lien—Lex loci or lex fori—Expenditure on British ship in foreign port.

2. In a process in Scotland for the judicial sale of a British ship, then lying in a Scottish port, warrant for sale was granted, and the ship was sold. A claim for a preferential ranking on the purchase price was lodged in the process by a New York firm, who alleged that by American law they had a good lien over the ship for certain expenditure incurred by them on her account while she was lying at New York. *Held* that the question whether any claimants in this process had a lien over the ship fell to be determined by Scots law, and not by American law. *Clark v. Bowring & Co.*, July 16, 1908, p. 1168.

Maritime Lien—Seamen's wages—Payment by third party—Acquisition of lien by third party—Acquisition without written assignation—Payments not made on credit of the ship.

3. The owners of a British ship, which was in need of repairs, requested a firm of shipbrokers in New York to give assistance to the ship on her arrival at New York. On the arrival of the ship the firm of shipbrokers expended a considerable sum on repairs and necessaries and also paid the seamen's wages. These payments were put together in a lump sum, and the owners accepted a bill for the amount, but the bill was not met at maturity. The owners having become bankrupt, the ship, which was then in Scotland, was sold by warrant of the Court. The New York firm claimed a preferential ranking on

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he purchase price in respect of their disbursements for seamen's wages, on the ground that the lien for seamen's wages had transmitted to them. *Held* (1) that a lien for seamen's wages transmits to the payer without a formal assignation if the payment is made on the credit of the ship; but (2) that, in the circumstances of this case, the payments had been made on the credit of the owners and not of the ship, and that consequently the payer had acquired no lien. *Clark v. Bowring & Co.*, July 16, 1908, p. 1168.

Seaman—Carriage of contraband of war—Refusal of seamen to proceed to belligerent port—Discharge of seaman by master—Wages—Damages—“Final Settlement”—Merchant Shipping Act, 1894, secs. 134 and 186.

In 1905, when Russia and Japan were at war, British seamen signed articles to serve on board a British ship for a voyage from Cardiff to Hong-Kong, and, if required, to any port or ports within certain limits of latitude specified. At Cardiff the ship took on board a cargo of coal. Coal had been notified by both belligerents as contraband of war. On arrival at the signal station, about eight hours' steaming from Hong-Kong, the master received orders to proceed to Nagasaki in Japan—a port within the limits specified in the articles. The crew refused to work the vessel to Nagasaki, but were not ordered and did not refuse to work her to Hong-Kong. She was worked to Hong-Kong by the officers alone. At Hong-Kong the members of the crew were each sentenced, at the instance of the master, to three weeks' imprisonment with hard labour, for refusal to obey the lawful orders of the master. In an action by one of the crew against the owners of the vessel for wages at the stipulated rate from the date of the articles down to “the time of final settlement” within the meaning of section 134 of the Merchant Shipping Act, 1894, and also for damages, *held* (1) that the pursuer, having been engaged for an ordinary commercial voyage, was not bound to incur the risks involved in serving on board a vessel carrying contraband of war to a port of one of the belligerents, and was therefore justified in disobeying the order of the master to proceed to Nagasaki; (2) that, the delay in paying the wages being due solely to the wrongful act or default of the master, the pursuer was entitled to wages at the stipulated rate down to “the time of final settlement,” and that “the time of final settlement” was the date of the interlocutor of the Court; and (3) that the pursuer was entitled to a sum in name of damages. *Lang v. St Enoch Shipping Co., Limited*, Nov. 12, 1907, p. 103.

Seaman—Fishing Vessel—Remuneration by share in profits or gross earnings—Workmen's Compensation Act, 1906, sec. 7 (2).

The sole remuneration of the mate or first fisherman of a steam-trawler while at sea was one and one-eighth share (each share being one-fourteenth) of the net balance of the gross price of the fish caught on a trip after deducting certain specified expenses, which did not include the wages of other members of the crew who were paid by fixed wages. *Held* that such remuneration was a share in the profits or the gross earnings of the vessel, and that the fisherman so paid fell under the exception contained in sec. 7 (2) of the Workmen's Compensation Act, 1906, and was consequently precluded from claiming compensation under that Act. *Gill v. Aberdeen Steam Trawling and Fishing Co., Limited*, Dec. 14, 1907, p. 328.

Collision—Fog—Duty of stopping—Foreign Vessel—Regulations for Preventing Collisions at Sea, 1897, Art. 16—Merchant Shipping Act, 1897, sec. 419, subsec. (4).

About noon on 10th February 1907 a collision took place off the coast of Norfolk in a dense fog between the British steamer “James Joicey” proceeding south to London, and the Austrian steamer

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"Kostrena," proceeding north to Methil. In cross actions of damages the following facts were held to be proved:—The vessels were proceeding on nearly parallel courses. The "Kostrena" heard a fog-signal from the "James Joicey" but did not stop as required by Art. 16 of the Regulations for Preventing Collisions at Sea, 1897. Believing that she had the "James Joicey" on her port bow, whereas in point of fact the "James Joicey" was on her starboard bow, the "Kostrena" on approaching the "James Joicey," ported her helm with the result that she went to starboard and collided with the "James Joicey." Austria had adopted the Regulations for the Prevention of Collisions at Sea, but had not adopted the collision sections of the Merchant Shipping Act; and the "Kostrena" therefore maintained that the statutory presumption of fault enacted by sec. 419, subsec. (4), of the Act did not apply to her. *Held* (1) that whether sec. 419, subsec. (4), applied to the "Kostrena" or not, it was essentially bad seamanship for a steam vessel on hearing the fog-signal of another vessel not to stop in order to ascertain the position of the signalling vessel when she next sounded; and (2) that the collision was due to the fault of the "Kostrena," she not having stopped, and having in consequence failed to ascertain the position of the "James Joicey," with the result that the "Kostrena" executed the manœuvre which brought about the collision. The "James Joicey" v. The "Kostrena," Nov. 27, 1907, p. 295.

Collision—Fog—Vessel "not under command"—"Moderate speed"—Regulations for Preventing Collisions at Sea, 1897, Arts. 15 and 16.

7. The steamer "James Joicey" through a collision with the steamer "Syria," in a dense fog, had her stem cut away from a little above the water line upwards, with the result that her forward compartment soon filled, but her engines and steering-gear were uninjured, and she was able to proceed and to manœuvre slowly, but she could not go at full speed. She hoisted the signals for a vessel "not under command," but she sounded the ordinary fog-signals and not those required by Art. 15 of the Regulations for a vessel not under command. Some hours afterwards, the fog still continuing, she came into collision with the steamer "Kostrena." In cross actions of damages the "Kostrena" pleaded that the "James Joicey" being a vessel not under command, was in fault in not sounding the signals required by Art. 15. It appeared that the "Kostrena" did not stop, on hearing an ordinary fog-signal from the "James Joicey," in order to ascertain the position of the "James Joicey" when she sounded again, and that this failure to stop was the cause of the collision. *Held* that as the "James Joicey" was not going at other than a "moderate" speed, in terms of Art. 16, and as when going at a moderate speed she was under command, she could not in the circumstances be described as a vessel not under command, and therefore that she was not in fault in not giving the signals required by Art. 15; and further, that in any view her failure to give these signals did not contribute to the collision, which was due to the "Kostrena" not having stopped on hearing the ordinary fog-signal from the "James Joicey." The "James Joicey" v. The "Kostrena," Nov. 27, 1907, p. 295.

Collision—Fog—"Moderate speed"—Regulations for Preventing Collisions at Sea, 1897, Art. 16.

8. The "Kostrena" was going at a speed through the water of about 3 knots an hour, but as the tide, which was with her, was running at about $2\frac{1}{2}$ knots an hour, her speed over the ground was about $5\frac{1}{2}$ knots an hour. *Held* by Lord Salvesen, Ordinary, that her progress over the ground was to be taken as the measure of her speed, and

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at $5\frac{1}{2}$ knots was not a "moderate" rate within the meaning of Art. 5 of the Regulations for Preventing Collisions at Sea, 1897. *The James Joicey* v. *The "Kostrena,"* Nov. 27, 1907, p. 295.

Collision—Compulsory Pilotage—Merchant Shipping Act, 1894, sec. 604 (1).

The steamship "Eildon" on a voyage from Leith to Dunkirk called at Middlesborough to complete her cargo. She carried a number of passengers, who were all booked for the voyage from Leith to Dunkirk. On arrival at Middlesborough the "Eildon" loaded cargo at ochrane's Wharf and then proceeded up the Tees to Dent's Wharf, both within the port of Middlesborough, in charge of a licensed pilot, to take in further cargo. While in the river off Dent's Wharf she collided with the lighter "Hebe" and her tug the "Thames." In an action of damages brought by the owners of the "Hebe" and of the "Thames" against the owners of the "Eildon," the defence was that the "Eildon" was carrying passengers between Leith and Middlesborough, and that when the collision occurred she was within a pilotage district and was compelled by the Merchant Shipping Act, 1894, sec. 604 (1), to employ a licensed pilot, and that, having done so, she was not responsible. The pursuers contended that as the only passengers on board the "Eildon" were booked for the voyage from Leith to Dunkirk, the section did not apply. The Court *repelled* the defenders' plea of compulsory pilotage. *Watson v. Gibson & Co.,* July 7, 1908, p. 1092.

Collision—Limitation of Liability—Competitive claims on limited fund—Expenses of competition—Merchant Shipping Act, 1894, secs. 503 and 504.

In a petition at the instance of shipowners for limitation of liability under secs. 503 and 504 of the Merchant Shipping Act, 1894, observed (*per* the Lord President),—"Where no question is raised as to the right of petitioners to have their liability limited, and where the ship, as it were, tables its stake, then such expenses as are given against the petitioners over and above the limited fund must be restricted to the expenses of lodging the claims and taking decree, and not extended to any expenses incurred in the competition between the claimants. *Kennedys v. Clyde Shipping Co., Limited,* June 5, 1908, p. 895.

Freightment—Charter-Party—Time Charter—Warranty of Seaworthiness—Separate Voyages.

Under a time charter-party a steamer was hired by the owners to the charterers for a period of six months from September 1905, "she being then tight, staunch, and strong, and every way fitted for the service," the owners being bound to "provide and pay for the necessary equipment for the proper and efficient working of the said steamer, maintaining her in a thoroughly efficient state for and during the service." On 28th November 1905 a breakdown of machinery occurred while the vessel was on a voyage from Jaffa to Valencia, necessitating her going to a port for repairs. This breakdown was due to defects which were in existence before the vessel left Jaffa on 20th November. *Held* that the owners' obligation at common law and under the charter-party was to hand over the vessel in a seaworthy condition at the commencement of the hiring, and to maintain her in that condition by defraying whatever expenses were necessary for repairs; but that there was no warranty, either express or implied, that she should be seaworthy at the commencement of each particular voyage or stage of a voyage during the currency of the charter, so as to entitle the charterers, on the ground of breach of implied warranty, to refuse payment of the hire for the voyage

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between Jaffa and the place where the breakdown was remedied. *Giertsen v. Turnbull & Co.*, July 9, 1908, p. 1101.

Affreightment—Charter-Party—Breakdown—Date of Commencement.

12. A time charter-party provided "that in the event of loss of time from . . . breakdown of machinery . . . the payment of hire shall cease from the time the breakdown occurred until "the vessel "be again in an efficient state to resume her service." In the course of a voyage the vessel left a port with defects in her machinery which at first did not impede her progress, but which gradually became more serious, and ultimately necessitated her going to a harbour for repairs. *Held* that the breakdown occurred at the point of time when the defects became so serious as to render it necessary, in the opinion of a prudent navigator, that she should proceed to a harbour for repairs. *Giertsen v. Turnbull & Co.*, July 9, 1908, p. 1101.

Affreightment—Charter-Party—Breakdown—Off Hire—Liability for coals consumed during off hire.

13. A clause in a time charter-party provided that the charterers of the vessel should pay for the coals used during the currency of the charter. The charter-party expressly provided that the payment of hire should cease during breakdowns. *Held* that the charterers were bound to pay for the coals used during periods of breakdown. *Giertsen v. Turnbull & Co.*, July 9, 1908, p. 1101.

Affreightment—Unloading of vessel—As fast as steamer can deliver—Charges necessary for quick dispatch—Liability of consignee.

14. A bill of lading for sugar shipped from the West Indies to Greenock contained this provision:—"The goods to be received by the consignee from the ship's tackles as fast as the steamer can deliver, any custom of the port to the contrary notwithstanding, and all charges incurred after being discharged necessary for the steamer's quick dispatch to be paid by the owner or consignee of the goods." *Held* that under this condition the ship was entitled to put the cargo out on to the quay as fast as she could; that the consignees, provided they had fair notice of the intended rate of discharge, were bound, whatever might be the custom of the port as to taking delivery, to make arrangements for having the cargo removed as fast as it was put out; and that if they had failed to do so, and so caused a block on the quay, which interrupted the discharge, the ship was entitled to employ men to clear the block, and to recover the expense of doing so from the consignees. *Crown S.S. Co., Limited, v. Leitch*, Jan. 31, 1908, p. 506.

Affreightment—Lay-days—Commencement—"Time for discharging to commence on being reported at custom-house"—Ship reported before being berthed.

15. By a charter-party it was provided that a vessel, after loading a cargo at Middlesborough, "should proceed to Savona or Genoa as ordered, . . . and there deliver the same, . . . time for discharging to commence on being reported at the custom-house." The vessel having been ordered to Savona, anchored in the roads there on a Tuesday morning, and was reported at the custom-house at 3 P.M. on that day, but had to wait until a later date before she could get into the harbour, and until a still later date before she got into the berth where she discharged her cargo. In an action for demurrage it was admitted that the roads were outside the geographical limits of the port of Savona and of what was known commercially as the port, and were the ordinary place at which vessels lay until there should be room in the harbour, where alone discharging could be effected. The pursuers averred "that according to the custom of the port, vessels on arrival in the roads are reported at the custom-house, and

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allotted berths in the harbour according to the order of reporting." *Held* that, assuming the pursuers' averment to be accurate, the time which under the charter-party the lay-days began was 3 P.M. on Tuesday, the hour of reporting at the custom-house, although the vessel had not then arrived at a place in the harbour where she could discharge. *Horsley Line, Limited, v. Roechling Brothers, May 1, 1908, p. 866.*

Eightment—Lay-days—Demurrage—Computation—Whole days or fractions.

charter-party provided "cargo to be received at the port of discharge at the rate of 400 tons per weather working day . . . demurrage at the rate of £25 per running day." The cargo was 350 tons. *Held* (1) that the charterers were only entitled to lay-days amounting to seven days and three hours (the time actually required for unloading the cargo at the specified rate) and not, as they contended, to eight complete days; (2) that the vessel having been on demurrage for a period of six days and one and a half hours of a seventh day, the owners were only entitled to demurrage for six days and one and a half hours, and not, as they contended, for seven complete days. *Horsley Line, Limited, v. Roechling Brothers, May 29, 1908, p. 866.*

Eightment—Lay-days—Demurrage—Exception—Hands striking work—Regulations of Co-operative Societies of Labour.

Under a charter-party, dated January 1907, the charterers were bound to discharge cargo at a certain rate per day, "except in cases of riot, or any hands striking work." For a certain period after her arrival in the port of discharge, the ship lay stern on to a quay until a berth became available at which she could lie broadside on. No cargo was discharged during this period, owing to a declaration of the presidents of the two co-operative societies of labour at the port that steamers were not to be discharged while moored end on to a quay. This declaration was published in November 1906, and was widely known and regularly acted upon. *Held* that this delay did not fall within the exception, and that the time during which the ship lay stern on to the quay must be counted in reckoning lay-days and demurrage. *Horsley Line, Limited, v. Roechling Brothers, May 29, 1908, p. 866.*

Salvage—Services rendered under contract.

Services rendered by one vessel to another in distress are not "salvage" services unless voluntarily rendered. *The Clan Steam Trawling Co., Limited, v. Aberdeen Steam Trawling and Fishing Co., Limited, Feb. 25, 1908, p. 651.*

One vessel assisted another in distress. Both vessels were insured in the same mutual insurance company, under policies which contained a condition that any vessel insured in the company should if necessary render assistance to any other vessel insured in the same company. *Held* that the services rendered, being contractual and obligatory, were not "salvage" services entitling the owners of the vessel rendering them to "salvage" remuneration. *The Clan Steam Trawling Co., Limited, v. Aberdeen Steam Trawling and Fishing Co., Limited, Feb. 25, 1908, p. 651.*

See Fishing, 3.

UNDER. *See Reparation, 3-6, 13-15.*

MP. *Conveyance on Sale—Stamp Act, 1891, secs. 14, 54, and 59.*

On 13th June 1904 M. verbally agreed to sell an ice-cream business to F. for £150, and F. thereupon entered into possession of the shop and business. M. having begun another ice-cream business in ~~the~~

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same town, F. brought an action against M. for decree for £150. The pursuer averred that the defender had as part of the agreement undertaken not to compete with the pursuer in business in the town, under a penalty of £150. The pursuer produced a document, dated 26th August 1904, signed by the parties, which the pursuer alleged set forth the terms of the agreement. This document bore a sixpenny agreement stamp. The defender pleaded that the document being a conveyance on sale within the meaning of sec. 54 of the Stamp Act, 1891, required an *ad valorem* stamp. *Held* that, having regard to the fact that there was a prior verbal agreement to sell followed by possession, the document was not so clearly a conveyance on sale as to make it the duty of the Court, under sec. 14 of the Stamp Act, 1891, to require the document to be stamped with an *ad valorem* stamp before allowing it to be admitted in evidence. *Don Francesco v. De Meo*, Oct. 18, 1907, p. 7.

Conveyance on Sale—Property purchased under compulsory powers—Necessity of producing stamped conveyance—Finance Act, 1895, sec. 12.

2. *Held* that the provisions of sec. 12 (b) of the Finance Act, 1895, were not limited to the case of a statutory confirmation of a provisional agreement to purchase, but applied to a purchase of property by a railway company in pursuance of compulsory powers contained in a special Act of the company. *Lord Advocate v. Caledonian Railway Co.*, Feb. 19, 1908, p. 566.
3. *Held* that a conveyance which had been produced at the collector's office in order to be provisionally marked with the duty payable, and had thereafter been stamped with that duty, had not been "produced to the Commissioners of Inland Revenue duly stamped" in the sense of sec. 12 of the Finance Act, 1895. *Lord Advocate v. Caledonian Railway Co.*, Feb. 19, 1908, p. 566.
4. *Held* that the date of the "completion of the purchase" in the sense of sec. 12 of the Finance Act, 1895, was the date of the final payment of the price. *Lord Advocate v. Caledonian Railway Co.*, Feb. 19, 1908, p. 566.

STATUTE. *Statutory Order—Competency of challenging validity of order in Summary Proceeding—Motor-Car Act, 1903, secs. 9 and 18.*

1. *Question* whether it was competent in a summary proceeding for recovery of penalties, or in the High Court when reviewing such a proceeding, to challenge the validity of a regulation made by the Secretary for Scotland under sec. 18 (3) of the Motor-Car Act, 1903. *Stewart v. Todrick*, Dec. 4, 1907, (J.) p. 8.

Acts 1579, c. 70, 1661, c. 18, and 1690, c. 5—Sunday Labour.

2. *Question* whether these Acts are in desuetude. *Middleton v. Tough*, March 10, 1908, (J.) p. 32.
See *Lease*, 8—*Police*, 5.

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- 1573, cap. 55, p. 1263.
- 1579, cap. 70, (J.) p. 32.
- 1661, cap. 18, (J.) p. 32.
- 1681, cap. 5, p. 964.
- 1690, cap. 5, (J.) p. 32.
- 2 Geo. III. cap. 19 (*Game (England) Act*, 1761), p. 60.
- 36 Geo. III. cap. 54 (*Game Act*, 1796), p. 63.
- 39 Geo. III. cap. 34 (*Partridges Act*, 1799), p. 60.
- 39 and 40 Geo. III. cap. 98 (*Thellusson Act*), p. 3.
- 48 Geo. III. cap. 151 (*Court of Session Act*, 1808), p. 1001.
- 3 Geo. IV. cap. 91 (*Royal Burghs (Scotland) Act*, 1822), p. 207.
- 4 Geo. IV. cap. 60 (*Lotteries Act*, 1823), (J.) p. 46.

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- 6 *Geo. IV. cap. 120 (Judicature Act, 1825)*, pp. 844, 1001.
 1 and 2 *Will. IV. cap. 32 (The Game Act, 1831)*, p. 61.
 1 and 2 *Will. IV. cap. 43 (General Turnpike Act, 1831)*, p. 56.
 2 and 3 *Will. IV. cap. 65 (Representation of the People (Scotland) Act, 1832)*, pp. 119, 290.
 2 and 3 *Will. IV. cap. 88 (Representation of the People (Ireland) Act, 1832)*, p. 118.
 3 *Will. IV. cap. lxxiv. (Glasgow Faculty of Procurators Widows' Fund Act, 1833)*, (H. L.) p. 10.
 3 and 4 *Will. IV. cap. 76 (Royal Burghs (Scotland) Act, 1833)*, p. 207.
 5 and 6 *Will. IV. cap. 70 (Small-Debt (Scotland) Act, 1835)*, p. 474.
 1 *Vict. cap. 41 (Small-Debt (Scotland) Act, 1837)*, p. 315, and (J.) pp. 71, 74.
 1 and 2 *Vict. cap. 114 (Personal Diligence (Scotland) Act, 1838)*, pp. 318, 768.
 3 and 4 *Vict. cap. 74 (Oyster Fisheries (Scotland) Act, 1840)*, (J.) p. 1.
 5 and 6 *Vict. cap. 35 (Income-Tax Act, 1842)*, p. 1003.
 6 and 7 *Vict. cap. xcix. (Glasgow Police Act, 1843)*, (J.) p. 29.
 8 and 9 *Vict. cap. 33 (Railways Clauses Consolidation (Scotland) Act, 1845)*, p. 244, and (J.) p. 69.
 8 and 9 *Vict. cap. 83 (Poor-Law Amendment Act, 1845)*, p. 194.
 10 *Vict. cap. 27 (Harbours, Docks, and Piers Clauses Act, 1847)*, pp. 797, 946.
 10 and 11 *Vict. cap. 48 (Transference of Lands (Scotland) Act, 1847)*, p. 396.
 10 and 11 *Vict. cap. 50 (Heritable Securities (Scotland) Act, 1847)*, p. 1054.
 11 and 12 *Vict. cap. 36 (Entail Amendment Act, 1848)*, p. 459.
 16 and 17 *Vict. cap. 34 (Income-Tax Act, 1853)*, p. 1003.
 17 and 18 *Vict. cap. 31 (Railway and Canal Traffic Act, 1854)*, p. 1275.
 17 and 18 *Vict. cap. 91 (Valuation of Lands (Scotland) Act, 1854)*, pp. 596, 600, 601, 608, 613, 620.
 18 and 19 *Vict. cap. 68 (Burial Grounds (Scotland) Act, 1855)*, pp. 835, 1082.
 19 and 20 *Vict. cap. 58 (Registration of Voters (Scotland) Act, 1856)*, p. 1089.
 19 and 20 *Vict. cap. 60 (Mercantile Law Amendment Act, 1856)*, p. 85.
 19 and 20 *Vict. cap. 79 (Bankruptcy (Scotland) Act, 1856)*, pp. 476, 897, 959, 1192.
 20 and 21 *Vict. cap. 26 (Registration of Leases (Scotland) Act, 1857)*, p. 1054.
 20 and 21 *Vict. cap. 71 (Lunatics (Scotland) Act, 1857)*, pp. 733, 974.
 21 and 22 *Vict. cap. cxlix. (Clyde Navigation Consolidation Act, 1858)*, p. 621.
 24 and 25 *Vict. cap. 84 (Trusts (Scotland) Act, 1861)*, p. 196.
 24 and 25 *Vict. cap. 86 (Conjugal Rights Amendment (Scotland) Act, 1861)*, p. 184.
 25 and 26 *Vict. cap. 89 (Companies Act, 1862)*, pp. 38, 309, 385, 559.
 25 and 26 *Vict. cap. 101 (General Police and Improvement (Scotland) Act, 1862)*, p. 594.
 26 and 27 *Vict. cap. 41 (Innkeepers Liability Act, 1863)*, p. 218, and (H. L.) p. 31.
 26 and 27 *Vict. cap. 115 (Gratuitous Trustees (Scotland) Act, 1863)*, p. 198.
 27 and 28 *Vict. cap. 53 (Summary Procedure (Scotland) Act, 1864)*, (J.) pp. 1, 2, 5, 61, 83.
 28 and 29 *Vict. cap. clxvii. (Caledonian and General Terminus Railways Amalgamation Act, 1865)*, p. 16.

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- 29 and 30 Vict. cap. 112 (*Evidence (Scotland) Act*, 1866), p. 841.
 29 and 30 Vict. cap. cclxxiii. (*Glasgow Police Act*, 1866), p. 247, and (J.) p. 29.
 30 and 31 Vict. cap. 97 (*Trusts (Scotland) Act*, 1867), p. 196.
 30 and 31 Vict. cap. 101 (*Public Health (Scotland) Act*, 1867), p. 135.
 30 and 31 Vict. cap. 131 (*Companies Act*, 1867), pp. 123, 891.
 30 and 31 Vict. cap. 144 (*Policies of Assurance Act*, 1867), p. 35.
 31 and 32 Vict. cap. 45 (*Sea Fisheries Act*, 1868), (J.) p. 17.
 31 and 32 Vict. cap. 48 (*Representation of the People (Scotland) Act*, 1868), p. 113.
 31 and 32 Vict. cap. 84 (*Entail Amendment (Scotland) Act*, 1868), pp. 463, 1154.
 31 and 32 Vict. cap. 96 (*Ecclesiastical Buildings and Glebes (Scotland) Act*, 1868), p. 1089.
 31 and 32 Vict. cap. 100 (*Court of Session Act*, 1868), pp. 1017, 1237.
 31 and 32 Vict. cap. 101 (*Titles to Land Consolidation (Scotland) Act*, 1868), pp. 394, 426, 718, 916, 1178.
 31 and 32 Vict. cap. 123 (*Salmon Fisheries (Scotland) Act*, 1868), (J.) p. 32.
 34 and 35 Vict. cap. 31 (*Trade Union Act*, 1871), p. 669.
 34 and 35 Vict. cap. 112 (*Prevention of Crimes Act*, 1871), (J.) p. 52.
 35 and 36 Vict. cap. 62 (*Education (Scotland) Act*, 1872), pp. 118, 772.
 35 and 36 Vict. cap. cxiv. (*Caledonian Railway (Additional Powers) Act*, 1872), p. 244.
 36 and 37 Vict. cap. 63 (*Law-Agents (Scotland) Act*, 1873), p. 681.
 37 and 38 Vict. cap. 94 (*Conveyancing (Scotland) Act*, 1874), pp. 173, 915, 1208.
 38 Vict. cap. vi. (*Glasgow Faculty of Procurators Act*, 1875), (H. L.) p. 10.
 38 and 39 Vict. cap. 62 (*Summary Prosecutions Appeals (Scotland) Act*, 1875), (J.) p. 48.
 38 and 39 Vict. cap. 63 (*Sale of Food and Drugs Act*, 1875), (J.) pp. 40, 83.
 38 and 39 Vict. cap. clx. (*Leith Harbour and Docks Act*, 1875), p. 797.
 39 and 40 Vict. cap. 22 (*Trade Union Amendment Act*, 1876), p. 669.
 39 and 40 Vict. cap. 36 (*Customs Consolidation Act*, 1876), (J.) p. 20.
 39 and 40 Vict. cap. 70 (*Sheriff Courts (Scotland) Act*, 1876), p. 13.
 40 and 41 Vict. cap. 26 (*Companies Act*, 1877), p. 123.
 41 and 42 Vict. cap. 28 (*Entail Amendment (Scotland) Act*, 1878), pp. 633, 648.
 41 and 42 Vict. cap. 43 (*Marriage Notice (Scotland) Act*, 1878), p. 173.
 41 and 42 Vict. cap. 51 (*Roads and Bridges (Scotland) Act*, 1878), pp. 56, 1089, and (J.) p. 8.
 41 and 42 Vict. cap. 78 (*Education (Scotland) Act*, 1878), p. 65.
 42 and 43 Vict. cap. 30 (*Sale of Food and Drugs Act Amendment Act*, 1879), (J.) p. 83.
 42 and 43 Vict. cap. cxxiii. (*Glasgow Municipal Act*, 1879), p. 207.
 43 and 44 Vict. cap. 34 (*Debtors (Scotland) Act*, 1880), pp. 319, 474.
 43 and 44 Vict. cap. clxx. (*Greenock Harbour Act*, 1880), p. 944.
 44 and 45 Vict. cap. 12 (*Customs and Inland Revenue Act*, 1881), (J.) p. 20.
 44 and 45 Vict. cap. 21 (*Married Women's Property (Scotland) Act*, 1881), pp. 164, 1046.
 44 and 45 Vict. cap. 22 (*Bankruptcy and Cessio (Scotland) Act*, 1881), p. 853.
 44 and 45 Vict. cap. 24 (*Summary Jurisdiction (Scotland) Act*, 1881), (J.) pp. 1, 2, 5, 61.
 44 and 45 Vict. cap. 48 (*Universities Elections Amendment (Scotland) Act*, 1881), p. 113.

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- 45 and 46 Vict. cap. 61 (*Bills of Exchange Act*, 1882), pp. 20, 69, 675.
 46 and 47 Vict. cap. 22 (*Sea Fisheries Act*, 1883), (J.) p. 17.
 46 and 47 Vict. cap. 62 (*Agricultural Holdings (Scotland) Act*, 1883), p. 1060.
 46 and 47 Vict. cap. cxc. (*Clyde Navigation Act*, 1883), p. 622.
 47 and 48 Vict. cap. 63 (*Trusts (Scotland) Amendment Act*, 1884), p. 196.
 48 and 49 Vict. cap. 70 (*Sea Fisheries (Scotland) Amendment Act*, 1885), (J.) p. 17.
 49 and 50 Vict. cap. 27 (*Guardianship of Infants Act*, 1886), p. 737.
 50 and 51 Vict. cap. 28 (*Merchandise Marks Act*, 1887), p. 1163, and (J.) pp. 47, 90.
 50 and 51 Vict. cap. 35 (*Criminal Procedure (Scotland) Act*, 1887), (J.) pp. 1, 2, 5, 49, 52.
 50 and 51 Vict. cap. 58 (*Coal Mines Regulation Act*, 1887), p. 846.
 52 and 53 Vict. cap. 23 (*Herring Fishery (Scotland) Act*, 1889), p. 325, and (J.) p. 17.
 52 and 53 Vict. cap. 26 (*Small-Debt Amendment (Scotland) Act*, 1889), p. 315.
 52 and 53 Vict. cap. 55 (*Universities (Scotland) Act*, 1889), p. 113.
 52 and 53 Vict. cap. 69 (*Public Bodies Corrupt Practices Act*, 1889), (J.) p. 28.
 53 and 54 Vict. cap. 10 (*Herring Fishery (Scotland) Act Amendment Act*, 1890), (J.) p. 17.
 53 and 54 Vict. cap. 63 (*Companies (Winding-up) Act*, 1890), p. 332.
 54 and 55 Vict. cap. 34 (*Local Authorities Loans (Scotland) Act*, 1891), p. 791.
 54 and 55 Vict. cap. 39 (*Stamp Act*, 1891), pp. 7, 681.
 54 and 55 Vict. cap. 67 (*Statute Law Revision Act*, 1891), p. 475.
 55 and 56 Vict. cap. 55 (*Burgh Police (Scotland) Act*, 1892), pp. 127, 588, 1089, and (H. L.) p. 6, (J.) p. 2.
 55 and 56 Vict. cap. clxv. (*Glasgow Police (Further Powers) Act*, 1892), p. 930, and (J.) p. 76.
 55 and 56 Vict. cap. clxxvii. (*Leith Harbour and Docks Act*, 1892), p. 797.
 56 and 57 Vict. cap. 48 (*Reformatory Schools Act*, 1893), (J.) p. 81.
 56 and 57 Vict. cap. 61 (*Public Authorities Protection Act*, 1893), p. 128.
 56 and 57 Vict. cap. 71 (*Sale of Goods Act*, 1893), pp. 82, 335, 490, 818, and (H. L.) p. 1.
 57 and 58 Vict. cap. 58 (*Local Government (Scotland) Act*, 1894), p. 194.
 57 and 58 Vict. cap. 60 (*Merchant Shipping Act*, 1894), pp. 103, 295, 330, 895, 1092.
 58 and 59 Vict. cap. 16 (*Finance Act*, 1895), p. 566.
 58 and 59 Vict. cap. 42 (*Sea Fisheries Regulation (Scotland) Act*, 1895), (J.) p. 17.
 59 and 60 Vict. cap. 25 (*Friendly Societies Act*, 1896), p. 171.
 59 and 60 Vict. cap. 26 (*Collecting Societies and Industrial Assurance Companies Act*, 1896), p. 1138.
 59 and 60 Vict. cap. 36 (*Locomotives on Highways Act*, 1896), p. 57.
 60 and 61 Vict. cap. 37 (*Workmen's Compensation Act*, 1897), pp. 174, 187, 431, 440, 479, 536, 545, 705, 722, 762, 905.
 60 and 61 Vict. cap. 38 (*Public Health (Scotland) Act*, 1897), pp. 127, 128, 1089, and (H. L.) p. 6.
 61 and 62 Vict. cap. 21 (*Poor-Law (Scotland) Act*, 1898), p. 733.
 62 and 63 Vict. cap. 47 (*Private Legislation Procedure (Scotland) Act*, 1899), p. 1089.
 62 and 63 Vict. cap. 51 (*Sale of Food and Drugs Act*, 1899), (J.) p. 40.
 62 and 63 Vict. cap. ccxv. (*Caledonian Railway (General Powers) Act*, 1899), p. 567.

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- 63 and 64 Vict. cap. 48 (*Companies Act*, 1900), p. 891.
 63 and 64 Vict. cap. 49 (*Town-Councils (Scotland) Act*, 1900), p. 135.
 63 and 64 Vict. cap. 50 (*Agricultural Holdings Act*, 1900), p. 1060.
 63 and 64 Vict. cap. 55 (*Executors (Scotland) Act*, 1900), pp. 428, 719, 812.
 63 and 64 Vict. cap. cl. (*Glasgow Building Regulations Act*, 1900), p. 754.
 1 Edw. VII. cap. 9 (*Education (Scotland) Act*, 1901), pp. 64, 772.
 1 Edw. VII. cap. 24 (*Burgh Sewerage, Drainage, and Water Supply (Scotland) Act*, 1901), p. 127, and (H. L.) p. 6.
 3 Edw. VII. cap. 25 (*Licensing (Scotland) Act*, 1903), (J.) pp. 14, 65.
 3 Edw. VII. cap. 33 (*Burgh Police (Scotland) Act*, 1903), pp. 135, 587.
 3 Edw. VII. cap. 36 (*Motor Car Act*, 1903), (J.) p. 8,
 4 Edw. VII. cap. ccxlii. (*Clyde Navigation Act*, 1904), p. 622.
 6 Edw. VII. cap. 10 (*Education of Defective Children (Scotland) Act*, 1906), p. 772.
 6 Edw. VII. cap. 34 (*Prevention of Corruption Act*, 1906), (J.) p. 26.
 6 Edw. VII. cap. 38 (*Statute Law Revision (Scotland) Act*, 1906), (J.) p. 34.
 6 Edw. VII. cap. 43 (*Street Betting Act*, 1906), (J.) pp. 57, 61.
 6 Edw. VII. cap. 58 (*Workmen's Compensation Act*, 1906), pp. 328, 713, 769, 827, 831, 848, 991, 1015, 1021, 1025, 1030, 1051, 1198, 1215, 1258.

STREET. See *Police*, 1-4.

SUCCESSION. *Testament—Construction—Subject of Gift—Words importing gift of heritage—Titles to Land Consolidation (Scotland) Act*, 1868, sec. 20.

1. A testator by holograph will appointed executors, and instructed them after paying his debts to divide the income of "the balance" between his brother and sister equally, and on the death of either to pay the whole income to the survivor; on the death of both "I wish my whole estate realised and equally divided between my cousins on my mother's side." The testator left about £3300 of moveable property, and also had a personal right to a share (valued at under £100) of a small heritable property. *Held* that the heritable property was carried by the will. *Copland's Executors v. Milne*, Jan. 16, 1908, p. 426.
2. A testator by his will, dated in 1905, appointed an executor whom he directed to realise "all my estate," and to pay certain legacies. He further directed that "the residue of my estate," after payment of the legacies, should be divided among his family. The testator died possessed of both heritable and moveable property. *Held* that the heritable property had been validly conveyed by the will to the executor, and that he had power to sell the same. *Jack's Executor v. Downie*, March 7, 1908, p. 718.
3. Terms of a holograph testament containing the expressions "Everything else to be sold" and "I leave the remainder," which were *held* sufficient to import a bequest of heritage. *Crowe v. Cook*, July 17, 1908, p. 1178.

Testament—Construction—Subject of Gift—"Carriage"—Motor-Car.

4. The proprietor of an estate died in January 1907 leaving a trust-disposition and settlement dated in 1890. In it he directed his trustees to make over his landed estate to his wife, and with certain small exceptions his whole "furniture and plenishing, including books, plate, pictures, jewellery, ornaments, and bed and table linen, and also my horses and carriages, live stock, plants, and garden and stable implements." At the date of his settlement the testator had carriages and horses, but subsequently he sold these and bought two motor-cars,

SUCCESSION—Continued.

which he possessed at the time of his death, *Held* that the bequest of carriages included the motor-cars. *Denholm's Trustees v Denholm*, Oct. 29, 1907, p. 43.

Testament—Construction—Subject of Gift—Power to consume—Gift over of portion unconsumed.

5. In a mutual settlement by spouses the husband conveyed his whole estates to trustees and directed them to pay to his wife, if she survived him, as an alimentary allowance for her and their children, the income of his estate and such portions of the capital as his trustees should deem necessary; "and in like manner and in consideration of what is above written," the wife conveyed her whole estates to her husband under the burden of maintaining her whole children, with full power to him "to consume such parts or portions of the capital during his lifetime as he may find or think necessary," and also power "to realise . . . said estates . . . and in general to deal and intromit therewith as freely as" she could have done herself. She appointed him to be her sole executor. Upon the death of her husband if he survived her (as he did), she conveyed her "said estate or such portion thereof as may be unconsumed" by him to trustees for certain purposes. The wife died in 1893. After the wife's death the husband realised certain properties which had belonged to her and paid the proceeds into his own bank account, so that they became immixed with his own funds, and could not ultimately be traced or identified. The husband died in 1905. In an action by the wife's trustees against the trustees under a will left by the husband, *held* (1) that under the mutual settlement the husband was not bound to account for his intromissions with his wife's estate, and that consequently his trustees were not bound so to account; (2) that the *onus* of proving what part of the wife's estate was unconsumed by the husband was upon the pursuers; and (3) that the proceeds of the wife's properties sold by the husband having been immixed with the husband's funds, and being now incapable of identification, must be held to have been consumed by the husband in the sense of the mutual settlement. *Denholm's Trustees v. Denholm's Trustees*, Nov. 29, 1907, p. 255.

Testament—Construction—Object of Gift—"Cousins."

6. The word "cousins" in a testamentary deed means first cousins only, unless there is something in the context of the deed or in the circumstances of the case to shew that the word is used in a different sense. *Copland's Executors v. Milne*, Jan. 16, 1908, p. 426.
7. **Legacy—Specific Legacies—Specific or general.** *Maclean v. Maclean's Executrix*, May 23, 1908, p. 838.

Destination—Liferent and Fee—Fiduciary Fee.

8. The creditor in a heritable bond bequeathed it by direct disposition to certain persons in liferent and in fee to the heir of entail who might be in possession of certain lands at the expiry of the liferenta. *Opinion* (per the Lord President) that there was no effectual destination of the fee, and that the purpose of the testator could only have been achieved by the interposition of a trust. *Observed*, "I have never heard—and I do not think we ought to extend the doctrine—of the doctrine of a fiduciary fee for somebody who is neither a child nor an heir in any sense of the person in whom the fiduciary fee is created." *Colville's Trustees v. Marindin*, June 6, 1908, p. 911.

Accretion—Liferent.

9. A testator directed his trustees to hold a certain part of the residue of his estate "for behoof of my son John, his wife, and family, for alimentary use, not alienable or assignable or attachable for his or their debts (and afterwards to their issue in fee), and the annual pro-

SUCCESSION—*Continued.*

ceeds arising therefrom to be paid quarterly to those entitled to receive the same." After the death of John and his wife and of one of his two children, *held* that the bequest was a bequest of a joint liferent, and that John's surviving child was entitled to the liferent of the whole fund. *Napier's Trustees v. Napier*, July 14, 1908, p. 1160.

10. *Observed, per Lord M'Laren*,—"A bequest to a plurality of persons for life is in law a joint bequest, unless (1) there are words of severance, such as 'in equal shares,' or (2) the bequest is capable of being construed as a family provision under which the issue of each liferenter takes the parent's original share." *Napier's Trustees v. Napier*, July 14, 1908, p. 1160.

Conditio si institutus sine liberis decesserit—Nephews and Nieces—Conditional Institution—Specific Legacy.

11. By her general trust-disposition and settlement a testatrix, who had no children, but had three sets of nephews and nieces, directed her trustees, *inter alia*, to invest £2500 for behoof of her niece Christina Black in liferent and her children in fee, and failing such children to pay it as follows:—To her own nephew George Black £1000, to her niece Jane Black £750, and to her nephew Charles Boswell Black £750: "Declaring that if the said Christina Black shall predecease me the said sum of £2500 shall form part of the residue of my estate." The Blacks mentioned were the whole family of a sister of the testatrix. To each of the testatrix's nephews and nieces was bequeathed a share of the residue. Christina Black survived the testatrix and died without issue. Jane Black predeceased the testatrix, leaving a son, who survived the testatrix and Christina, the liferentrix. *Held* that the conditional bequest of £750 to Jane Black could not be regarded as a family provision, and therefore that the *conditio si institutus sine liberis decesserit* did not apply. *Allan v. Thomson's Trustees*, Jan. 24, 1908, p. 483.

Fee and Liferent—Mines and Minerals—Rent of mineral field opened after testator's death.

12. The proprietor of the estate of W., who died in 1848, by his trust-disposition and settlement directed his trustees to divide the annual income of his whole estates, heritable and moveable, among certain of his relatives, and their issue in succession, with further substitutions, and on the death of all these beneficiaries to convey the fee of his whole estates to the person who should then be the heir-male of his, the testator's father. The estate of W. contained coal, which down to the date of the testator's death had never been worked, and his trust-disposition and settlement did not contain any reference to coal. In 1907 the trustees let the coal in W. for a fixed rent or lordships. The mineral tenants did not at first begin operations for opening up the coalfield, and in consequence they paid the fixed rent to the trustees. In a special case, *held* that the fixed rent or lordships, whether the coal was being worked or not, represented part of the *corpus* of the estate, and being thus capital and not income, did not fall to be paid to the beneficiaries in right of the income, and that the fixed rent or lordships fell to be retained by the trustees for behoof of the person ultimately found to be entitled to a conveyance of the fee of the estate. *Ranken's Trustees v. Ranken*, Oct. 17, 1907, p. 3.

Conditions and Directions—Impossibility of literal fulfilment.

13. A testator directed his trustees to realise and divide the residue of his estate among his children equally, "declaring . . . that the term of the vesting of the foregoing provisions of residue shall, as regards daughters, be on their respectively attaining majority or being married, whichever of these events shall happen first: As regards said provisions to my daughters, I hereby appoint that the capital of

SUCCESSION—Continued.

the same shall not be paid to them (except as after mentioned), but that my trustees shall pay to my daughters the revenue of their respective provisions while they remain unmarried, and on their marriage my trustees shall see to it that the said provisions, both revenue and capital, be secured in trust . . . by antenuptial settlement upon my daughters and their children to be born . . . Further, notwithstanding what is before written, my trustees shall have power on the marriage of such daughter to pay to her, or to pay to any daughter already married at my death, for her own absolute use, such portion (not exceeding one-tenth part) of the capital of her provision as my trustees shall think proper." The testator was survived by two married daughters, whose marriages took place before the date of the settlement. In a special case these daughters maintained that they were entitled to immediate payment of their respective shares of residue on the ground that the direction to secure by "antenuptial contract" being inapplicable to the case of daughters who were already married was ineffectual to burden the initial gift of fee and fell to be disregarded. *Held* that the testator's intention that the shares of the daughters, married as well as unmarried, should be secured to them and their children being sufficiently plain, that intention was not to be defeated simply because he had indicated a method of carrying out his wishes which was not precisely applicable to every case, and that the trustees were bound (subject to the power to advance) to settle the shares of daughters, married at the date of the testator's death, in trust in names of the trustees or of other trustees for the daughters' behoof in liferent and otherwise as directed by the testator. *Fyfe's Trustees v. Duthie*, Jan. 31, 1908, p. 520.

Conditions and Directions—Directions to purchase annuities—Right of beneficiary to payment of the capital—Government Annuities.

14. A testator directed his executor or his trustees to invest certain sums in the purchase of annuities in the name and for the benefit of certain persons. He further provided: "And I declare that all annuities . . . shall be purchased by him or them from the British Government or from the Scottish Widows' Insurance Company, Limited, of Edinburgh, in Scotland, and any other first-class company or annuity office as my said executor or . . . trustees shall in this behalf think fit." There was no declaration that the annuities were to be alimentary, but Government annuities, purchased under the Government Annuities Act, 1853, are not assignable except on the insolvency or bankruptcy of the annuitant. The beneficiaries having called on the trustees to pay over the principal sums instead of investing them in the purchase of annuities, *held* that the beneficiaries were entitled to payment of the principal sums. *Turner's Trustees v. Fernie*, May 30, 1908, p. 883.

Conditions and Directions—Accumulation—Rent of mineral field opened after testator's death—Thellusson Act.

15. Thellusson Act *held* not to apply to accumulations of fixed rents of a mineral field opened after the testator's death. *Ranken's Trustees v. Ranken*, Oct. 17, 1907, p. 3.

Vesting—Initial gift of fee to daughters—Subsequent directions to secure daughters' shares for behoof of daughters and their respective children.

16. A testator directed his trustees to realise and divide the residue of his estate among his children equally, "declaring that the term of the vesting of the foregoing provisions of residue shall, as regards daughters, be on their respectively attaining majority or being married, whichever of these events shall happen first: As regards said provisions to my daughters, I hereby appoint that the capital of the same shall not be paid to them . . . but that my trustees shall

SUCCESSION—*Continued.*

pay to my daughters the revenue of their respective provisions while they remain unmarried; and on their marriage my trustees shall see to it that the said provisions, both revenue and capital, be secured in trust . . . by antenuptial settlement upon my daughters and their children to be born, in usual form, the husbands of my said daughters (if my said daughters shall so desire) to have a liferent only, postponed to my said daughters' liferent." There was no destination over in the event of a daughter dying after the period of vesting without leaving children. The testator was survived by daughters who had attained majority. *Held* (1) that a right to a share in the fee had vested in each daughter burdened with a trust for the purpose of securing to her the income of her share during her life, and the capital to her children who should survive her; and therefore (2) that on the death of a daughter without leaving children her share would be carried by her will if she left one, and if not would pass to her heirs *ab intestata*. *Fyfe's Trustees v. Duthie*, Jan. 31, 1908, p. 520.

Vesting—Vesting subject to Defeasance—Conditional Institution of Issue—Direction to divide at postponed period—Power to advance meantime.

17. A testator by his general settlement appointed his wife his sole trustee with power to advance for the purpose of setting up any of his children in business—all payments to children "being reckoned as part of their ultimate share,"—and left his wife the liferent of his whole estate, "the same to be realised and divided equally on her death among" his "children, share and share alike, the issue of predeceasing children taking among them the share which would have fallen to their parents if in life." *Held* that the estate vested in the children of the testator *a morte testatoris* subject to defeasance in the event of their predeceasing the liferentrix leaving issue. *Opinion* reserved as to whether defeasance took place on a child's issue surviving their parent irrespective of whether or not they survived the liferentrix. *Penny's Trustees v. Adam*, Feb. 25, 1908, p. 662.

Ademption—Special Legacy—Specific Bequest of Heritage—Sale of Subject—Suspensive Condition.

8. A testator by his will bequeathed to his daughter, as a special legacy, a hotel of which he was the proprietor. Shortly before his death the testator sold the hotel to William Steven, and signed a minute of sale which bore that "it shall be a condition of this agreement being binding on both parties that Mr Steven applies for and obtains a transfer of the licence certificate of the said hotel." The transfer was not obtained until after the death of the testator, and thereafter a formal conveyance was executed in favour of the purchaser, and the price paid. In a special case the question was put whether the bequest of the hotel had been adeemed. *Held* that the contract of sale being subject to a suspensive condition—namely, the transfer of the licence—the hotel remained part of the testator's estate at his death, and accordingly that the legacy had not been adeemed, and that the price of the hotel belonged to the daughter. *Opinions* that even if there had been no suspensive condition there had been no ademption, the hotel, or the right to its price, remaining part of the testator's estate. *M'Arthur's Executors v. Guild*, March 11, 1908, p. 743.

Ademption.

19. By a general disposition and settlement a testatrix bequeathed her whole estate to her daughter F., "with the exception of £300 sterling of mine which my son A. has invested for me, and which I do hereby leave and bequeath to himself." At the date of the settlement A. had in his possession a sum of £300 belonging to his mother

SUCCESSION—Continued.

on which he paid interest to her. This sum he subsequently repaid to her before her death. *Held* that the legacy to A. was a specific legacy of a sum of £300 in his hands at the date of the settlement, and that as there was no sum in his hands at the death of the testatrix the legacy must be held to have been adeemed. *Maclean v. Maclean's Executrix*, May 23, 1908, p. 838.

See *Charitable and Educational Bequests and Trusts—Process*, 9—*Trust*, 5.

SUNDAY LABOUR. See *Justiciary Cases*, 8—*Master and Servant*, 6—*Statute*, 2.

SUPERIOR AND VASSAL. *Feu-duty—Recovery of arrears—Vassal a company—Action by superior for sequestration for feu-duty after Liquidation—Companies Act, 1862, sec. 163.*

Held that an action by a superior against his vassal, a limited company in liquidation, for sequestration of the moveables on the feu for arrears of feu-duty, was not an "attachment, sequestration, distress, or execution" within the meaning of the Companies Act, 1862, sec. 163. *Anderson's Trustees v. Donaldson & Co., Limited (in Liquidation)*, Oct. 26, 1907, p. 38.

TEINDS. *Minister's Stipend—Augmentation—Augmentation of seven chalders.*

The minister of a parish applied for an augmentation of seven chalders. There had been no augmentation for fifty-nine years, and it appeared that the previous minister, who had occupied the benefice for fifty-six years, had been possessed of considerable private means. All the heritors assented to the augmentation. In the circumstances the Court *granted* an augmentation of seven chalders. *Minister of Dalsersf v. Heritors*, July 10, 1908, p. 1123.

TESTAMENT. See *Succession*.

TITLE TO SUE AND DEFEND. *Right to compel provision of education—Pupil Child or Parent—Education (Scotland) Act, 1872, sec. 1—Education (Scotland) Act, 1901, sec. 1.*

1. The Education (Scotland) Acts confer no right upon a child to compel a school board to provide him with education. *Sinclair v. Moulin School Board*, March 17, 1908, p. 772.

2. *Observed* that the only person entitled to bring an action against a school board to compel them to provide a child with education is the parent (as defined by the Education (Scotland) Act, 1872, sec. 1). *Sinclair v. Moulin School Board*, March 17, 1908, p. 772.

Executor—Dependant's Executor—Workmen's Compensation Act, 1906, First Schedule, (1) (a) (i.).

3. *Held* that the right to compensation, conferred by the Workmen's Compensation Act, 1906, on the dependant of a deceased workman, vests in the dependant on the death of the workman, and transmits to the representatives of the dependant, although the dependant may have made no claim for compensation during his lifetime. *Hendry v. United Collieries, Limited*, July 18, 1908, p. 1215.

Informers—Game—Partridges Act, 1799.

4. *Held* that the Partridges Act, 1799, did not give a title to a private individual, as informer, to prosecute for a penalty under the Act, and that the concurrence of the procurator-fiscal did not supply the defect in the instance. *M'Douall v. Irvine*, Nov. 2, 1907, p. 60.

Procurator-Fiscal—Game—Partridges Act, 1799.

5. *Question* whether the procurator-fiscal had a title to prosecute for a penalty under the Partridges Act, 1799. *M'Douall v. Irvine*, Nov. 2, 1907, p. 60.

TITLE TO SUE AND DEFEND—*Continued.**Tenant—River—Pollution.*

6. In an action for interdict at the instance of the tenant of a farm to prevent pollution of a stream which flowed through the farm, *held* that he had a good title to pursue the action. *Fleming v. Gemmill*, Dec. 20, 1907, p. 340.

Wife and Children of Tenant—Insanitary House.

7. Held that the wife and children of the tenant of a dwelling-house had no title to sue the landlord for damages for loss and injury caused to them by illness due to the insanitary condition of the house. *Cameron v. Young*, Feb. 27, 1908, (H. L.) p. 7.

Title to Defend—Heritable Office—Title to dispute claim to office.

8. The Earl of Lauderdale raised an action for declarator that he was entitled to the office of Hereditary Standard Bearer of Scotland. He averred that by the Act 1600, cap. 44, the office was confirmed to "Sir James Scrymgeour and his heirs-male," and that the pursuer's predecessors had subsequently acquired right to the office. He called as defender Henry Scrymgeour Wedderburn, who denied the pursuer's right to the office, and, in support of his title to defend the action, averred that he was "heir-male of the Sir James Scrymgeour mentioned in the Act of 1600." *Held* that the defender had averred a sufficient title to defend the action and to dispute the pursuer's claim, and that it was not necessary for him *ante omnia* to prove by service that he was the person entitled to the office in the event of the pursuer's claim proving invalid. *Earl of Lauderdale v. Wedderburn*, July 18, 1908, p. 1237.

See *Company*, 1—*Road*.

TOWN-COUNCIL. See *Burgh*, 1, 4.

TRADE-MARK. *Trade Description—"Scotch Tweed, All Wool"—Applying Description—Merchandise Marks Act, 1887, secs. 2 (2), 3 (1), 5 (1) (d).*

1. A tailor, having received a letter from a person who stated that he wanted "a suit of Scotch tweeds," and asked for "patterns of good stuff—all wool," sent certain patterns of cloth, some of which were Scotch tweed all wool and some of which were not, enclosed in a letter, which stated—"Enclosed please find patterns as desired." The customer chose two patterns, and from the cloth chosen, to which they referred, the tailor made him a suit of clothes. The cloth did not conform to the description "Scotch Tweed All Wool," as defined by the trade. *Held* that, even assuming that sec. 2 (2) of the Merchandise Marks Act, 1887, applies to a false trade description not affixed to the goods by a stamp or label, no false description had been "applied" in the sense of sec. 2 (2) of that Act by the seller in this case. *Question* whether the application of sec. 2 (2) of the Merchandise Marks Act, 1887, is not limited to cases where a person sells, or exposes for or has in his possession for sale, goods on which a false description is stamped or attached by label. *H. M. Advocate v. Jacob*, July 16, 1908, (J.) p. 90.
2. A person acting at the instigation of a procurator-fiscal wrote to the Glasgow branch of a firm of clothiers, asking for patterns of "Scotch Tweed" waterproofs, and saying,—“What I want is a good serviceable coat, all wool.” The firm wrote, enclosing patterns “as requested.” One of these patterns, which did not answer to the trade description “Scotch Tweed All Wool,” was chosen, and the firm supplied a coat of the material selected. It appeared that the firm’s assistants were enjoined not to give goods any description other than that by which they were invoiced to the branch. The material in question was invoiced to the branch as “overcoating,” and by the rules of the

TRADE-MARK—Continued.

business the firm's salesmen were permitted to supply it only under the name of "overcoating." *Held* (*per* the Lord Justice-Clerk, Lord Low, and Lord Ardwall) that the trade description "Scotch Tweed All Wool" had not been "applied," in the sense of the Merchandise Marks Act, 1887, sec. 2 (2), to the material in question; and (*per* the Court) that even if the trade description "Scotch Tweed All Wool" had been applied to the material, the respondents had acted innocently in the sense of sec. 2 (2) of that Act. *H. M. Advocate v. Suits, Limited*, July 16, 1908, p. 1163.

3. *Observations* on the conduct incumbent upon persons seeking evidence to support prosecutions under the Merchandise Marks Act, 1887, by making purchases for that purpose. *H. M. Advocate v. Suits, Limited*, July 16, 1908, p. 1163.

TRADE UNION. See *Company*, 1.

TRUST. Nature and Constitution—Gift in will of power to consume—Gift over of portion unconsumed.

1. In a mutual settlement by spouses the wife conveyed her whole estates to her husband under the burden of maintaining her whole children, with full power to him "to consume such parts or portions of the capital during his lifetime as he may find or think necessary," and also power "to realise . . . said estates . . . and in general to deal and intromit therewith as freely as" she could have done herself. She appointed him to be her sole executor. Upon the death of her husband if he survived her (as he did), she conveyed her "said estate or such portion thereof as may be unconsumed" by him to trustees for certain purposes. In an action by the wife's trustees against the trustees under a will left by the husband, *held* that under the mutual settlement the husband was not bound to account for his intromissions with his wife's estate, and that consequently his trustees were not bound so to account. *Denholm's Trustees v. Denholm's Trustees*, Nov. 29, 1907, p. 255.

Control—Removal of Trustee—Appointment of New Trustees.

2. It is within the power of the Court, in the exercise of its *nobile officium*, to appoint new trustees in room of a sole trustee removed from office. *Lamont v. Lamont*, June 30, 1908, p. 1033.

Administration—Investment of Funds—Power to retain Investments—Company Shares—Uncalled Liability.

3. A power given by a testator to his trustees to "hold any investments" he "may die possessed of for such time as they may think fit," entitles the trustees to retain shares in public companies upon which there is an uncalled liability, but only so long as they are satisfied of the safety of the shares as a trust investment, and in the exercise of the power the trustees must act with prudence. *Boyd's Trustees v. Boyd*, July 11, 1908, p. 1147.

Administration—Investment of Funds—Liability of Trustees—Local Authorities Loans Stock—Purchase at Premium—Local Authorities Loans (Scotland) Act, 1891, sec. 44 (2).

4. Testamentary trustees, who held funds for behoof of different persons as liferenter and fiar respectively, in 1897 invested part of these funds in a redeemable stock issued under the Local Authorities Loans (Scotland) Act, 1891, at the price of £102 per cent, being £2 per cent more than the redemption value. They at the same time entered into an arrangement with the liferenter whereby he undertook to repay to the trust this £2 per cent of excess cost. On the death of the liferenter this £2 per cent of excess cost had been paid back to the trustees, but at that time the stock stood in the market

TRUST—Continued.

at 10 per cent below its redemption value. *Held* that as the stock had been purchased at a price beyond its redemption value, contrary to sec. 44 (2) of the Local Authorities Loans Act, 1891, the investment was *ultra vires* of the trustees, and that the arrangement whereby the excess cost was to be repaid to the trust by the life-renter did not make the investment lawful. *Held* further, that as the investment was *ultra vires* the trustees were personally liable to restore to the trust the difference between the redemption value of the stock and the amount which it might yield on being realised. *Beveridge's Trustee v. Beveridge*, March 17, 1908, p. 791.

Administration—Power to limit interest of beneficiaries—Gift of whole or portion of annual income according to trustees' discretion.

5. A testator directed his trustees to invest in their own names, as trustees, a sum of £5000, and to pay to A B during his lifetime "either the whole or only a portion of the annual revenue thereof, and that subject to such conditions and restrictions, all as my trustees in their sole and absolute discretion think fit," and, on the decease of A B, to pay "said sum of £5000, with any revenue accrued thereon that has not been paid to" A B, to A B's children, declaring that in the event of A B dying without children, "said sum of £5000 and accumulations of revenue, if any," should form part of the residue of his estate. The testator died in June 1899. A B was the testator's sole next of kin, and in 1903 he assigned to X, in security of a debt of £650, his interest in the deceased's estate as next of kin and as a legatee. In August 1904 an action was raised by X as assignee of A B against the trustees concluding for payment of the income of the £5000. The pursuer maintained that the defenders—who had since the testator's death paid only certain trifling sums to A B from time to time—were bound to have exercised their discretion annually as to the amount of the income of the £5000 to be paid to A B, and in respect that they had failed to do so, were bound to make payment of the whole income thereof that had accrued since the date of the testator's death, under deduction of the sums paid to A B. The First Division held that the payments to be made to A B were left by the testator entirely in the discretion of the trustees, and that in the circumstances the trustees had done nothing to entitle the Court to interfere with their discretion, and assailed the defenders. In an appeal the House affirmed the judgment. *Train v. Clapperton*, May 25, 1908, (H. L.) p. 26.

Administration—Trustee—Disabilities—Judicial Factor's firm acting as law-agents—Fees paid by borrowers of trust funds.

6. A partner in a firm of law-agents was appointed judicial factor on a trust-estate. He lent part of the factory funds on heritable security to clients of the firm. The usual fees were paid to the firm by the borrowers in accordance with the table of fees. *Held* that the factor was not bound to communicate to the factory estate the fees paid by the borrowers to his firm. *Sleigh v. Sleigh's Judicial Factor*, July 9, 1908, p. 1112.

Administration—Trustee—Disabilities—Judicial Factor's firm acting as law-agents for beneficiaries.

7. A partner in a firm of law-agents was appointed judicial factor on a trust-estate. The firm did legal work on the employment of the beneficiaries' guardians, and of the beneficiaries themselves after they had attained majority. The work was done in connection with the disbursement of the factory income to the beneficiaries, and also in connection with the preparation of deeds rendered necessary in consequence of certain beneficiaries having applied for an advance of capital. For these services the firm charged fees and commission against the beneficiaries. *Held* that the factor was not bound to

TRUST—Continued.

communicate to the factory estate fees and commission recovered from the beneficiaries. *Sleigh v. Sleigh's Judicial Factor*, July 9, 1908, p. 1112.

See *Aliment*, 1—*Bankruptcy*, 2, 3, 6—*Entail*, 4—*Expenses*, 9—*Succession*, 8, 13, 14.

ULTRA VIRES. See *Company*, 3-6—*Harbour—Road—Statute*, 1—*Trust*, 4.

UNDUE INFLUENCE. Paramour—Testament—Reduction.

Held that the relation existing between a man and a woman, who had lived with him as his mistress, was not of such a character as to support a plea of undue influence in an action for reduction of a will, by which he left the bulk of his property to her and their illegitimate son, to the detriment of his legitimate family. *M'Kechnie v. M'Kechnie's Trustees*, Oct. 30, 1907, p. 93.

VALUATION ACTS. Subjects—"Lands and Heritages"—Slag Heap—Valuation of Lands (Scotland) Act, 1854, sec. 42.

1. A large slag heap, owned by trustees and deposited on ground belonging to them, was let to a railway company under a lease by which the company had, on payment of a royalty or fixed rent, right to remove and use the slag for the purposes of their railway. *Held* that the slag heap was a heritable subject, and that the trustees and the railway company had rightly been entered in the Valuation-roll as respectively the proprietors and the tenants thereof. *Airdrie, Coatbridge, and District Water Trustees v. Assessor for Lanarkshire*, Feb. 19, 1908, p. 596.

Value—Subject unlet—Principle of Valuation—Revenue Principle—Whether income to be taken on an average of years.

2. In valuing a gas company's undertaking the Assessor adopted the "revenue" principle, and took as the revenue the average income for the preceding five years, in one of which the income was exceptionally large. *Held* that the Assessor had rightly estimated the income by taking an average of years; that five years was a fair period to average; and that the circumstance that the income for one of the five years was exceptionally large was not a ground for treating the case exceptionally. *Melrose Gas Co., Limited, v. Assessor for Roxburghshire*, Feb. 20, 1908, p. 600.

Value—Subject unlet—Principle of Valuation—Harbour.

3. In 1863 it was held by the Court of Session that the Clyde Navigation Trustees were not assessable as proprietors of the waterways of the port and harbour of Glasgow, the incorporeal right of harbour not being vested in them, and that they were assessable only as proprietors of the wharfs, quays, and other structures in the harbour. In 1866 the Valuation Appeal Judges in fixing the yearly value of the undertaking of the Clyde Trustees gave effect to the judgment of the Court of Session by deducting from the dues payable to the trustees a proportion as being applicable to the waterways of the port and harbour. The undertaking continued to be valued on that basis for more than forty years. In 1908 the Assessor for Lanarkshire proposed to value the portion of the undertaking within the county either (a) on the basis of taking into account the whole or a much larger proportion of the dues paid to the trustees, or (b) on the "contractor's" principle, i.e., by taking a percentage on the structural cost of the quays, &c. *Held* (a) that there was no such change of circumstances as to warrant a change in the method of dealing with the dues, and (b) that the contractor's method was inapplicable. *Assessor for Lanarkshire v. Clyde Navigation Trustees*, March 4, 1908, p. 620.

VALUATION ACTS—*Continued.*

Value—Subject unlet—Shop in occupation of proprietor—Valuation by comparison with rent of neighbouring shops let—Valuation by floorage area—Re-valuation where no change of circumstances.

4. Jenner & Co. were the owners and occupiers of a large block of buildings in Edinburgh fronting Princes Street on the south, St David Street on the east, and Rose Street on the north. The whole buildings were occupied in connection with Jenner & Co.'s business of drapers, &c., the main floors being used as shops and saloons, and the upper floors as workrooms and a boarding residence for the employees. The building had been recently erected, and down to 1907 it was entered in the Valuation-roll at the yearly rent or value of £7250. In 1907 the Assessor entered the buildings at £8780, a sum reached by taking the floorage area of each floor and applying thereto a varying rate per square foot, the rates being based upon an analysis of rents actually paid for neighbouring shops in Princes Street. Jenner & Co. appealed and maintained that the re-valuation was not justified by any change of circumstances. The Magistrates reduced the valuation to £8000. *Held* that the Magistrates were wrong, and that the valuation should be reduced to £7250. *Jenner & Co. v. Assessor for Edinburgh*, Feb. 21, 1908, p. 601.

Value—Subject unlet—Insurance Office—No similar office in same street—Valuation by comparison with shops.

5. A large recently built office in Princes Street, Edinburgh, belonging to and occupied by an insurance company was entered by the Assessor at £5500, a sum reached by taking the floorage area, and applying thereto varying rates per square foot, the rates being derived from an analysis of rents actually paid for shops in Princes Street. There was no similar insurance office in Princes Street. The Company appealed and maintained that the valuation ought to be on the basis of the valuation of other insurance offices in Edinburgh, *e.g.*, in George Street or St Andrew Square. The Magistrates reduced the valuation to £5000. On appeal the Judges *declined* to interfere with the determination of the Magistrates, as it was not shewn to be unreasonable. *North British and Mercantile Insurance Co. v. Assessor for Edinburgh*, Feb. 21, 1908, p. 601.

Value—Subject unlet—Spinning Mills—Estimated capital value—Criterion of value—Recent sales of similar property in vicinity.

6. In fixing the capital value of spinning mills, in the occupation of their owners, as the basis for reaching the yearly rent or value of the mills, it is legitimate to take into consideration the prices obtained at a number of recent sales of these and similar mills in the same town. *Webster & Sons v. Assessor for Arbroath*, March 4, 1908, p. 613.

Procedure—Appeal—Appeal against recent valuation by the Judges—New Evidence.

7. In 1902 the Lands Valuation Appeal Judges fixed the yearly value of the Alma Spinning Mill, Arbroath (occupied by the owners) at £1293, and in succeeding years the Assessor continued to enter the mill at that sum. In 1907 the owners appealed against the entry, and adduced evidence that since 1900 nearly all the similar mills in Arbroath had been sold, and at prices which shewed that the Assessor's valuation of these mills was over 50 per cent too high. The Valuation Committee (with the exception of £130, which they allowed for depreciation) confirmed the Assessor's valuation on the ground that there was no change of circumstances since the value was fixed in 1902. *Held* by the Judges, on appeal, that the evidence (which was not before the Court in 1902) as to the recent sales of other mills justified a reconsideration of the value of the mill in ques-

VALUATION ACTS—Continued.

tion, and reduced the valuation to £923. *Webster & Sons v. Assessor for Arbroath*, March 4, 1908, p. 613.

VITIOUS INTROMISSION. See *Passive Title*.

WAGES. See *Ship*, 3, 4.

WAIVER. See *Lease*, 3.

WARRANTICE. *Eviction—Expenses of unsuccessful action to prevent eviction.*

The Magistrates and Councillors of the burgh of Dunfermline let a farm, part of the Common Good, bounded on one side by a stream and loch, to A, reserving the privilege of fishing “by themselves or others having written authority from them,” and granted absolute warrantice. A subsequently complained to the lessors that he had sustained partial eviction by anglers, who had no written authority from the lessors, invading the banks of the stream and loch. The lessors having declined to take action, A raised an action for interdict against B and others, who had used the banks for angling without written authority from the lessors. The Lord Ordinary found that the defenders, as members of the community and ratepayers in the burgh, had right to use the banks for the purpose, and refused interdict. This judgment was not reclaimed against. In an action subsequently raised by A against the lessors, the Lord Ordinary held (1) that A had sustained partial eviction, and was entitled to an abatement of rent, and (2) that A was entitled to payment of the expenses incurred by him, and those for which he had been found liable in the action for interdict. The defenders having reclaimed against the judgment on the second point, the Court *adhered*. *Dougall v. Magistrates of Dunfermline*, Nov. 20, 1907, p. 151.

WARRANTY. See *Sale*, 2, 3—*Ship*, 11.

WIDOWS' FUND. See *Insurance*, 1.

WITNESS. See *Justiciary Cases*, 13—*Writ*, 2.

WORKMEN'S COMPENSATION ACTS. See *Master and Servant*, 7-39.

WRIT. *Authentication—Signature by Mark—“Writing under his hand”*
—*Friendly Societies Act*, 1896, sec. 56 (1).

1. The Friendly Societies Act, 1896, enacts, sec. 56 :—“(1) A member of a registered society . . . may, by writing under his hand . . . nominate a person to whom any sum of money payable by the society or branch on the death of that member, not exceeding £100, shall be paid at his decease.” *Held* that a nomination authenticated by the member's mark only (she being unable to write) and by the signatures of two instrumentary witnesses, was not a writing under her hand within the meaning of the above enactment, and that being of a testamentary character and unsigned it was of no force or effect in law. *Morton v. French*, Nov. 21, 1907, p. 171.

Instrumentary Witness—Knowledge of Granter by Witness—Act 1681, cap. 5.

2. *Held* that a codicil was validly executed where one of the witnesses had not previously known the granter, but was introduced to him at the time of the execution by the other witness, who was an acquaintance, and whom he knew to be a law-agent. *Brock v. Brock*, June 12, 1908, p. 964.

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